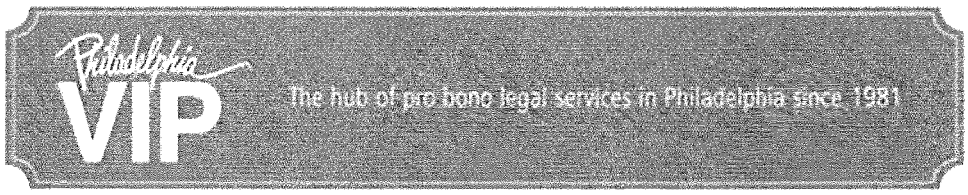

CONSUMER DEBT COLLECTION TRAINING GUIDE

Updated June 2020

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Defending Consumer Debt Collection Lawsuits in Philadelphia

June 10, 2020

CLE Materials

THE FAIR DEBT COLLECTION PRACTICES ACT

As amended by Pub. L. 111-203, title X, 124 Stat. 2092 (2010)

As a public service, the staff of the Federal Trade Commission (FTC) has prepared the following complete text of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p.

Please note that the format of the text differs in minor ways from the U.S. Code and West's U.S. Code Annotated. For example, this version uses FDCPA section numbers in the headings. In addition, the relevant U.S. Code citation is included with each section heading. Although the staff has made every effort to transcribe the statutory material accurately, this compendium is intended as a convenience for the public and not a substitute for the text in the U.S. Code.

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15 USC 1601 note

§ 801. Short Title

This title may be cited as the "Fair Debt Collection Practices Act."

15 USC 1692

§ 802. Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

As used in this title—

(1) The term "Bureau" means the Bureau of Consumer Financial Protection.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6), such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the

enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity

(i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;

(ii) concerns a debt which was originated by such person;

(iii) concerns a debt which was not in default at the time it was obtained by such person; or

(iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 804. Acquisition of location information

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall— 15 USC 1692b

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to the communication from the debt collector.

15 USC 1692c

§ 805. Communication in connection with debt collection

(a) Communication with the consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties

Except as provided in section 804, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication

If a consumer notifies a debt collector in writing that the

consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

§ 806. Harassment or abuse

15 USC 1692d

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3)[1] of this Act.

1. Section 604(3) has been renumbered as Section 604(a)(3).

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 804, the placement of telephone calls without meaningful disclosure of the caller's identity.

15 USC 1692e

§ 807. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this title.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act.

15 USC 1692f

§ 808. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true propose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

§ 809. Validation of debts

15 USC 1692g

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(d) Legal pleadings

A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).

(e) Notice provisions

The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly

required by the Internal Revenue Code of 1986, title V of Gramm-Leach-Bliley Act, or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

§ 810. Multiple debts

15 USC 1692h

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

§ 811. Legal actions by debt collectors

15 USC 1692i

(a) Venue

Any debt collector who brings any legal action on a debt against any consumer shall—

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Authorization of actions

Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors.

15 USC 1692j

§ 812. Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 813 for failure to comply with a provision of this title.

15 USC 1692k

§ 813. Civil liability

(a) Amount of damages

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of such failure;

(2) (A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action,

(i) such amount for each named plaintiff as could be recovered under subparagraph (A), and

(ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this sec-

tion was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by court

In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors—

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) Intent

A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Jurisdiction

An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) Advisory opinions of Bureau

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau, notwith-

standing that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

15 USC 1692*l*

§ 814. Administrative enforcement

(a) Federal Trade Commission

The Federal Trade Commission shall be authorized to enforce compliance with this subchapter, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another Government agency under any of paragraphs (1) through (5) of subsection (b), subject to subtitle B of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5511 et seq.]. For purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act, including the power to enforce the provisions of this subchapter, in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Applicable provisions of law

Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with any requirements imposed under this subchapter shall be enforced under—

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act [12 U.S.C. 601 et seq., 611 et seq.]; and

(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks;

(2) the Federal Credit Union Act [12 U.S.C. 1751 et seq.], by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(3) subtitle IV of title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(4) part A of subtitle VII of title 49, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that part;

(5) the Packers and Stockyards Act, 1921 [7 U.S.C. 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C. 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act; and

(6) subtitle E of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5561 et seq.], by the Bureau, with respect to any person subject to this subchapter.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) Agency powers

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law, except as provided in subsection (d) of this section.

(d) Rules and regulations

Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5519(a)], the Bureau may prescribe rules with respect to the collection of debts by debt collectors, as defined in this subchapter.

15 USC 1692m

§ 815. Reports to Congress by the Bureau; views of other Federal agencies

(a) Not later than one year after the effective date of this title and at one-year intervals thereafter, the Bureau shall make reports to the Congress concerning the administration of its functions under this title, including such recommendations as the Bureau deems necessary or appropriate. In addition, each report of the Bureau shall include its assessment of the extent to which compliance with this title is being achieved and a summary of the enforcement actions taken by the Bureau under section 814 of this title.

(b) In the exercise of its functions under this title, the Bureau may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 814 of this title.

§ 816. Relation to State laws

15 USC 1692n

This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this title if the protection such law affords any consumer is greater than the protection provided by this title.

§ 817. Exemption for State regulation

15 USC 1692o

The Bureau shall by regulation exempt from the requirements of this title any class of debt collection practices within any State if the Bureau determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this title, and that there is adequate provision for enforcement.

§ 818. Exception for certain bad check enforcement programs operated by private entities

15 USC 1692p

(a) In general

(1) Treatment of certain private entities

Subject to paragraph (2), a private entity shall be excluded from the definition of a debt collector, pursuant to the exception provided in section 803(6), with respect to the operation by the entity of a program described in paragraph (2)(A) under a contract described in paragraph (2)(B).

(2) Conditions of applicability

Paragraph (1) shall apply if—

(A) a State or district attorney establishes, within the jurisdiction of such State or district attorney and with respect to alleged bad check violations that do not involve a check described in subsection (b), a pretrial diversion program for alleged bad check offenders who agree to participate voluntarily in such program to avoid criminal prosecution;

(B) a private entity, that is subject to an administrative support services contract with a State or district attorney and operates under the direction, supervision, and control of such State or district attorney, operates the pretrial diversion program described in subparagraph (A); and

(C) in the course of performing duties delegated to it by a State or district attorney under the contract, the private entity referred to in subparagraph (B)—

(i) complies with the penal laws of the State;

(ii) conforms with the terms of the contract and directives of the State or district attorney;

(iii) does not exercise independent prosecutorial discretion;

(iv) contacts any alleged offender referred to in subparagraph (A) for purposes of participating in a program referred to in such paragraph—

(I) only as a result of any determination by the State or district attorney that probable cause of a bad check violation under State penal law exists, and that contact with the alleged offender for purposes of participation in the program is appropriate; and

(II) the alleged offender has failed to pay the bad check after demand for payment, pursuant to State law, is made for payment of the check amount;

(v) includes as part of an initial written communication with an alleged offender a clear and conspicuous statement that—

(I) the alleged offender may dispute the validity of any alleged bad check violation;

(II) where the alleged offender knows, or has reasonable cause to believe, that the alleged bad check violation is the result of theft or forgery of the check, identity theft,

or other fraud that is not the result of the conduct of the alleged offender, the alleged offender may file a crime report with the appropriate law enforcement agency; and

(III) if the alleged offender notifies the private entity or the district attorney in writing, not later than 30 days after being contacted for the first time pursuant to clause (iv), that there is a dispute pursuant to this subsection, before further restitution efforts are pursued, the district attorney or an employee of the district attorney authorized to make such a determination makes a determination that there is probable cause to believe that a crime has been committed; and

(vi) charges only fees in connection with services under the contract that have been authorized by the contract with the State or district attorney.

(b) Certain checks excluded

A check is described in this subsection if the check involves, or is subsequently found to involve—

(1) a postdated check presented in connection with a payday loan, or other similar transaction, where the payee of the check knew that the issuer had insufficient funds at the time the check was made, drawn, or delivered;

(2) a stop payment order where the issuer acted in good faith and with reasonable cause in stopping payment on the check;

(3) a check dishonored because of an adjustment to the issuer's account by the financial institution holding such account without providing notice to the person at the time the check was made, drawn, or delivered;

(4) a check for partial payment of a debt where the payee had previously accepted partial payment for such debt;

(5) a check issued by a person who was not competent, or was not of legal age, to enter into a legal contractual

obligation at the time the check was made, drawn, or delivered; or

(6) a check issued to pay an obligation arising from a transaction that was illegal in the jurisdiction of the State or district attorney at the time the check was made, drawn, or delivered.

(c) Definitions

For purposes of this section, the following definitions shall apply:

(1) State or district attorney

The term "State or district attorney" means the chief elected or appointed prosecuting attorney in a district, county (as defined in section 2 of title 1, United States Code), municipality, or comparable jurisdiction, including State attorneys general who act as chief elected or appointed prosecuting attorneys in a district, county (as so defined), municipality or comparable jurisdiction, who may be referred to by a variety of titles such as district attorneys, prosecuting attorneys, commonwealth's attorneys, solicitors, county attorneys, and state's attorneys, and who are responsible for the prosecution of State crimes and violations of jurisdiction-specific local ordinances.

(2) Check

The term "check" has the same meaning as in section 3(6) of the Check Clearing for the 21st Century Act.

(3) Bad check violation

The term "bad check violation" means a violation of the applicable State criminal law relating to the writing of dishonored checks.

15 USC 1692 note

§ 819. Effective date

This title takes effect upon the expiration of six months after the date of its enactment, but section 809 shall apply only with respect to debts for which the initial attempt to collect occurs after such effective date.

LEGISLATIVE HISTORY

House Report: No. 95-131 (Comm. on Banking, Finance, and Urban Affairs)

Senate Report: No. 95-382 (Comm. on Banking, Housing and Urban Affairs)

Congressional Record, Vol. 123 (1977)

April 4, House considered and passed H.R. 5294.

Aug. 5, Senate considered and passed amended version of H.R. 5294.

Sept. 8, House considered and passed Senate version.

Enactment: Public Law 95-109 (September 20, 1977)

Amendments: Public Law Nos.

99-361 (July 9, 1986)

101-73 (August 9, 1989)

102-242 (December 19, 1991)

102-550 (October 28, 1992)

104-88 (December 29, 1995)

104-208 (September 30, 1996)

109-351 (October 13, 2006)

111-203 (July 21, 2010)

Printed May 2013

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

UNIFUND CCR PARTNERS ASSIGNEE OF PALISADES COLLECTIONS, LLC	:	APRIL TERM, 2008
	:	NO. 3966
V.	:	
	:	CONTROL NO. 08206576 080930
JENNY T. VO	:	

COPIES SENT
PURSUANT TO Pa.R.C.P. 236(b)
FEB 17 2009
FIRST JUDICIAL DISTRICT OF PA.
USER I.D.:

OPINION AND ORDER

FOX, J.

This matter comes before the Court for disposition of Preliminary Objections to the Plaintiff's Third Amended Complaint.

DOCKETED
FEB 17 2009
T. DUGAN

PROCEDURAL HISTORY

Plaintiff, Unifund CCR Partners, assignee of Palisades Collections, LLC (hereinafter Plaintiff) initiated this action by filing a Complaint demanding $14,237.78 plus interest, costs, and attorney's fees. Defendant Jenny T. Vo (hereinafter Defendant), filed Preliminary Objections to the complaint.

In response, Plaintiff filed an Amended Complaint demanding $6,417.62 plus interest, costs, and attorney's fees. Thereafter Defendant again filed Preliminary Objections to the Amended Complaint. The Court sustained the Preliminary Objections and granted Plaintiff leave to file an amended complaint.

Plaintiff filed a Second Amended Complaint, again demanding $6,417.62 plus interest, costs, and attorney's fees. Defendant filed Preliminary Objections and in response Plaintiff filed a Third Amended Complaint demanding $5,703.26 plus interest, costs, and attorney's fees. Defendant filed Preliminary Objections which are at issue herein. This court initially sustained the Objections and dismissed the Complaint without further leave to amend. Plaintiff filed for Reconsideration which this court granted, vacating its Order and scheduling the matter for oral arguments. The court heard arguments on December 3, 2008.

DISCUSSION

Pennsylvania is a fact-pleading jurisdiction. Pa.R.C.P. 1019(a) states that "the material facts on which a cause of action or defense is based shall be stated in a concise and summary form." The purpose of Rule 1019(a) is to "require the pleader to disclose the 'material facts' sufficient to enable the adverse party to prepare his case." Landau v. Western Pennsylvania National Bank, 282 A.2d 335, 339 (Pa. 1971). A complaint "must not only give the defendant notice of what the plaintiffs' claim is and the grounds upon which it rests, but it must also formulate the issues by summarizing those facts essential to support the claim." Alpha Tau Omega Fraternity v. University of Pennsylvania, 464 A.2d 1349, 1352 (Pa. Super. 1983).

I. FAILURE TO PLEAD PRIVITY OF CONTRACT WITH THE ORIGINAL CREDITOR

The Plaintiff has failed to plead the chain of assignment of the Defendant's account from the alleged original creditor, Citibank (South Dakota) N.A., to the Plaintiff.

"Where the plaintiff relies upon a contract in which he or she has privity but to which he or she is not a direct party, the complaint is required to show how the privity of contract arose." 4 *Standard Pennsylvania Practice 2d* § 22:10 at 124.

In its Third Amended Complaint, Plaintiff states that it is the "successor in interest to the original creditor as set forth in the caption of this Complaint." The caption of the Complaint lists the Plaintiff as "Unifund CCR Partners assignee of Palisades Collection, LLC." The Plaintiff also attaches three documents purporting to establish the chain of assignment of the defendant's account:

- A "Bill of Sale, Assignment and Assumption Agreement" dated May 26, 2006 between Citibank (South Dakota) N.A. and Unifund Portfolio A, LLC which assigns "Accounts described in Section 1.2 of the Agreement." Section 1.2 is not attached, nor is it averred in the Complaint that the Defendant's account is included in Section 1.2.
- A "Bill of Sale" dated May 26, 2006 between Unifund Portfolio A, LLC and Cliffs Portfolio Acquisition I, LLC, which assigns the "Cliffs Subpool as defined in the Agreement." There is no further description of the "Cliffs Subpool," nor is it averred that the Defendant's account is included in the Cliffs Subpool.
- An "Assignment" dated January 1, 2005 among Palisades Collection, LLC and Cliffs Portfolio Acquisition I, LLC as assignors and Unifund CCR Partners as assignee, which assigns "Receivables" to the assignee. There is no description of the Receivables, nor is it averred that the Defendant's account is included in the Receivables.

Pa. R.C.P. 2002(a) requires actions to be prosecuted "by and in the name of the real party in interest." Rule 2002(a) "requires the plaintiff to trace in his statement of claim the derivation of his cause of action from his assignor" so that the defendant "may challenge the plaintiff's claim that he is the present owner of the cause of action." Brown v. Esposito, 42 A.2d 93, 94 (Pa. Super. 1945).

Plaintiff contends that the three documents attached to the Complaint demonstrate the chain of title. However, none of the documents specifically mention the Defendant's account as included among the accounts assigned. The Complaint does not plead the chain of assignment other than to state conclusorily that the Plaintiff is "successor in interest" to the original creditor. "When suit is brought against a defendant by a stranger to his contract, he is entitled to proof the plaintiff is the owner of the claim against him . . . Otherwise, the defendant might find himself subjected to the same liability to the original owner of the cause of action, in the event that there was no actual assignment." Produce Factors Corp. v. Brown, 179 A.2d 919, 921 (Pa. Super. 1962), *citing* Brown v. Esposito, 42 A.2d at 94.

Plaintiff's failure to adequately plead the assignment of the Defendant's account is a failure to plead material facts upon which the claim is based.

II. INSUFFICIENT SPECIFICITY IN A PLEADING – Pa. R.C.P. 1028(a)(3)

Plaintiff has alleged in four complaints that Defendant owes three different amounts, ranging from $14,237.78 in its original Complaint to $5,703.26 in its Third Amended Complaint. To support the amount owed, Plaintiff attached to the Third Amended Complaint what purports to be seven months of the Defendant's credit card bills, May to

December 2004. The first statement shows a "previous balance" of $5,738.33. The statements do not show any purchases or cash advances, but instead reflect only interest charges at rates ranging from 9.9% to 29.49%, and various fees such as a $29 "returned check fee," a $39 "bad check fee," and a $39 late fee. The final balance on the December 3, 2004 statement is $5,703.26.

Pa. R.C.P. 1019(f) states that "averments of time, place and items of special damage shall be specifically stated." This court concurs with the decision in Worldwide Asset Purchasing, LLC v. Stern, 153 P.L.J. 111 (C.P. Allegheny 2004), which held that in suits to recover credit card debts, under Rule 1019(f) the "defendant is entitled to know the dates on which individual transactions were made, the amounts therefore and the items purchased to be able to answer intelligently and determine what items he can admit and what items he must contest." Id. at 112.

Worldwide Asset Purchasing described the requirements to adequately plead and prove an account:

> "An account must show the name of the party charged. It begins with a balance, preferably at zero, or with a sum recited that can qualify as an account stated, but at least the balance should be a provable sum. Following the balance the item or items, dated and identifiable by number or otherwise, representing charges, or debits, and credits, should appear. Summarization is necessary showing a running or developing balance or an arrangement which permits the calculation of the balance claimed to be due." Id., *citing* Asset Acceptance Corp. v. Proctor, 804 N.E.2d 975, 977 (Ohio Ct. App. 2004).

The Plaintiff does not plead any information in the Complaint to show the basis of Defendant's account prior to May 4, 2004. The Plaintiff contends that under the terms of the card member agreement, the Defendant has only 60 days to contest any charges to the account believed to be incorrect, and therefore the Defendant is estopped from contesting the validity of any charges more than 60 days old. If the Complaint does not state with

particularity the basis of the alleged amount owed, the Defendant is unable to adequately prepare a defense to the Plaintiff's case. The importance of this pleading requirement is illustrated by the procedural history of this case wherein the Plaintiff has changed the amount Defendant allegedly owes from $14,237.78 in the original Complaint, $6,417.62 in the Amended and Second Amended Complaints, and finally $5,703.26 in the Third Amended Complaint.

The failure to plead sufficient information so that the Defendant can determine the basis of the alleged balance owed constitutes insufficient specificity in a pleading under Pa. R.C.P. 1028(a)(3).

III. FAILURE TO ATTACH A MATERIAL PART OF THE WRITING UPON WHICH THE CLAIM IS BASED – Pa. R.C.P. 1019(i)

Pa. R.C.P. 1019(i) states that "[w]hen any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing." The Plaintiff attaches a copy of a form contract entitled "AT&T Universal card member Agreement," and avers in the Third Amended Complaint that upon information and belief, the Defendant "executed a written application for the credit card at issue on or about July 5, 2001."

Although the Plaintiff has attached contract language governing an account, the Plaintiff has failed to plead or attach the interest rates and fees that the parties agreed to as part of the credit card agreement. Regulation Z, promulgated by the Federal Reserve under the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, requires that interest rates, fees, and finance charges applicable to a credit card account be disclosed in the credit card

application in a tabular format, commonly known as the "Schumer Box." *See* 12 C.F.R. § 226.5a; *see also* Roberts v. Fleet Bank, 342 F.3d 260, 265-266 (3d Cir. 2003) (describing the disclosure requirements of the Schumer Box).

The information contained in the Schumer Box is a material part of the writing upon which the Plaintiff's claim is based; it establishes the agreed-upon contract terms for the interest rates and fees. Without attaching the Schumer Box or setting forth its substance in the complaint, the Plaintiff does not adequately plead the basis for the amounts of interest, late fees, returned check fees, and over-the-limit fees alleged to be owed. The failure to either attach a copy of the original Schumer Box and any subsequent amendments, or to set forth the substance of the information contained in the Schumer Box in the complaint, constitutes a failure under Rule 1019(i) to attach a material part of the writing upon which the claim is based.

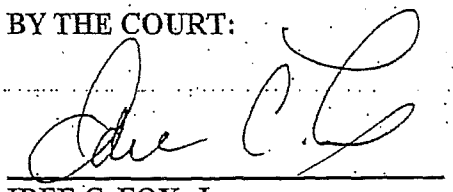
Finally, Defendant requests that the Court not only sustain the Preliminary Objections but also not allow the Plaintiff a fourth opportunity to amend the complaint. The issues raised by Defendant herein are the same as those raised in previous preliminary objections filled in this case. The Plaintiff has had more than ample opportunity to plead this case in accordance with the Rules of Civil Procedure. This Court agrees that further opportunity will prove fruitless and cause undue hardship on Defendant.

ORDER

AND NOW, this 17th day of February, 2009, it is hereby **ORDERED** and **DECREED** that Defendant's Preliminary Objections to Plaintiff's Third Amended

Complaint are **SUSTAINED**. The Complaint is dismissed without further leave to amend.

BY THE COURT:



IDEE C. FOX, J.

Worldwide Asset Purchasing, LLC v. Nancy A. Stern

and

Commonwealth Financial Systems, Inc. v. Scott Miller

Arbitration Appeals—Preliminary Objections—Sufficiency of Complaint Under Pa. R.C.P. 1019 and 1042

1. Assignees of credit card companies filed actions before District Justice against Defendants to recover credit card balances allegedly due. District Justices entered default judgment against both Plaintiffs for failure to appear at hearings and Plaintiffs filed timely notices of appeal. Defendants filed preliminary objections arguing complaints should be dismissed for failure to comply with pleading requirements of Pa. R.C.P. No. 1019 and verification requirements of Rule 1042. Preliminary Objections were granted, complaints were stricken and Plaintiffs were given 20 days to file amended complaints.

2. For complaints to satisfy the pleading requirements of Pa. R.C.P. 1019, Plaintiffs need to plead the facts on which a cause of action is based, including averments of time, place and items of special damage and must also attach copies of writings when the claim is based on a writing.

3. Where assignees of credit card companies sue for alleged credit card balances, suit is based on the contract between it, as assignee of assignor credit card company's rights, and Defendant credit card holders. To satisfy the pleading requirements, the underlying contract between Defendant credit card holder and credit card company must be attached to the complaint along with the contract between the credit card company and assignee to establish the assignees' contractual right to maintain suit against the Defendants.

4. Where Plaintiff sues for alleged credit card balances due, it must set forth the dates and amounts of the charges due as part of the duty imposed by the Rules of Civil Procedure to attach all documents which form the foundation of a cause of action and to give the Defendants sufficient notice of the charges against.

5. Where Plaintiff's counsel's verification under Pa. R.C.P. 1042(c) did not state that all parties were out of the court's jurisdiction it would be stricken as defective on its face and counsel would be permitted to file amended complaint complying with the verification requirements of the rule.

(Peter Clyde Papadakos)

Yale D. Weinstein for Worldwide Asset Purchasing, LLC.
Ann E.L. Shapiro for Stern.
Joel E. Hausman for Commonwealth Financial Systems, Inc.
Clayton S. Morrow for Miller.

Nos. AR 04-4429 and AR 04-4572. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION and ORDERS OF COURT

Wettick, J., December 29, 2004—The preliminary objections of defendants questioning the sufficiency of complaints to recover credit card balances are the subject of this Opinion and Orders of Court.[1]

In both cases, plaintiffs instituted district justice proceedings to recover credit card balances allegedly due. However, plaintiffs did not appear at the district justice proceedings and the district justices entered default judgments in favor of defendants. Plaintiffs filed timely notices of appeal from the district justice judgments. Defendants' preliminary objections to the complaints which plaintiffs have filed in these common pleas court proceedings are the subject of this Opinion and Orders of Court.

The basis for the preliminary objections is the failure of plaintiffs to comply with the pleading requirements of Pa. R.C.P. No. 1019. Defendants contend that plaintiffs have failed to comply with Rule 1019(a) which requires a pleading to set forth the material facts on which a cause of action is based; Pa. R.C.P. No. 1019(f) which requires averments of time, place, and items of special damage to be specifically stated; and Pa. R.C.P. No. 1019(i) which requires the pleader to attach a copy of a writing, or the material part thereof, whenever any claim is based on a writing.

GENERAL DISCUSSION OF THE CASE LAW

In *Atlantic Credit and Finance, Inc. v. Giuliana*, 829 A.2d 340 (Pa.Super. 2003), Atlantic Credit filed a complaint in which it alleged that the defendants were indebted to GM Card and that the plaintiff had purchased the defendants' account from GM Card. The plaintiff did not attach to the complaint any agreements between GM Card and the defendants, or any contract or agreement between GM Card and itself other than a single sheet which appeared to be a monthly statement from GM Card addressed to the defendants showing a new balance of $9,644.66 as of March 28, 2000. The Superior Court found to be meritorious the defendants' preliminary objection asserting that the plaintiff was required to attach writings evidencing any contract between GM Card and the defendants. The Court stated that the plaintiff's "failure to attach the writings which assertedly establish appellee's right to a judgment against appellants in the amount of $17,496.27, based on an alleged debt it allegedly purchased for substantially less than $9,644.66, is fatal to the claims set forth in the appellee's complaint. Thus, the preliminary objection of appellants based on failure to produce a cardholder agreement and statement of account, as well as evidence of the assignment, establishes a meritorious defense." *Id.* at 345.

In *St. Hill and Associates, P.C. v. Capital Asset Research Corp., Ltd.*, 2000 W.L. 33711023 (C.P. Phila. 2000), the Court considered preliminary objections to a complaint alleging that the defendant owed $93,000 to the plaintiff. In these preliminary objections, the defendant contended that (1) the complaint failed to comply with Rule 1019(a) because it did not set forth material facts regarding how the alleged debt arose and (2) the complaint violated Rule 1019(f) because it did not specify what services were performed for the defendant, when they were performed, and from where the alleged sum of $93,000 derived. While the plaintiff alleged that it sent notices and invoices to the defendant, it did not state when these invoices were sent or what the invoices covered. The Court sustained the preliminary objections stating that:

> ...the proper procedure is to require St. Hill to file an amended pleading specifying the times and dates of St. Hill's performance and demands for payment, pursuant to the alleged contract. It should also attach the relevant invoices to its amended complaint. *Id.* at 2.

In *Marine Bank v. Orlando*, 25 D.&C.3d 264 (C.P. Erie 1982), the Court addressed preliminary objections to a complaint to recover a credit card debt raising noncompliance with Rule 1019. The Court ruled that the plaintiff may comply with Rule 1019(h) by attaching the underlying agreement between the issuer and the cardholder. *Id.* at 66.

The Court also addressed the defendant's contention that the complaint failed to comply with Rule 1019(f) because the complaint failed to contain averments of time, place, and specific

averments of damage. The Court sustained these preliminary objections, stating that "defendant is entitled to know the dates on which individual transactions were made, the amounts therefore and the items purchased to be able to answer intelligently and determine what items he can admit and what items he must contest." *Id.* at 268.

A recent opinion of an Ohio Court of Appeals (*Asset Acceptance Corp. v. Proctor*, 804 N.E.2d 975 (Ohio Ct. App. 2004)) addressed the pleading requirements in a lawsuit by an assignee of an AT&T Universal credit card. The complaint alleged that the defendant owed $3,540.92, plus another $3,901.55 in accrued interest through September 30, 2002, and interest thereafter of 10% per annum. The complaint included a copy of a customer account statement and an affidavit of a branch manager setting forth the total principal and total accrued interest through September 30, 2002. Neither the complaint nor the affidavit explained how the plaintiff arrived at these numbers. The Court described the pleading requirements:

> Because an action on an account is founded upon contract, the plaintiff must prove the necessary elements of a contract action, and, in addition, must prove that the contract involves a transaction that usually forms the subject of a book account. In order to adequately plead and prove an account, '[a]n account must show the name of the party charged. It begins with a balance, preferably at zero, or with a sum recited that can qualify as an account stated, but at least the balance should be a provable sum. Following the balance, the item or items, dated and identifiable by number or otherwise, representing charges or debits, and credits, should appear. Summarization is necessary showing a running or developing balance or an arrangement which permits the calculation of the balance claimed to be due." *Id.* at 977 (citations omitted).

PRELIMINARY OBJECTIONS—WORLDWIDE ASSET PURCHASING, LLC v. STERN

Plaintiff's complaint (without Exhibit A) and plaintiff's revised verification are attached to this Opinion as Attachment 1.

In its complaint, plaintiff avers that Bank of America issued a credit card to defendant for her use in making purchases subject to the terms and conditions governing the use of the credit card. Defendant accepted these terms and conditions. Plaintiff purchased defendant's account from Bank of America and is now the holder and owner of the account.

Plaintiff's preliminary objections include the failure of plaintiff to attach to the complaint the written agreement showing the assignment of defendant's account from Bank of America to plaintiff. Rule 1019(i) provides that when a claim is based on a writing, the pleader shall attach a copy of the writing or material part thereof. Plaintiff's claim is based on the assignment of defendant's account from Bank of America to plaintiff because this assignment is a material fact upon which plaintiff's cause of action is based. See *Atlantic Credit and Finance v. Giuliana, supra*; 4 *Standard Pennsylvania Practice 2d* §21:75 at 84 (all documents which form a plaintiff's cause of action shall be attached to the complaint).

Defendant's preliminary objections also raise the failure of plaintiff to attach any writings showing the agreement between defendant and plaintiff's assignor, Bank of America. The only writing attached to the complaint (Exhibit A) is an undated and unsigned Visa or MasterCard CardMember Agreement which appears to have been prepared in 4/99. The complaint does not contain any documents signed by defendant that would show whether defendant ever agreed to these terms and conditions or whether these terms and conditions are applicable to the relevant period in which plaintiff's claim is based. As defendant states in her brief, "it is impossible to discern from Plaintiff's Complaint whether the attached Terms and Conditions were ever agreed to by Plaintiff, or whether these Terms and Conditions have merely been copied from some anonymous debtors' credit card file and attached to the Complaint." (Brief in Support of Preliminary Objections at 5.)

In *Atlantic Credit and Finance v. Giuliana, supra*, the plaintiff sought money allegedly due under a credit card which GM Card allegedly issued to the defendants. However, the plaintiff did not attach to its complaint any agreement between GM Card and the defendants; it attached only what appeared to be a monthly statement from GM Card addressed to the defendants. The Court sustained the defendants' preliminary objections based on a failure to attach writings which assertedly establish the plaintiff's right to a judgment in the specific amount which it sought.

It is my understanding that in a typical credit card transaction, the relationship between the cardholder and the issuer begins with a written application signed and submitted by the cardholder. In this application, the cardholder agrees to be bound by provisions set forth in the application and possibly other terms and conditions that are furnished to the cardholder at the time the card is issued. The application also provides that the terms and conditions may be changed through mailings to the cardholder and accepted by the cardholder's continued use of the credit card. In this situation, the writings that must be attached to the complaint include the application signed by the cardholder and any other relevant terms and conditions which govern the issuer's claims. For example, if the claim involves a period of time in which the initial terms and conditions applied and a later period of time in which amended terms and conditions apply, the complaint must attach both the original and amended terms and conditions with the dates for which they were applicable.

Defendant Stern next contends that plaintiff's complaint fails to comply with Rule 1019 because it seeks recovery of a specific amount of money that is allegedly due without offering any documentation or allegations supporting the claim. This complaint does not include a single date. The complaint simply avers that monthly statements were sent to defendant which detailed the charges made to the account, including finance charges, late and over limit charges, and that the balance due is $7,240.44. None of the monthly statements is attached and there is no description of the items forming the basis of the claim.

Under Rule 1019, a complaint must include the amounts of the charges that are part of the claim, the dates of the charges, credits for payments if any, dates and amounts of interest charges, and dates and amounts of other charges. The complaint should contain sufficient documentation and allegations to permit a defendant to calculate the total amount of damages that are allegedly due by reading the documents attached to the complaint and the allegations within the complaint. See *St. Hill and Associates v. Capital Asset Research Corp., supra; Marine Bank v. Orlando, supra.*[2]

Defendant also seeks to strike the complaint because the verification does not comply with Pa. R.C.P. No. 1024. This rule requires a pleading containing an averment of fact not appearing of record to state "that the averment or denial is true upon the signer's personal knowledge or information and belief." Rule 1024(a). Plaintiff's substitute verification does not make any statement as to the truthfulness of any factual allegations within the complaint—the substitute verification simply states that Angel Y. Moss, Attorney Relationship Manager for worldwide, "makes this statement on its behalf as to the truthfulness of the facts set forth in the foregoing Complaint." (Attachment 1, last page.) Consequently, the substitute verification is stricken.

PRELIMINARY OBJECTIONS—COMMONWEALTH FINANCIAL SYSTEMS, INC. v. MILLER

Plaintiff's complaint and Exhibit C (without Exhibits A and B) are attached as Attachment 2. Defendant's preliminary objections to this complaint raise grounds very similar to those raised by the defendant in *Worldwide Asset Purchasing v. Stern*.

In its complaint, Commonwealth Financial avers that it is an assignee of Unifund CCR Partners, assignee of Citibank Universal Card, and that plaintiff's assignor transferred to plaintiff all its right, title, and interest in, and to the agreement between the assignor and defendant. Plaintiff attaches as Exhibit A to the complaint a bill of sale under which Unifund CCR transferred to plaintiff its title to accounts listed in an account schedule (which is not attached).

Defendant's preliminary objections raise the failure of the complaint to contain allegations as to the terms and conditions of any alleged assignment between Citibank and Unifund CCR Partners, and plaintiff's failure to attach a copy of this assignment. I am sustaining this preliminary objection.

The complaint is based on an alleged credit card relationship between defendant and Citibank Universal Card. Plaintiff is not a party to this relationship (i.e., plaintiff does not stand in the shoes of Citibank Universal Card) unless plaintiff can establish that its assignor (Unifund CCR Partners) acquired Citibank's right, title, and interest in and to the alleged account between defendants and Citibank. As I previously discussed, Rule 1019(i) requires a party to attach all documents which form the foundation of the plaintiff's cause of action. The foundation of plaintiff's cause of action includes Citibank's assignment of defendant's account.

Defendant's preliminary objections also raise the failure of plaintiff to attach any writings showing the agreement between defendant and Citibank Universal Card. The complaint avers that defendant was granted a credit card by "plaintiff" (I assume the complaint should read Citibank Universal Card) at the terms and conditions agreed upon by the parties as more specifically shown in an agreement, a copy of which is attached as Exhibit B. However, Exhibit B is an incomplete and unsigned writing that makes no reference to the defendant. The final page of this exhibit has a date of 1998. The heading of the writing states, "AT&T Universal Card Cardmember Agreement." I am sustaining this preliminary objection because of plaintiff's failure to attach to the complaint any writing referring to and/or signed by the defendant or any explanation as to how Exhibit B applies to defendant. Exhibit B raises more questions than it answers because the complaint refers to the initial assignor as Citibank Universal Card and plaintiff appears to have attached to the complaint a portion of an AT&T Universal Card Cardmember Agreement.

The complaint is also deficient because of the absence of any documentation or other explanation supporting the averment that the balance due is $8,250.70, with interest at the rate of 19.99% per annum on the balance due from October 23, 2003.[3] While paragraph 9 of the complaint alleges that the amount which is due is more specifically shown in a statement of account marked Exhibit C, this exhibit is simply a computer printout showing a balance of $4,827.51, interest of $3,304.69 and court costs of $118.50, for a total balance of $8,250.70. As I previously discussed, in order to meet the requirements of Rule 1019, the complaint must set forth the dates and amounts of the charges and the contractual basis for any interest payments and late charges.[4]

Defendant's preliminary objections also seek dismissal of the complaint on the ground that the complaint is not properly verified. The relevant portion of the verification reads as follows:

> 1. I am the attorney for the Plaintiff;
>
> 2. Verification by the Plaintiff or an authorized agent of Plaintiff cannot be obtained within the time allowed by law for the filing of pleading;
>
> 3. That the facts set forth in the foregoing Pleading are true and correct to the best of my knowledge, information, and belief, based upon information received from the Plaintiff.

A verification must be made by a party "unless all of the parties (1) lack sufficient knowledge or information, or (2) are outside the jurisdiction of the court and the verification of none of them can be obtained within the time allowed for filing the pleading." Rule 1042(c). Counsel's verification (which is based on information received from the plaintiff) does not state that all of the parties are outside the jurisdiction of the court. Consequently, the verification is stricken.[5]

For these reasons, I enter the following Orders of Court:

Worldwide Asset Purchasing, LLC v. Nancy A. Stern

No. AR 04-4429

ORDER OF COURT

On this 29th day of December, 2004, upon consideration of defendant's preliminary objections, it is hereby ORDERED that:

(1) plaintiff's complaint is stricken; and

(2) within twenty (20) days, plaintiff may file an amended complaint, including an amended verification, which complies with the pleading and verification requirements set forth in the Opinion accompanying this Order of Court.

BY THE COURT:
/s/Wettick, A.J.

Commonwealth Financial Systems v. Scott Miller

No. AR 04-4572

ORDER OF COURT

On this 29th day of December, 2004, upon consideration of defendant's preliminary objections to plaintiff's complaint, it is hereby ORDERED that:

(1) plaintiff's complaint is stricken; and

(2) within twenty (20) days, plaintiff may file an amended complaint, including an amended verification, which complies with the pleading and verification requirements set forth in the opinion accompanying this Order of Court.

BY THE COURT:
/s/Wettick, A.J.

ATTACHMENT 1

BURTON NEIL & ASSOCIATES, P.C.
By: Yale D. Weinstein, Esquire
Identification No. 89678
1060 Andrew Drive, Suite 170
West Chester, PA 19380
(610) 696-2120

WORLDWIDE ASSET PURCHASING, LLC
9911 Covington Cross Drive, Suite 107
Las Vegas, NV 89144
Plaintiff
v. NANCY A. STERN
1750 Borland Road, Pittsburgh, PA 15243
Defendant

IN THE COURT OF COMMON PLEAS
ALLEGHENY COUNTY, PENNSYLVANIA
NO. CIVIL ACTION—LAW

a statute of limitations defense based on the pleadings. (Attachment 2, Ex. C.)

[6] If the verification had not been defective on its face, I would have required a written explanation of the facts supporting the averment that a verification by the plaintiff could not be obtained within the time allowed by law for the filing of the pleading. This is so because this litigation was instituted through the filing of a complaint with a district justice on May 21, 2004, and the verification is dated July 29, 2004. See *Rokeby-Johnson v. William Moennig and Son, Ltd.*, 41 D.&C.3d 594, 597-98 (C.P. Phila. 1984) ("given our modern, worldwide facilities of communication and travel, it is patently disingenuous to claim baldly that verifications cannot be obtained from any of the foreign plaintiffs within the time limit of the applicable statute of limitations").

American International Resources, Inc. v. Russell E. Swanson v. Christopher D. Moore,

Preemption—Amended Pleadings

1. ERISA preempts state law cause of action for pension or welfare benefits.

2. Amended Counterclaim and Complaint to Join Third Party Defendant in state court may not state cause of action preempted by ERISA.

(Joan Shoemaker)

Peter N. Georgiades for Plaintiff.
Adam S. Ennis for Russell E. Swanson.

GD 04-3018. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

Strassburger, J., January 10, 2005—This matter first came before the Court upon a suggestion by the Plaintiff, American International Resources, Inc. ("AIR"), that this Court lacks jurisdiction over the subject matter of portions[1] of the counterclaim asserted in this case by Defendant, Russell E. Swanson, as well as the third-party complaint filed against Additional Defendant Christopher D. Moore. Later, Defendant filed a motion to amend its counterclaims and third party complaint.

Defendant, a former employee of AIR, has asserted claims for the value of medical and dental benefits and for contributions to an employee pension plan which Defendant maintains AIR was to have funded for the benefit of Defendant while Defendant was an employee of AIR. Pursuant to Pa. R.Civ.P. 1032 (b), Plaintiff has suggested that this Court lacks jurisdiction over such claims because they are preempted by the Employee Retirement Income Security Act, Public Law No. 93-406, 88 Stat. 829 ("ERISA"), and that these portions of Defendant's counterclaims must now be dismissed.

An argument was held on the matter on December 28, 2004, at which time this Court granted the parties until January 3, 2005 to file any motions or supplemental memoranda related to this aspect of the case. Defendant has filed a motion for leave to amend both his counterclaim and his complaint to join additional defendant, which motion Plaintiff has opposed.

Defendant bases the portion of his counterclaim against AIR regarding medical, dental and pension benefits upon two legal theories. One theory is that the failure to pay these benefits is a violation of the Pennsylvania Wage Payment and Collection Law, 43 P.S. §260.1, *et seq*. The Defendant's other theory is breach of contract. The Defendant bases his claim against the Additional Defendant, Christopher D. Moore, exclusively upon the Pennsylvania Wage Payment and Collection Law.

It is now well settled that ERISA preempts all state law causes of action for pension or welfare benefits. 29 U.S.C. §1144(a). This preemption has specifically been held to preclude actions under the Pennsylvania Wage Payment and Collection Law and common law claims for breach of contract. *Vulcan v. United of Omaha Life Ins. Co.*, 715 A.2d 1169 (Pa.Super. 1998); *McMahon v. McDowell*, 794 F.2d 100 (3d Cir. 1986). Defendant's sole remedy for the alleged failure of AIR to pay for medical, dental and retirement benefits is pursuant to ERISA itself, and prior to the proposed amendments, no such claim was pleaded in this case.

Defendant has asserted that Plaintiff's preemption argument, first asserted less than a month before the scheduled trial date, has been waived. Whether that is so depends upon whether preemption goes to subject matter jurisdiction, which cannot be waived. This court agrees with Plaintiff's contention that preemption does indeed go to subject matter jurisdiction. See *Phillips ex rel. Estate of Williams v. Cricket Lighters*, 773 A.2d 802, 806 fn. 2 (Pa.Super. 2001) *rev'd in part on other grds. Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000 (2003) (preemption relates to jurisdiction, and is a non-waivable inquiry); *LaChappelle v. Interocean Mgmt. Corp.*, 731 A.2d 163, 165 (Pa.Super. 1999)(federal preemption under Seaman's Act deprived Pennsylvania courts of jurisdiction over the subject matter); *Fetterman v. Green*, 689 A.2d 289 (Pa.Super. 1997) (Federal Communications Act deprives Pennsylvania courts of jurisdiction to impose state law remedies).

Defendant's proposed amendments to his counterclaim and to the complaint to join third party defendant would reassert the causes of action under state law, and add a cause of action under ERISA, pursuant to 29 U.S.C. §1132(a)(1)(B). The state law causes of action, being preempted, would be no more valid under the proposed amended pleadings than they are now, and so amendment to that extent would be pointless. The Defendant's motion for leave to amend will therefore be denied to the extent the Defendant seeks to reassert causes of action for unpaid pension benefits under Pennsylvania common law or the Pennsylvania Wage Payment and Collection Law.

The remainder of Defendant's proposed amendments seek to raise claims under ERISA.[2] Plaintiff admits that state courts have concurrent jurisdiction to hear claims for health and pension benefits under ERISA. *Vulcan*, 715 A.2d at 1175-76.

However, Plaintiff asserts that the amendment to raise ERISA claims should not be allowed at this time because Defendant has failed to exhaust his administrative remedies. Although there is no exhaustion requirement in the ERISA statute, Defendant cites numerous federal courts of appeal decisions implying such a requirement, including *Harrow v. Prudential Ins. Co. of America*, 279 F.3d 244, 249 (3d Cir. 2002). Although entitled to respect, such decisions are not binding on this court, even when a federal question is involved. *Vulcan*, 715 A.2d at 1172.

Assuming *arguendo* that an exhaustion requirement exists, it is inapplicable here. Plaintiff seems to be taking the position that Defendant must exhaust both an internal review within the plan, and a review by the Department of Labor. Under the circumstances of this case, there is no need for the internal review within the plan because Plaintiff asserts in its brief that it has already taken place and Plaintiff has offered to credit Defendant with the amount Plaintiff thinks is due. Just because Defendant has not accepted Plaintiff's offer of settlement does not mean that Defendant has failed to exhaust his administrative remedy.

As far as review by the Department of Labor[3] is concerned, none of the cases cited by Plaintiff holds that such a review is required, and this court will not imply such a requirement.

An appropriate order follows.

STRASSBURGER, J.
January 10, 2005

Complaint

1. The plaintiff is WORLDWIDE ASSET PURCHASING, LLC, a business corporation. with place of business located at 9911 Covington Cross Drive, Suite 107, Las Vegas, NV.

2. The defendant is Nancy A. Stern, who resides at 1750 Boriand Road, Pittsburgh, Allegheny County, Pennsylvania.

3. At the defendant's request, Bank of America issued the defendant a credit card bearing account number 5442626xxxxx for defendant's use in making charge purchases subject to the terms and conditions governing the use of the credit card. Attached hereto, made a part hereof and marked Exhibit A is a true and correct copy of the terms and conditions.

4. The defendant accepted the credit card and the terms and conditions governing its use for the purchase of goods, merchandise and services and/or for cash advances from vendors who accepted Bank of America's credit card. In using the credit card, the defendant agreed to comply with the terms and conditions governing its use which included the obligation to pay Bank of America for all charges made in full upon receipt of the statement or in installments subject to monthly finance charges.

5. The defendant utilized the credit card by making/obtaining purchases of goods, merchandise and services and/or cash advances from vendors who accepted the credit card. Monthly statements were sent to the defendant which detailed the charges made to the account including finance charges, late and/or, over limit charges. The balance due for the charges made by the defendant including any finance charges, late or over limit charges is $7,240.44.

6. Defendant did not pay the balance due in full upon receipt of the billing statements and failed to make the required minimum monthly payment set forth in the billing statement. As such, defendant is in default of the terms and conditions governing the use of the credit card.

7. Plaintiff purchased the defendant's account from Bank of America and is now the holder and owner of the account.

8. Although demand has been made by plaintiff upon defendant to pay the sum of $7,240.44, the defendant failed and refused to pay all or any part thereof.

9. Plaintiff alleges it is entitled to recovery of attorneys fees from defendant pursuant to the terms and conditions governing the account. Plaintiff seeks recovery of attorneys fees in the sum of $759.56.

Wherefore, plaintiff demands judgment against the defendant in the sum of $7,240.44, attorneys fees in the sum of $759.56 and the costs of this action.

BURTON NEIL & ASSOCIATES, P.C.
By: Yale D. Wienstein, Esquire
Attorney for Plaintiff

The law firm of Burton Neil & Associates, P.C. is a debt collector.

Verification

Angel Y. Moss is Attorney Relationship Manager for Worldwide Asset Purchasing, LLC, the within Plaintiff, and makes this statement on its behalf as to the truthfulness of the facts set forth in the foregoing Complaint subject to the penalties of 18 Pa. C.S. Section 4904, relating to unsworn falsification to authorities.

Date: 7/13/04 Name: Angel Y. Moss

Nancy A. Stern

ATTACHMENT 2

COMPLAINT ON APPEAL

1. Plaintiff is a corporation having offices at 120 North Keyser Avenue, Scranton, PA 18504, and as the assignee of Unifund CCR Partners, assignee of Citibank Universal Card, stands in its assignor's stead, and all are hereinafter referred to interchangeably as "Plaintiff."

2. At a specific instance the Assignor sold, assigned and transferred to Plaintiff all of Assignor's right, title and interest in, and to the agreement between Assignor and Defendant. Assignor had the right to assign the agreement. A copy of the assignment is attached hereto as Exhibit "A."

3. All conditions precedent to Assignor's right to be paid under the terms of the contract have occurred.

4. Defendant is an individual whose address is 425 7th St., Pittsburgh, Allegheny County, Pennsylvania 15139.

5. At a specific instance and request of the Defendant, the Defendant applied for and was granted a credit card by Plaintiff at the terms and conditions agreed upon by the parties, as is more specifically shown by the Agreement, a true and correct copy of which is attached hereto, marked Exhibit "B" and made a part hereof.

6. The Plaintiff avers that the agreement between the parties was based upon a written agreement which the Defendant accepted by using credit card to make purchases and/or cash advances.

7. Thereafter, in breach of obligations under the Agreement, the Defendant failed to make payments as they became due.

8. Plaintiff avers that the terms of the Agreement provide for acceleration of the entire balance due and owing upon Defendant's breach of the Agreement.

9. Plaintiff avers that the balance due amounts to $8,250.70, as is more specifically shown by Plaintiff's Statement of Account, a true and correct copy of which is attached hereto, marked Exhibit "C" and made a part hereof.

10. Plaintiff avers that the interest has accrued at the rate of 19.99% per annum on the balance due from October 23, 2003.

11. Per the term of the agreement, the Defendant has agreed to pay to the Plaintiff as liquidated damages, the costs of collection, including all reasonable attorneys' fees incurred in the collection of monies owing, which Plaintiff avers will amount to 25% of the balance due.

12. Although repeatedly requested to do so by Plaintiff, Defendant has willfully failed and refused to pay the amount due to Plaintiff or any part thereof.

WHEREFORE, Plaintiff demands Judgment against Defendant in the principal amount of $8,250.70, with appropriate additional interest from October 23, 2003, plus attorneys fees and costs.

APPLE AND APPLE, P.C.
BY: s/_____
Attorneys for Plaintiff(s)

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[1] I am addressing these preliminary objections through an Opinion because issues concerning the adequacy of complaints to recover credit card balances have been arising with considerable frequency.

[2] According to 4 *Standard Pennsylvania Practice 2d* §22:84 at 210-11, the "complaint should contain an informative statement of the account, with debits and credits properly identified, itemized, and segregated; there must be clear and definite charges, not lumped but itemized, showing the nature of the transactions[;] an] exhibit must set forth the items on which plaintiff claims, delivery dates, unit charges, and total amounts." (Footnotes omitted.)

[3] The complaint does not attach any writing showing that defendant agreed to pay this rate of interest.

[4] The computer printout lists 10/11/99 as the last payment date. There is no reference to the date when the card was last used. Without such information, defendant is not in a position to raise

FIA Card Services, N.A. v. Jeffrey M. Kirasic

Consumer Credit Transactions—Pleading Requirements

1. Amended Complaint seeking credit card charges is proper when all statements supporting the amounts claimed in the Complaint are attached thereto.

2. Even though credit agreement itself (containing information about late fees, over limit charges, etc.) is not attached to Complaint, where those items are not sought in the suit, failure to attach them is not basis to dismiss Complaint.

(Margaret P. Joy)

Sarah E. Ehasz for Plaintiff.
Thomas J. Dausch for Defendant.

No. AR 06-009360. In the Court of Common Pleas of Allegheny County, Civil Division.

OPINION

Wettick, J., November 7, 2007—The preliminary objections of defendant questioning the sufficiency of plaintiff's second amended complaint to recover credit card balances are the subject of this Opinion and Order of Court.

Card Services' original complaint alleges that defendant was issued an open-end credit account that was created through a written contract accepted by defendant when he signed and utilized the credit card account.[1] Card Services attached to the complaint a five-page writing which it identified as a true and correct copy of the credit card agreement governing this account. The complaint alleges that defendant received monthly statements which accurately stated all purchases and payments made during the month, interest charges imposed on the unpaid balance, and the amount due. As of November 9, 2006, the remaining balance is $22,061.86.

Defendant filed preliminary objections based on my ruling in *Worldwide Asset Purchasing, LLC v. Stern*, 153 P.L.J. 111 (2005). In that case, the credit card companies filed complaints very similar to the original complaint filed in this case. I ruled that the complaints failed to comply with the requirements of Pa. R.C.P. No. 1019, that the plaintiff set forth the material facts upon which the cause of action is based, and that the writings be attached when a claim is based on a writing. I stated that whenever a claim involves one period of time in which the initial terms and conditions of the credit card agreement apply and later periods of time in which amended terms and conditions apply, the complaint must attach both the original and amended terms and conditions with the dates for which they were applicable.

I also stated that the complaint cannot seek recovery of a specific amount of money that is allegedly due without including any documentation or allegations supporting recovery of this amount. Under Rule 1019, a complaint must include the amounts of the charges that are part of the claim, the dates of the charges, credits for payments, dates and amounts of interest charges, and dates and amounts of other charges. The complaint must contain sufficient documentation and allegations to permit a defendant to calculate the total amount of damages that are allegedly due by reading the documents attached to the complaint and the allegations within the complaint.

I sustained defendants' preliminary objections to the original complaint filed in the present case, because it did not satisfy the pleading requirements described in *Worldwide Asset Purchasing.*

In the present case, Card Services filed an amended complaint which attached the monthly statements upon which it based its claim for $22,061.86 but did not attach any writings showing the terms and conditions of the amended credit card agreements applicable to defendant during the relevant times. Consequently, I sustained defendant's preliminary objections to the amended complaint with leave to amend.

Plaintiff filed a second amended complaint which stated at paragraph 11 that plaintiff is unable to attach a copy of the applicable writings governing interest rates and fees. Defendant filed essentially the same preliminary objections to the second amended complaint that he had filed to the original and first amended complaint; he sought dismissal of the complaint because plaintiff was incapable of providing the writings upon which plaintiff bases its claims.

However, plaintiff's second complaint was not a carbon copy of its prior complaints. Instead, plaintiff sought payment only for the amount of the cash advances and purchases identified in the invoices attached to the complaint, less payments defendant made to plaintiff as set forth in the invoice.

Plaintiff has attached to its second amended complaint the November 2004 statement showing a balance of $0.00 for the beginning of the billing cycle. Plaintiff has also attached to this complaint the statements from November 2004 through August 2006. Plaintiff alleges that the total amount of the cash advances or purchases shown on these statements, less the total amount of payments shown on these statements, is $16,251.99. In this lawsuit, this is the only money plaintiff seeks to recover.

In *Worldwide Asset Purchasing*, I stated that under the pleading requirements of Pa. R.C.P. No. 1019, the complaint must contain sufficient documents and allegations to permit a defendant to calculate the total amount of damages that are sought by reading the documents attached to the complaint and the allegations within the complaint. Plaintiff's second amended complaint satisfies this requirement.

While plaintiff cannot produce the writings that govern defendant's obligations during the period in question, it is not disputed that the credit card that is the subject of this litigation was issued to defendant in 1990. A fact-finder may assume that any writing governing defendant's obligations to plaintiff from 1990 to August 2006 would include the obligation to pay the cash advances and the purchases shown on the invoices. Writings that plaintiff cannot produce would be relevant only to establish the finance charges, late fees, over limit fees, and the like that plaintiff may have been permitted to impose. However, the claim raised in the second amended complaint does not include any of these items. Consequently, the writings that plaintiff attached to the second amended complaint support the claim that plaintiff is raising.

In summary, in consumer credit transactions, the Pennsylvania Rules of Civil Procedure require a credit cardholder seeking to recover money allegedly due to attach to the complaint the writings which support the claim which the credit cardholder is making. Invoices showing cash advances or purchases support a claim for payment of these items.

ORDER OF COURT

On this 7th day of November, 2007, it is hereby ORDERED that defendant's preliminary objections to plaintiff's second amended complaint are overruled.

BY THE COURT:
/s/Wettick, A.J.

[1] Plaintiff is FIA Card Services, N.A., formerly known as MBNA America Bank, N.A.

were filed as to this parcel for tax years 2002, 2003, or 2004.[1]

On May 3, 2005, the School District filed a tax assessment appeal for 2005. On November 28, 2005, the Board of Property Assessment Appeals and Review kept the assessment at $176,700. The School District appealed to the Board of Viewers.

The second and third parcels that are the subject of this litigation (Parcel 808-S-194 and Parcel 808-P-271) are referred to as the *Foxwood Knolls Plan of Lots*. On May 17, 2001, the Foxwood Plan was acquired for $600,000. At the time of acquisition, Parcel 808-S-194 had an assessed valuation of $35,500, and Parcel 808-P-271 had an assessed valuation of $114,500. No tax assessment appeals were filed as to these parcels for tax years 2001, 2002, 2003, and 2004.[2]

On May 3, 2005, the School District filed a tax assessment appeal for both parcels. On September 19, 2005, the Board of Assessment Appeals and Review kept the assessed value of the two parcels at $35,500 and $114,500. The School District appealed the decision as to both parcels to the Board of Viewers.

The Board of Viewers has postponed any hearing pending a ruling by this court as to the applicability of Section 13 of the assessment legislation governing counties of the second class (72 P.S. §5452.13) to the assessments of these parcels.

This section reads, in relevant part, as follows:

> No land assessed as acreage or unimproved property, which is subsequently laid out in residential lots and the plan of such lots is recorded, shall be assessed in excess of the total assessment of the land as acreage or unimproved property until such time as the lots are actually improved with permanent construction of any new building and either sold to a bona fide purchaser or occupied for residential purposes.

Assessments in Allegheny County are based on 2002 values. Thus, under Section 13, assessments for years 2005-2007 must be based on the 2002 assessed value of the land as acreage or unimproved property. No assessment for years 2005-2007 may take into account increases in value attributable to the development of the property. However, neither Section 13 nor any other provision of the Second Class County and General Assessment Laws bars a taxing body from appealing an assessment of land that has been approved for residential development, or that is being developed, on the ground that the assessed value of the land as acreage or unimproved property is less than the fair market value as of 2002 of the land as acreage or unimproved property.

The purpose of Section 13 is to encourage the development of vacant and unimproved property for residential use by not requiring the developer to pay taxes based on improvements made to the property until a new building is constructed and the property is either sold or occupied. *In Re: Appeal from the Action of the Board of Property Assessment Appeals and Review of Allegheny County regarding the Assessments of Residential Property owned by various owners and situated in Allegheny County, Pennsylvania v. County of Allegheny and various Municipalities and School Districts*, 151 P.L.J. 9 (2002). Section 13 achieves this purpose by providing that land which is being developed shall continue to be assessed as acreage or unimproved property until a lot is improved with a new building and either sold or occupied for residential purposes. In these proceedings, the protections of Section 13 do not apply because the School District is claiming only that the 2002 fair market values of the properties as acreage or unimproved property is greater than their current assessed values.

For these reasons, I enter the following Order of Court:

ORDER OF COURT

On this 3rd day of December, 2007, it is ORDERED that the Board of Viewers shall hear the tax appeals in BV05-000618, BV05-000201, and BV05-000203 and shall make its decision based on the ruling made in this Opinion.

BY THE COURT:
/s/ Wettick, A.J.

[1] On February 12, 2002, Maronda Homes filed an application for approval of a plan of lots with Moon Township. Approval was received on August 3, 2005.

[2] An application for approval of subdivision plan for Foxwood Plan was filed by Maronda Homes on February 12, 2002. On July 8, 2004, Maronda received final approval for the plan.

Target National Bank/Target Visa v. Liz G. Samanez and Target National Bank v. John R. Celesti

Preliminary Objections—Sufficiency of Complaint

1. Where a complaint does not describe an express agreement, the complaint must include sufficient documentation and allegations to permit the defendant to calculate the total amount allegedly due, by reading the documents attached to the complaint and the allegations in the complaint.

2. The defendant's failure to object to an invoice at the time it is received does not result in an implied agreement that the amount claimed to be owed is correct. The defendant may question the correctness of the claim regardless of whether he or she previously questioned the correctness of the invoices.

(Meg L. Burkardt)

Gregg L. Morris for Plaintiff.
Liz G. Samanez, *Pro Se.*
Thomas J. Dausch for John R. Celesti.

No. AR07-009777 and No. AR06-009418. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION AND ORDER OF COURT

Wettick, A.J., December 19, 2007—The subject of this Opinion and Order of Court is defendants' preliminary objections to plaintiffs' complaints raising noncompliance with the pleading requirements of Pa. R.C.P. 1019 because of the failure of plaintiffs to attach the monthly credit card statements upon which plaintiffs' claims are based, and plaintiffs' failure to attach writings that govern the defendants' obligations.

I. ***Target National Bank/Target Visa v. Samanez***

The complaint filed by plaintiff ("Target") alleges that defendant opened an account with plaintiff for the purchase of goods and services. Plaintiff maintains accurate books of account recording all credits and debits for this account. Defendant received monthly statements setting forth the nature and amount of all charges made by defendant. Defendant refuses to pay a balance due and owing of $8,215.84.

The only writing attached to plaintiff's complaint is a July 25, 2007 closing statement showing a previous balance of $8,180.84, late charges of $35.00, a new balance of

$8,215.84, an amount past due of $1,814.34, and a minimum payment due of $8,215.84.

In *Worldwide Asset Purchasing, LLC v. Stern*, 153 P.L.J. 111 (2004), and in *FIA Card Services, N.A. v. Kirasic*, AR06-009360, 156 P.L.J. 39 (November 7, 2007), I addressed preliminary objections to complaints to recover credit card balances based on a failure to attach the writings setting forth the terms and conditions of the credit card agreement and documents to support balances allegedly due.

In *Worldwide Asset Purchasing*, Bank of America was the issuer of the credit card and suit was brought by Worldwide Asset Purchasing. I ruled that Worldwide Asset Purchasing was required to attach to the complaint the written assignment or assignments that traced ownership of the account from Bank of America to Worldwide Asset Purchasing.

In *Worldwide Asset Purchasing*, the credit card companies filed complaints which attached only one monthly statement showing the balance allegedly due. I ruled that the complaints failed to comply with the requirements of Rule 1019 that a plaintiff shall (1) set forth the material facts upon which a cause of action is based and (2) attach the writings when a claim is based on a writing. I said that whenever a claim involves one period of time in which the initial terms and conditions of the credit card agreement apply and other periods of time in which amended terms and conditions apply, the plaintiff must attach to the complaint both the original and amended terms and conditions with the dates on which they are applicable.[1]

I also ruled that a complaint in which a plaintiff seeks recovery of a specific amount of money that is allegedly due must include documentation or allegations supporting recovery of this amount. I said that a complaint must contain sufficient documentation and allegations to permit a defendant to calculate the total amount of damages that are allegedly due by reading the documents attached to the complaint and the allegations in the complaint.[2]

In *FIA Card Services*, the plaintiff's initial complaint alleged that the defendant received monthly statements which accurately stated all purchases and payments made during the month, interest charges imposed on the unpaid balance, and the amount due. The complaint stated that as of November 9, 2006, the remaining balance was $22,061.86. The defendant filed preliminary objections based on my ruling in *Worldwide Asset Purchasing* that requires a credit card company to attach writings showing the terms and conditions of the applicable credit card agreement(s) and the applicable monthly statements which support the amount that is claimed. Card Services filed an amended complaint which attached the monthly statements upon which it based its claim for $22,061.86. However, it did not attach any writings showing the terms and conditions of the credit card agreements applicable to the defendant during the relevant times. Consequently, I sustained the defendant's preliminary objections to the amended complaint with leave to amend.

Card Services filed a second amended complaint which stated that it was unable to attach a copy of the applicable writings governing interest rates and fees during the relevant times. However, in the second amended complaint, Card Services only sought payment of the amount of the cash advances and purchases identified in the invoices attached to the complaint, less payments made to the plaintiff as set forth in the invoices.

Card Services attached to its second amended complaint a November 2004 statement showing a balance of $0.00 for the beginning of the billing cycle. Card Services also attached to the complaint the monthly statements from November 2004 through August 2006. The total amount of the cash advances and purchases shown on these statements, less the total amount of payments shown on these statements, was $16,251.99. In this lawsuit, this was the only money that Card Services sought to recover.

I overruled the defendant's preliminary objections, stating that while the plaintiff cannot produce the writings that govern the defendant's obligations during the period in question, the defendant does not dispute that the credit card that is the subject of this litigation was issued by the plaintiff to the defendant in 1990. A fact-finder may assume that any writing governing the defendant's obligations to the plaintiff between 1990 and August 2006 included the obligation to pay the cash advances and purchases shown on the invoices. Thus, the writings that the plaintiff cannot produce would be needed only to establish finance charges, late fees, over limit fees, and the like that the plaintiff may have been permitted to impose. However, the claim raised in the second amended complaint does not include any of these items. Consequently, the writings that the plaintiff attached to the second amended complaint supported the claim that the plaintiff is raising.

I stated:

> In summary, in consumer credit transactions, the Pennsylvania Rules of Civil Procedure require a credit card issuer seeking to recover money allegedly due to attach to the complaint the writings which support the claim which the credit card issuer is making. Invoices showing cash advances or purchases support a claim for payment of these items. *Id.* @*4.

In the present case, Target contends that my rulings in *Worldwide Asset Purchasing* and *FIA Card Services* do not apply. According to Target, this is a lawsuit to recover an account stated. Target has alleged that defendant received monthly statements and never raised any objections to the contents of the statements. Consequently, according to Target, she has agreed to pay the balance set forth in the final statement so any writings describing the relationship between the parties and the monthly charges and credits set forth in prior statements are irrelevant.[3]

The law recognizes a lawsuit based on an account stated where the complaint describes discussions between the parties or other back and forth communications as to the amount that is due. Once an agreement is made as to the amount that will resolve the dispute, this account stated constitutes a new and independent cause of action superseding any antecedent cause of action.

There may be situations in which a party's silence will be deemed to be an agreement to make payment of the amount set forth in a statement, in which instance it is not necessary for the creditor to introduce documents concerning the underlying transaction or documents supporting the amount of damages set forth in the statement. However, the failure to object cannot be construed as assent to pay the amount set forth in the statement unless the creditor can plead facts in addition to the failure to object to the invoice which show an express or implied agreement to pay the amount set forth in the invoice.

Traditionally, an account stated was a promise by a debtor to pay a stated account of money which the parties had expressly agreed upon. Watter H.E. Jaeger, 15 *Williston on Contracts* §1862 (3d ed. 1972). The doctrine was expanded to include an implied promise by the debtor to the creditor: "To establish an account stated there must be a contract between the parties, that is, an express or implied promise by the debtor to the creditor." *Id.* at 566 (footnote omitted).

Black's Law Dictionary 18 (8th ed. 2004) defines *account stated* as follows:

> A balance that parties to a transaction or settlement agree on, either expressly or by implication. The phrase also refers to the agreement itself or to the assent giving rise to the agreement.

Standard Pennsylvania Practice (Second), Action on *account stated*, describes an *account stated* as follows:

> An account stated is an account in writing, examined and accepted by both parties.
>
> **Observation:** An account stated is an agreement between parties to an open account; it includes a promise by the debtor, express or implied, to pay that balance.
>
> To produce an account stated, the account must be rendered, and the other party must accept, agree to, or acquiesce in the correctness of the account. 4 Standard Pennsylvania Practice 2d §22:17 at 303 (2001) (footnotes omitted).

The creation of an account stated is discussed in Contracts, Sections 512 and 513 of the *Pennsylvania Law Encyclopedia (Second)*. The relevant portions of the discussion are set forth below:

> **§512. — General Considerations**
> An account stated has been defined as an account in writing, examined and expressly or impliedly accepted by both parties thereto, as distinguished from a simple claim or a mere summary of accounts.
>
> In an action upon an account stated, it is not necessary to show the nature of the original transaction or indebtedness or to set forth the items entering into an account in the pleadings. However, in an action of enforcement of accounts stated, the plaintiff must prove there is an account in writing, examined and accepted by both parties, of which acceptance need not be expressly so, but may be implied from the circumstances. There must also be evidence of an acceptance, at least from the circumstances, by the defendant. 13 P.L.E.2d Contracts §512 at 9-10 (2001) (footnotes omitted).
>
> **§513. — Assent of Parties as to Account**
> To produce an account stated, the account must be rendered, and the other party must accept, agree to, or acquiesce in the correctness of the account, under such circumstances as to import a promise of payment on the one side and acceptance on the other. In short, there must be a meeting of the minds, and there can be no account stated where the account rendered meets with general objection.
>
> Acceptance or acquiescence need not be manifested expressly, but may be implied from the circumstances. Where the debtor has had an opportunity to scrutinize the account, his silence is prima facie evidence of acquiescence in an account stated, but the rule is otherwise if the debtor makes a timely objection.
>
> Something more than mere acquiescence by failing to take exception to a series of statements of account received in the mail is required to create an account stated. 13 P.L.E.2d Contracts §513 at 11-12 (2001) (footnotes omitted).

I have reviewed the limited Pennsylvania case law discussing an action upon an account stated. The case law is accurately summarized in Sections 512 and 513 of the *Pennsylvania Law Encyclopedia*.

The opinions in the following cases appear to be the most recent Pennsylvania state court published opinions addressing the cause of action of an account stated: *Obermayer, Rebmann, Maxwell & Hippel v. Banta*, 28 Pa. D.&C.4th 225 (C.P. Phila. 1996), *aff'd in part, vacated in part*, 687 A.2d 866 (Pa.Super. 1996); *Rush's Service Center, Inc. v. Genareo*, 10 Pa. D.&C.4th 445 (C.P. Lawrence 1991); *C-E Glass v. Ryan*, 70 Pa. D.&C.2d 251 (C.P. Beaver 1975); and *Ryon v. Andershonis*, 42 Pa. D.&C.2d 86 (C.P. Schuylkill 1967).

In *Obermayer*, the Court stated that in the action of enforcement of accounts stated, the plaintiff must prove there is an account in writing examined and accepted by both parties. 28 Pa. D.&C.4th at 233. Acceptance by the defendant may be implied from the circumstances. *Id.* In this case, the Court found acceptance because the defendant expressed concern to the plaintiff about his ability to pay the fees recorded in the accounts. *Id.* at 233-34.

In *Rush's Service Center*, the Court stated that a complaint states a cause of action upon an account stated if it contains averments that there had been a running account, a balance remains due upon the account, the account has been rendered to the defendant, and the defendant has assented to the account. 10 Pa. D.&C.4th at 447. The Court overruled the defendant's preliminary objections because the complaint contained the necessary averments. *Id.* at 448. The opinion never described the allegations in the complaint which would support a finding that the defendant assented to the account.

In *C-E Glass*, the plaintiff alleged that it sent statements each and every month. 70 Pa. D.&C.2d at 252. It attached to the complaint a monthly statement of account showing the amounts allegedly due for each of four invoices and a total balance due. It did not include information about the goods purchased or the amounts charged. The Court held that these allegations did not state a cause of action on an account stated because "something more than mere acquiescence by failure to take exception to a series of statements of accounts received in the mail is required." *Id.* at 253.

In *Ryon*, an insurance broker sued for insurance premiums. 42 Pa. D.&C.2d at 87. The complaint alleged that an account had been stated and the defendant has refused and neglected to pay the account. The Court ruled that these allegations did not set forth a cause of action on an account stated: "[m]utual assent to the correctness of the computation is essential to an account stated. Here, there is no allegation that defendant assented to the correctness of the account submitted to him." *Id.* at 88 (citations omitted).

According to this legal authority which I have described, there cannot be an account stated without evidence showing an agreement (express or implied) that the defendant owes the amount set forth in the account. Plaintiff's complaint does not include any factual allegations that would support a finding of an express or implied agreement that the cardholder will pay the amount set forth in the statement attached to plaintiff's complaint.

It appears to be plaintiff's position that a recipient of an invoice is estopped from requiring the party submitting the invoice to prove the accuracy of the amount claimed in the invoice unless the recipient has contested the accuracy of the invoice upon which plaintiff's complaint is based. Even if there are situations in which this position may have merit, it is without merit in credit card transactions because it is based on the assumption that the recipient, upon review of an invoice, can readily determine whether this is an amount that he or she owes.

This is not an accurate assumption in credit card transactions. Credit cardholders who do not pay the full amount of the new balance usually do not know whether any charges, other than the charges for purchases and cash withdrawals, are correct. It is reasonable to assume that most credit cardholders have never attempted to read the entire initial cardholder agreement. Furthermore, even if they attempted to do so, it is unlikely that they would fully understand what they have read. Also, most agreements provide that they can be amended upon fifteen days notice, and frequently the monthly statements are accompanied by amendments to the initial agreement that cannot be understood unless the credit cardholder has access to and does review the initial agreement, subsequent amendments, and the newest amendment. This does not occur.

In the present case, for example, the annual percentage rates in the monthly statements from October 25, 2005 through September 25, 2007 frequently differed from month-to-month. In January 2006, the annual percentage rate for purchases was 20.99%; in May 2006, the annual percentage rate for purchases was 21.74%; in August 2006, the annual percentage rate for purchases was 22.24%; in December 2006, the annual percentage rate for purchases was 22.24%; and in March 2007, the annual percentage rate for purchases was 28.24%.

For several months, there was a late payment fee charge of $35.00.

While the credit cardholder, looking at the statement, can see the amount of the charges that were imposed, he or she is unlikely to know whether the charges are consistent with the writings governing the cardholder's obligations. Consequently, he or she is not in a position to either agree or disagree with the amount of the balance in any monthly statement that does not begin with a $0.00 balance.

The above description of the cardholder and issuer relationship is consistent with the findings in a September 2006 108-page report prepared by the United States Government Accountability Office titled *Credit Cards—Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers, www.gao.gov*, Document GAO-06-929 (9/2006) (the "Report").

The portion of the Report titled *Results in Brief*, states that disclosures are too complicated for many consumers to understand. *Id.* at 4-6. In addition, the disclosures are often poorly organized, burying important information in the text, and scattering information about a single topic in numerous places. *Id.* at 6. The design of the disclosures often makes the disclosures hard to read with large amounts of the text in small, condensed typefaces and poor, ineffective headings. *Id.* at 6. The cardholder is not in a position to agree or disagree with the charges on a monthly statement that are unrelated to the cash withdrawals and purchases shown on the monthly statement because the obligations imposed on the cardholder are not easily understood.

Prior to 1990, most issuers charged a fixed interest rate and imposed few other charges. Thus, furnishing an adequate disclosure was relatively easy. Today, credit cards feature complex pricing structures. *Id.* at 13. Most cards now assess one interest rate on balances from the purchase of goods, another on balances that are transferred from another credit card, and a third on balances that result from using the card to obtain cash. Also, the cards usually provide for payments to be allocated first to the balance assessed at the lowest interest rate. *Id.* at 14-15, 27.

In addition to having separate rates for the different transactions, the cards increasingly impose interest rates that vary periodically as market interest rates change. Issuers typically establish these variable rates by taking the prevailing level of a base rate, such as the prime rate, and adding a fixed percentage amount. They frequently reset the interest rates on a monthly basis. *Id.* at 15.

Most credit cards provide for a penalty fee, described as a late fee, which issuers assess when they do not receive at least a minimum required payment by the due date. Most of the cards have a tiered fee structure depending upon the amount of the balance held by the cardholder (e.g., $15.00 late fee where the balances are between $100.00 and $250.00; $25.00 to $29.00 fee on accounts with balances up to $1,000.00; and $34.00 to $39.00 fee where the balance exceeds $1,000.00). *Id.* at 19-20.

Most issuers also assess cardholders a penalty fee for exceeding the credit limit, with the over limit fee also involving the use of a tiered structure. *Id.* at 20-21. Cards frequently have total credit limits at a lesser limit for cash. *Id.* at 22. Also, issuers do not reject purchases during the sale authorization even though the transaction puts the cardholder over the card's credit limits, thereby exposing the cardholder to an over limit fee and a higher interest rate. *Id.* at 30.

Many cards provide for higher interest rates to be assessed if cardholders make late payments or exceed the credit limit. *Id.* at 24. Many cards also provide for increased rates when cardholders fail to make payments to other creditors. *Id.* at 24-25.

Most of the cards also provide for the cardholder to pay fees for certain services (e.g., 3% of cash advance amounts, 3% of transfer of a balance from another creditor, 3% of purchases made in a foreign country). *Id.* at 23.

The Report concluded that the disclosures which provide information about the costs and terms of using credit cards "had serious weaknesses that likely reduce their usefulness to consumers;... The disclosures...[were] written at a level too difficult for the average consumer to understand, and [had] design features, such as text placement and font sizes, that did not conform to guidance for creating easily readable documents. When attempting to use these disclosures, cardholders were often unable to identify key rates or terms and often failed to understand the information in [the] documents." *Id.* at 33.

The pricing structures depend upon the circumstances of the cardholder, and credit card disclosures are inadequate to inform cardholders as to the interest rates, fees, penalties, and other costs that may be imposed. The Report stated that the "disclosure documents were written such that understanding them required a higher reading level than that attained by many U.S. cardholders; ...nearly half of the adult population in the United States reads at or below the eighth-grade level." *Id.* at 38. Accordingly, the Securities and Exchange Commission recommends that disclosure materials be written at a sixth-to eighth-grade level. *Id.* Disclosures of credit card issuers on average were written "at a reading level commensurate with about a tenth-to twelfth-grade education." *Id.* at 37. An understanding of the disclosures in the solicitation letters would require "an eleventh-grade level of reading comprehension, while understanding the cardmember agreements would require about a twelfth-grade education. *Id.* In addition, certain portions of the typical disclosure documents required even higher reading levels to be understandable. For example, information about annual percentage rates, grace periods, balance computation, and payment allocation methods required "a minimum of a fifteenth-grade education, which is the equivalent of 3 years of college education." *Id.* at 38.

The Report described additional problems that also prevented cardholders from understanding the transactions, even assuming that the relevant documents were available. The disclosure documents do not use effective organizational structures and formatting. *Id.* at 38. The typical credit

card disclosure lacks effective organization. *Id.* at 39. Many of the disclosure documents use font sizes that are difficult to read and thus hinder the consumer's ability to find information. *Id.* at 41. The typical disclosure documents are overly complex and present the relevant information in too much detail, "such as by using unfamiliar or complex terms to describe simple concepts." *Id.* at 46.

CONCLUSION

It is the position of Target that in litigation instituted by an issuer to recover money allegedly due, a cardholder cannot question the correctness of the claim unless the cardholder previously questioned the correctness of the invoices upon which the claim is based. If I were to accept Target's position, I would be creating a rule of law that imposes an obligation on the part of any person receiving an invoice to respond to the issuer of the invoice. There is no body of law which supports this position. If this were to become the law of Pennsylvania, every lawsuit to recover money allegedly due in which invoices were sent would include two counts—a breach of contract count and an account stated count based on the invoices that the plaintiff furnished the defendant.

The cause of action of an account stated is based on principles of contract law. There must be an express or implied agreement between the creditor and debtor that the debtor owes the amount set forth in the account. Where a complaint does not describe an express agreement, the complaint must include allegations which would support a finding that the cardholder has agreed that he or she owes the amount set forth in the writing. Plaintiff's complaint does not do so.

Cardholders do not know whether the finance charges, fees, penalties, and costs set forth in a monthly statement are permitted under the applicable credit card agreement.[1] If cardholders cannot be expected to know whether the information in the monthly statement accurately states what they owe, there cannot be an express or implied agreement that their silence means that they have agreed that the amount claimed is correct.

For these reasons, I am sustaining defendant's preliminary objections.

II. *Target National Bank v. Celesti*

The complaint filed in this case is virtually identical to the complaint filed in the prior action.

Target alleges that defendant opened an account for the purchase of goods and services. Defendant made or authorized a number of purchases and as of July 25, 2006, defendant owes $8,121.05 on the account. Plaintiff maintains accurate books of account recording all credits and debits. Defendant has received monthly statements and has failed to object to any of these statements. The only document attached to the complaint is a July 25, 2006 statement showing a previous balance of $8,086.05, a late payment fee of $35.00, and a new balance of $8,121.05.

Defendant has filed preliminary objections based on my Opinion in *Worldwide Asset Purchasing*. For the reasons that I sustained defendant's preliminary objections in the action at AR07-009777, I am sustaining defendant's preliminary objections to the complaint filed in this action.

For these reasons, I enter the following Order of Court:

ORDER OF COURT
No. AR07-009777

On this 19th day of December, 2007, it is hereby ORDERED that defendant's preliminary objections to plaintiffs complaint are sustained and plaintiff may file an amended complaint within thirty (30) days.

BY THE COURT:
/s/Wettick, A.J.

ORDER OF COURT
No. AR06-009418

On this 19th day of December, 2007, it is hereby ORDERED that defendant's preliminary objections are sustained and within thirty (30) days plaintiff may file an amended complaint.

BY THE COURT:
/s/Wettick, A.J.

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[1] Most credit card agreements permit the issuer to change the terms and conditions of the cardholders' obligations regarding payment of interest, late fees, penalties, and costs and this is a common occurrence.

[2] The material facts on which the cause of action is based include a listing of the cash advances, purchases, and charges that form the basis of the amount for which a judgment is sought. Those material facts may be pled by attaching the monthly invoices to the complaint.

[3] At the argument on defendant's preliminary objections, counsel for Target, while contending that such writings are inapplicable and not relevant to a lawsuit to enforce an account stated, handed to me the monthly statements Target issued to plaintiff from October 25, 2005 through September 25, 2007. The November 25, 2005 statement begins with a $0.00 balance (i.e., it shows full payment of the previous balance of $265.40). Consequently, at a minimum, Target will be permitted to amend its complaint to attach these invoices and to seek recovery of the total amount of the cash advances and purchases shown on these statements less the total amount of payments shown on these statements. Furthermore, if Target, in an amended complaint, can attach writings that show the terms and conditions of the credit card agreements applicable to defendant during relevant times, plaintiff can also recover finance charges, late fees, and the like permitted under the agreements.

In this case, plaintiff is the issuer of the credit card. Consequently, this case does not involve the requirement imposed in *Worldwide Asset Purchasing* that the plaintiff attach writings to the complaint that trace ownership of the account from the issuer to the plaintiff.

Richard Colella v. Borough of Wilkinsburg and Civil Service Commission of the Borough of Wilkinsburg

Statutory Appeal—Fire Department Promotion

1. Highest scoring applicant's appeal was sustained with Borough directed to promote him to Captain of the fire department with seniority, lost earnings and benefits restored retroactively to date of appointment of second highest scoring applicant.

2. Under the rationale of *McGrath v. Staisey*, 249 A.2d 280 (Pa. 1968), the Borough did not have discretion under its Borough Code provisions to make its appointment from the top three candidates in a case of promotion to Fire Department Captain.

(I. M. Lundberg)

Patrick Sorek for Appellant.
Patricia L. McGrail for Borough of Wilkinsburg.
Michael B. Kaleugher for Civil Service Commission of the Borough of Wilkinsburg.

November 19, 2001

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Dear **********:

This letter will respond to the letter ("Letter") that you sent to Mr. Victor Seesholtz, Chief of the Compliance Division ("Division") of the Pennsylvania Department of Banking ("Department"), concerning numerous issues you raised about your client's ("Client") plans to engage in certain activities that may fall under the jurisdiction of the Consumer Discount Company Act ("CDCA"), 7 P.S. § 6201 *et seq*. This letter will address the issues that you raised in the order that you raised them in your Letter.

Background

Client is a ******** corporation that was incorporated during the summer of **** and has its principal office located in **********. Client is a wholly owned subsidiary of a [redacted]. Client intends to purchase what you describe in your letter as "distressed consumer debt", Letter at 1, from creditors either once or on an ongoing basis. Client will purchase these distressed consumer debts by assignment from the creditors in question. You explain that Client intends to purchase by assignment the following kinds of debt:

1. charged-off credit card accounts from lenders, banks, or other chartered financial institutions
2. charged-off credit card accounts from retail merchants or sellers
3. charged-off retail installment paper
4. charged-off motor vehicle paper
5. charged-off closed-end installment loans, or charged-off revolving loan accounts, from state or federally chartered financial institutions that either originated the account or acquired the account

6. charged-off closed-end installment loans or revolving loan accounts from creditors or assignors that are not state or federally chartered financial institutions.

You note in your Letter that Client does not intend to purchase loans secured by residential real estate. You also explain that, although Client will own the accounts in question, Client will not employ collection personnel and will not directly collect or "enforce", Letter at 2, the accounts. Rather, the actual collection efforts related to the debts purchased by Client will be done exclusively by state licensed collection agencies[1] or outside counsel, presumably hired by Client. You further state that Client currently contemplates collecting (by and through its collection agents) only the balance due on the debts on the date of purchase by the Client without Client assessing any additional interest, fees, or other charges. However, you also state that, at some point in the future, Client may consider charging and collecting up to six percent interest on the balance due on a debt, but will never seek to collect interest in excess of six percent.[2]

Finally, you explain Client's plans to purchase consumer credit accounts that involve debtors who have filed for protection under the bankruptcy statutes of the United States.

Questions #1 and #2

You state in your letter:

> [a]s I understand, the interpretation of the CDCA by the Department, only a domestic Pennsylvania corporation, or a foreign corporation that has filed for 'domestication,' can obtain such license, and a licensee must maintain an office in Pennsylvania.

Letter at 3.

Answer

Your understanding is correct. Under the CDCA, a license may only be granted to a, "domestic business corporation organized under or existing by virtue of the Business Corporation Law of this Commonwealth." 7 P.S. §6203.A. In addition, foreign corporations that have become domesticated pursuant to the Pennsylvania Business Corporation Law may also be licensed under the CDCA, since such domesticated foreign corporations are no longer considered to be foreign business corporations and have all of the powers and privileges of domestic business corporations. *See* 15 Pa.C.S. §§ 4161 – 4162; *August 29, 1996 Letter of Staff Counsel Valentino F. DeGiorgio III.*

[1] The Department only issues a separate license to engage in collection activity to collector-repossers under the Motor Vehicle Sales Finance Act, 69 P.S. § 601 *et seq.*

[2] The Department assumes that by six percent you mean six percent simple interest *per annum.*

You are also correct in your understanding that the CDCA requires a licensee to have an office in Pennsylvania. Section 3.A. of the CDCA specifically refers to activity, "in this Commonwealth." 7 P.S. § 6203.A. In addition, the CDCA specifically refers to a licensee's principal place of business in Pennsylvania. 7 P.S. § 6208. Furthermore, the license issued to a licensee must specify an office address. *Id.* The Department takes the position that it is the intention of the General Assembly that each licensee shall have a principal place of business in Pennsylvania.

Question #3

You state in your Letter:

> [a]s I understand the manner in which the Department interprets the CDCA, the licensing obligation applies to entities making or brokering closed-end installment loans for $25,000 or less, or revolving loan accounts with a credit line up to $25,000, and charging or collecting interest in excess of the interest rate that the lender otherwise would be permitted to charge.

Letter at 4.

Answer

The scope of the CDCA is set by Section 3 which states:

> A. On and after the effective date of this act, no person shall engage or continue to engage in this Commonwealth, either as principal, employe, agent or broker, in the business of negotiating or making loans or advances of money ***[or]*** credit, in the amount or value of twenty-five thousand dollars ($25,000) or less, and charge, collect, contract for or receive interest, discount, bonus, fees, fines, commissions, charges, or other considerations which aggregate in excess of the interest that the lender would otherwise be permitted by law to charge if not licensed under this act on the amount actually loaned or advanced, or on the unpaid principal balances when the contract is payable by stated installments except a domestic business corporation organized under or existing by virtue of the Business Corporation Law of this Commonwealth, after first obtaining a license from the Secretary of Banking of the Commonwealth of Pennsylvania in accordance with the provisions of this act.

B. Any person who shall hold himself out as willing or able to arrange for or negotiate such loans of twenty-five thousand dollars ($25,000), or less where the interest, discount, bonus, fees, fines, commissions or other considerations in the aggregate exceeds the interest that the lender would otherwise be permitted by law to charge or who solicits prospective borrowers of such loans of twenty-five thousand dollars ($25,000), or less shall be deemed to be engaged in the business contemplated by this act, unless otherwise permitted by law to engage in such activities. The referring borrowers to a licensee shall not be deemed to be engaged in the business contemplated by this act if no charge, no matter how denominated, for such reference is imposed on the prospective borrower by the person making the reference. No licensee shall knowingly include in any loan under this act any amount which is to be paid by the borrower to another as a fee or charge, no matter how denominated, for referring said borrower to the licensee.

7 P.S. § 6203 (emphasis added). You will note that instead of reproducing the phrase, "loans or advances of money on credit" as that phrase appears in Purdon's Pennsylvania Statutes at 7 P.S. ? 6203.A, the Department reproduced above, "loans or advances of money ***or*** credit". Through research and study, the Department has discovered that an unofficial error changed the Purdon's text of Section 3.A. from "or" to "on".

As originally enacted in 1937, Section 3.A of the CDCA stated, "the business of negotiating or making loans or advances of money ***or*** credit . . ." Act of April 8, 1937, P.L. 262, No. 66, § 3 (emphasis added). However, the text of Section 3.A of the CDCA in Purdon's Pennsylvania Statutes Annotated currently reads, "the business of negotiating or making loans or advances of money ***on*** credit . . ." 7 P.S. § 6203.A (emphasis added). The change from the word "or" to the word "on" was the result of an unofficial error when the statute was amended in 1963 by the Act of July 30, 163, P.L. 335, No. 183, § 1 ("1963 Amendment"). A review of the text of the 1963 Amendment immediately reveals that the word "on" in Section 3.A of the CDCA was neither in italics, which would indicate new language, nor in brackets, which would indicate deleted language. The purpose of the 1963 Amendment, insofar as it amended Section 3.A of the CDCA, was simply to change the dollar figure in Section 3.A of the CDCA from $2,000 to $3,500. Thus, it was not the intention of the General Assembly to change the word "or" in Section 3.A to the word "on." This is why Section 18 of the CDCA (penalties) still reads in Purdon's in relevant part, ". . . and who shall engage in the business of negotiating or making loans or advances of money ***or*** credit . . ." 7 P.S. § 6218 (emphasis added).

An understanding of this issue is important because, by using the word "or" in Section 3.A above in 1937, the General Assembly included within the scope of the CDCA, "the business of negotiating or making . . . loans or advances of . . . credit." Act of April 8, 1937, P.L. 262, No. 66, § 3. The ability to lend credit is well recognized.

Gray v. Brackenridge, 2 P&W 75 (Pa. 1830); 45 American Jurisprudence, Second Edition, Interest and Usury, ? 113. The word "advance" *may* be the equivalent of the word "loan." *See Words and Phrases, Volume 2A, "Advance; Advances," West Publishing Co. (1955).*

Thus, the General Assembly intended the CDCA to apply broadly to all loans or advances of money or credit. For example, at the time the CDCA was enacted in 1937, Pennsylvania courts generally held that the credit a store advanced to a customer was not a loan that was subject to usury laws. *See Melnicoff v. Huber Investment Co., 12 D. & C. 405 (1929)*, cited with approval by *Equitable Credit and Discount Company v. Geier, 21 A.2d 53, 58 n. 7 (Pa. 1941)*. However, because Section 3.A of the CDCA applies to loans or advances of credit as well as to loans or advances of money, such store credit transactions would fall within the scope of the CDCA were it not for the exception for such transactions found in Section 17 of the CDCA.

Based on the foregoing, it is clear that, as enacted and as currently in force, the CDCA was intended to govern loans or advances of money or loans or advances of credit. Exceptions to the CDCA are found in Section 17 of that act. All loans or advances of money or credit that meet the other jurisdictional requirements of Section 3.A of the CDCA fall under the jurisdiction of the CDCA unless they are the subject of an exception in Section 17 or it is otherwise clear that the person making such a loan or advance has the legal authority to engage in that activity.

Question #4

You state in your Letter that, "[t]he general usury ceiling for these types of obligations in Pennsylvania is six percent per year."

Answer

Your statement is generally correct. The general usury statute in Pennsylvania is referred to as the Loan Interest and Protection Law ("LIPL") and is found at 41 P.S. § 101 *et seq.* Section 201 of the LIPL states:

> Except as provided in Article III of this act, the maximum lawful rate of interest for the loan or use of money in an amount of fifty thousand dollars ($50,000) or less in all cases where no express contract shall have been made for a less rate shall be six per cent per annum.

41 P.S. § 101 *et seq.* However, as the text of the LIPL indicates, there are exceptions to this interest rate limitation for various kinds of loans. 41 P.S. §§ 301 -302. Of course, if a lender is otherwise authorized to charge a particular interest rate, then the general limit of six per cent *per annum* found in the LIPL does not apply. 41 P.S. ? 604.

Question #5

You state in your letter:

> [a]lthough the CDCA does not expressly impose a license obligation merely to acquire or purchase loans regulated under the CDCA, the Department takes the position that an entity acquiring loans regulated under the CDCA must have the authority to charge interest at the note rate if it exceeds this general interest rate ceiling. If an entity does not have such interest rate authority, then the purchasing entity must either obtain a license or collect interest on the account that does not exceed this general usury limit in the Commonwealth.

Letter at 4.

Answer

The Department disagrees with your conclusion that the CDCA does not impose a licensing obligation on people who acquire or purchase loans or advances of money or credit that fall under the jurisdiction of that act and, for the following reasons, believes that the General Assembly intended to impose just such a licensing obligation.

Title of Act

First, the very title of the act gives evidence that the scope of the CDCA includes the sale of loans.[3] The word "discount", which is part of the title of the CDCA ("Consumer ***Discount*** Company Act") was explained by one Pennsylvania court as follows:

> [d]iscount, as we have seen, is the difference between the price and the amount of the debt, the evidence of which is ***transferred.***

Professional Service Credit Association, Inc. v. O'Hara, 40 D. & C. 291, 296 (1940) (emphasis added; citations and quotation marks omitted). This demonstrates the intention of the General Assembly to require licensure even to buy and sell loans or advances of money or credit falling under the jurisdiction of the CDCA.

"Negotiating"

Second, the text of the CDCA imposes a licensing obligation to buy and sell loans or advances of money or credit that fall under the scope of the CDCA. Section 3.A of the CDCA specifically requires a person to obtain a license if that person is in the business

[3] "The title and preamble of a statue may be considered in the construction thereof." 1 Pa.C.S. § 1924.

of, "negotiating," 7 P.S. § 6203.A, loans or advances of money or credit. In the world of lending and finance, the word "negotiate" includes arranging a transaction, but it also means more than that. The CDCA was enacted in 1937, *see* Act of April 8, 1937, P.L. 262, No. 66, and a legal dictionary from that era defines the word negotiate as follows:

> [t]he power to negotiate a bill or note is the power to indorse and deliver it to another, so that the right of action thereon shall pass to the indorser or holder. 42 Md. 581. See 69 N.Y. 386; 30 Minn. 408. A note transferred by delivery is negotiated; 49 Mo. App. 153. A national bank, under the power to negotiate evidences of debt, may exchange government bonds for registered bonds; 69 N.Y. 383.
>
> To negotiate is a general word coming to us from the Latin and signifies to carry on negotiations concerning, and so to conduct business, to conclude a contract or to transfer or arrange. 70 S.W. 186.

Bouvier's Law Dictionary, Baldwin's Century Edition (1934) (Banks-Baldwin Law Publishing Company) at page 843. Thus, at the time of the enactment of the CDCA, the word "negotiate" was used to describe, among other things, the transfer of evidences of debt. *See also Alford v. Raschiatore, 63 A.2d 366, 368 (Pa. Super. 1949),* which interpreted "negotiate" broadly in a regulatory context and differently from another statute in light of legislative intent. The meaning of "negotiate" as it existed when the CDCA was enacted is still used today since "negotiate" is defined as, among other things, "to transfer (as a bill of exchange) to another by delivery or endorsement." *Merriam Webster's Collegiate Dictionary (1993 10th Ed.). See also* 13 Pa.C.S. § 3201 (definition of "negotiation" in Pennsylvania version of the Uniform Commercial Code).

Collecting or Receiving Unpaid Principal Balances

Third, section 3.A of the CDCA requires licensure under the CDCA when a person would:

> . . . charge, ***collect, contract for*** or ***receive*** interest, discount, bonus, fees, fines, commissions, charges, or other considerations which aggregate in excess of the interest that the lender would otherwise be permitted by law to charge if not licensed under this act on the amount actually loaned or advanced, or ***on the unpaid principal balances*** when the contract is payable by stated installments . . .

7 P.S. § 6203.A (emphasis added). Thus, licensure is required under the CDCA for any person who collects, contracts for or receives unpaid principal balances. The Department notes that those are some of the activities that Client seeks to engage in.

Legislative History

Fourth, the CDCA was passed "on the basis of", *Geier, 21 A.2d at 57*, a report written by Secretary of Banking Luther Harr that was submitted to the Pennsylvania House of Representatives in 1937. *See* Report from the Department of Banking in Pursuance to Resolution No. 180 Session 1936 Study Operation of Small Loan Companies, Appendix to the Legislative Journal, Sessions of 1937 Page 7554 *et seq.* ("Report"). A copy of the Report is attached for your review. A review of the Report reveals that the CDCA was passed as comprehensive legislation designed to protect Pennsylvania consumers from exorbitant interest rates while at the same time making credit available from legitimate lenders. As the Report puts it:

> the borrowing public must be protected against extortionate interest charges and the rates allowed must be sufficient to permit the lender to earn a fair return on his invested capital.

Report at 7563. Much of the Report is devoted to an analysis of the Department's experience with the Small Loans Act, Act of June 17, 1915 (P.L. 1012, No. 432), repealed by Act of March 3, 1976 (P.L. 40, No. 18). Part of that experience included the Department interceding on behalf of consumers to protect them from strident collection practices:

> [t]he licenses under the Small Loans Act of Pennsylvania are issued by the Secretary of Banking. The licenses are issued only after a careful investigation has been made of the character and reputation of the applicants. At least once each year the Secretary of Banking through his representatives makes an examination of the affairs of every licensed lender. The scope of this examination covers not only the legal aspects of the business but takes into consideration also the moral obligation of the lender to the borrowing public and society in general. ***The Department will not permit a lender to use harsh and unconscionable collection methods on delinquent borrowers who are unable to pay by reason of unfortunate circumstances. On the other hand, the Department cannot protect the borrower who is able to pay his just obligation but resists every attempt of the lender to collect.***

Report at 7555 (emphasis added). This passage of the Report is especially relevant to your inquiry since Client proposes to engage in collection activity by and through outside counsel or state licensed collection agencies. Letter at 2. From the foregoing, it is clear that the Department used its authority under the Small Loans Act to protect consumers

throughout the entire life of a loan, including when collection activity became necessary, and not just when a loan was originated. The Department's experience with the Small Loans Act formed the basis of the CDCA and it is only reasonable to conclude that the General Assembly intended for the Department to continue to play the same kind of role under the CDCA and, thus, licensure is required even to buy and sell CDCA loan contracts. In light of this interpretation, the Department has promulgated regulations that govern the treatment of a consumer's collateral. 10 Pa. Code § 41.5.

Purpose of the CDCA

Fifth, if licensure under the CDCA was not generally required to purchase loans or advances of money or credit made pursuant to the CDCA and collect the remaining balances at the rates and charges authorized by the CDCA, the ability to protect consumers from harsh and obstreperous collection practices would be completely thwarted. In addition, it was also not the intention of the General Assembly to allow people to avoid licensure under the CDCA simply by acquiring such debts by assignment from their originators.

Sale of Loan Contracts Regulated

Sixth, the Department has consistently interpreted the CDCA as governing the sale of CDCA loan contracts. The Department has promulgated a regulation that explains when and how loan contracts may be sold or otherwise disposed of. As the pertinent provision states:

> [a] prospective licensee shall notify the Administrator of a contemplated purchase of contracts from a licensee and furnish the name and address of the licensee from whom the contracts will be purchased, the total number of contracts to be purchased, and the total outstanding principal balances thereof. Failure to comply with this subsection may preclude a prospective licensee from obtaining a license. A licensee shall obtain prior approval of the Administrator for the purchase of contracts from another licensee and for the sale of contracts to another licensee. Requests for approval of purchase or sale of contracts shall state the name and address of the licensee from whom the contracts are to be purchased or to whom they are to be sold, the total number of contracts and the total outstanding principal balances thereof. ***A licensee may not sell or otherwise dispose of contracts to a person or corporation not holding a license under the act, unless prior written approval is obtained from the Administrator. The privilege of collecting the charges authorized by the act may not be transferred to an unlicensed purchaser.*** This subsection shall not apply to:

(1) The purchase or transfer of loan contracts between licensees under the same management and control.
(2) The occasional sale or transfer of a loan contract to an out-of-State affiliate to effect the collection thereof, or for the convenience of a consumer.
(3) The transfer of a loan contract by a licensee to any maker or person secondarily liable on the contract.

10 Pa. Code § 41.6(a) (emphasis added). After this regulation was promulgated, the CDCA itself was amended in 1998 to only require CDCA licensees to notify the Department when it was selling loan contracts to other CDCA licensees rather than seek the Department's approval. 7 P.S. § 6214.I. However, CDCA licenses must still seek the prior written approval of the Department when they seek to sell loan contracts to non-licensees. Id. To the extent that the regulation conflicts with the new statutory amendment, the statutory amendment prevails. Under both the CDCA itself and the regulation promulgated by the Department, a licensee may not sell loan contracts entered into under the CDCA to an unlicensed person or entity without the Department's prior approval.

Please note that a line of cases discusses whether certain transactions involving the sale of promissory notes constituted loans under the CDCA. *See Medical Dental Business Service of New Jersey, Inc. v. Morrison, Secretary of the Commonwealth, 51 D. & C. 552 (1944), Professional Service Credit Association, Inc., supra; General Motors Acceptance Corporation v. Freeman, Secretary of Banking, 63 D. & C. 163 (1946).* The central question in all of those cases was whether or not the transaction was a loan governed by the CDCA or merely a sale of negotiable notes not intended as a loan. As one court put it:

> [s]urely, if this were a fair sale of these notes, which unquestionably petitioner might lawfully purchase for less than the sum due upon them, and afterward receive the whole amount with interest, the legality of such a sale we could not question. But, as already pointed out, the character and circumstances of this transaction bespeak it to be a loan notwithstanding petitioner speaks of it as a sale.

Medical Dental Business Service of New Jersey, Inc., 51 D. & C. at 558. Since the facts in your letter presume that the transactions involve a CDCA loan, these cases are not on point and provide no safe harbor for Client to buy and sell CDCA loans.

Statutory Authority Required to Charge or Collect Interest

Seventh, the Department's interpretation that the CDCA imposes a licensing obligation even merely to buy and sell CDCA loan contracts, including the regulation reproduced above, is supported in part by the rule that a person or entity needs some kind

of statutory authority to charge more than the general usury rate of 6% *per annum* simple interest. As the Pennsylvania Supreme Court has held:

> [a]t common law the taking of any interest whatever was illegal, and the right to charge it, being a privilege granted by statute, is subject to legislative control.

Geier, 21 A.2d at 58. *Accord* 41 P.S. § 604. And, in addition to the making of usurious loans, the prohibition against usury applies to any person who collects usurious interest, such as when a person or entity has purchased a loan. 41 P.S. § 502.[4] Also, the privilege of charging interest in excess of the general usury rate may not be transferred to a person not licensed under the CDCA, 10 Pa. Code § 41.6(a), and neither may a license issued under the CDCA be transferred or assigned. 7 P.S. § 6208.

Law of Assignment; Banks and other Statutorily Authorized Lenders

Eighth, Client proposes to purchase loan contracts through assignment. Under Pennsylvania law:

> an assignment extinguishes the assignor's right to performance by the obligor and transfers that right to the assignee . . . 'The assignee stands in the same shoes as the assignor.'

Southall v. Humbert, 685 A.2d 574, 579 (Pa.Super.Ct. 1996). Therefore, in order for Client to "stand in the same shoes" as a licensee under the CDCA, Client must obtain its own statutorily conferred right to charge and collect interest, fees and other charges in excess of the general usury rate of 6% *per annum* simple interest. Otherwise, the Department would only approve the sale of CDCA loan contracts to an unlicensed person or entity if the unlicensed person or entity purchasing the CDCA loan contracts formally agreed, pursuant to a written contract, to only charge the general usury rate of 6% *per annum* simple interest on a loan contract even though much higher interest rates and charges are authorized under the contract in question.

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[4] Based on the text of the prior 18th century Pennsylvania usury statute, Act of 2d March 1723, that is no longer in force, it was the taking or receiving of usurious interest that was prohibited, not bargaining for it. As the Pennsylvania Supreme Court has held, "[t]he offence consists not in *bargaining* for more than six per cent., but in *taking* it on any bond or contract." Craig v. Pleiss, 26 Pa. 271 (Pa. 1856). This rule was changed by the 1858 Pennsylvania usury statute which is also no longer in force ("[s]ince the passage of the [1858 usury statute] above referred to, it is not unlawful for a debtor to pay, or a creditor to receive more than six per cent. interest." *Stayton, to use of Bryan v. Riddle, 7 A. 72 (Pa. 1886)*. But regardless of the rules that existed prior to the enactment of the CDCA, the CDCA makes it unlawful to even, "charge, collect, contract for or receive interest, discount, bonus, fees, fines, commissions, charges or other considerations." 7 P.S. § 6203.A. In addition, the text of the current usury statute is broader than its predecessor, *see* 41 P.S. § 201, and debtors who are aggrieved by usury may maintain their action under the usury statute against the person, "who has ***collected*** such excess interest or charges." 41 P.S. ? 502 (emphasis added).

On the other hand, the Department would not object to a CDCA licensee selling loan contracts made pursuant to the CDCA to a bank or other lender that is not licensed under the CDCA if the bank or other lender in question is authorized by law to make loans and charge and receive interest and fees at the same or higher rate and in the same or higher amounts that are authorized by the CDCA. The logic to this is very clear. The CDCA specifically states that:

> [t]his act shall not affect any existing laws, special or general, authorizing a charge for the loan of money in excess of interest at the legal rate. This act shall not apply to any person, persons, partnership, association or corporation operating under the laws related to banking institutions, building and loan associations, credit unions or licensed under the Small Loans Act, approved June seventeen, one thousand nine hundred fifteen, and supplements or amendments, or licensed by the Secretary of Banking of the Commonwealth of Pennsylvania under the provisions of any other statute.

7 P.S. § 6217. *See also* 7 P.S. § 6203.A (concerning interest, fees and other charges that, "aggregate in excess of the interest that the lender would otherwise be permitted by law to charge if not licensed under this act . . ."). Thus, the CDCA is not intended in any way to hinder or impair the ability of other entities authorized to originate loans, charge and receive interest, and buy and sell loan contracts and promissory notes, including depository institutions. For instance, the U.S. Supreme Court has held that:

> [t]he sale of mortgages and 'other evidences of debt' acquired by way of loan or discount with a view to reinvestment is, we think, within the recognized limits of the incidental powers of national banks.

First National Bank of Hartford, Wisconsin v. City of Hartford, 273 U.S. 548, 560 (1927). Pennsylvania state-chartered banks enjoy the same, if not greater, powers. 7 P.S. §§ 201(a)(ix), 303, and 315(i). *See also* 7 P.S. § 307. Thus, the Department would not object if a CDCA licensee sold loan contracts to national banks or Pennsylvania state-chartered banks provided the Department was satisfied that the bank in any particular transaction was authorized to charge and receive the interest and other fees provided for in the loan contract, promissory note and other documents to be assigned and no other regulatory concerns were present. Naturally, the CDCA licensee selling loans to banks would still be required to obtain the Department's approval pursuant to 7 P.S. § 6214.I and 10 Pa. Code § 41.6(a).

Of course, if a bank later decides to sell a loan contract that it purchased by assignment from a CDCA licensee, the person or entity to which the bank proposes to sell the loan must be similarly authorized by statute to charge and receive the interest provided for in the loan contract in question. If the person or entity is not so authorized,

it would run afoul of the general usury statute and the CDCA, although the bank in question would not otherwise need the Department's prior written approval to sell such a CDCA loan contract unless required by a statute other than the CDCA or regulation or order stemming from the CDCA, since a bank is not a CDCA licensee. *See* 10 Pa. Code § 41.6(a), 7 P.S. § 6214.I.

Consequences of Not Obtaining a License

The Department notes that the consequences of not obtaining a CDCA license when required by law to do so can be severe. For instance, criminal penalties apply. 7 P.S. § 6218.

In addition, a CDCA loan contract that has been bought by a person not holding a CDCA license and not otherwise authorized to buy CDCA loan contracts may be declared void. The Pennsylvania Supreme Court has held that:

> . . . the general rule that an agreement which ***violates a provision of a statute, or which cannot be performed without violation of such a provision, is illegal and void.*** Where a contract is found to be ***against public policy***, "it cannot, under any circumstances, be made the basis of a cause of action. The law when appealed to will have nothing to do with it, but will leave the parties just in the condition in which it finds them." . . . [W]henever it appears that the enforcement of a contract would violate public policy the court should refuse to proceed in an action based solely upon it, and should dismiss the proceedings of its own motion.

American Association of Meat Processors v. Casualty Reciprocal Exchange, 588 A.2d 491, 495-496 (Pa. 1991) (emphasis added). Given the Department's interpretation of Section 3.A, it is clear that a CDCA loan contract that has been purchased by a person who lacks the authority to do so cannot be performed without violating the CDCA. Therefore, such a CDCA loan contract might very well be void under the holding of *American, supra.*[5]

[5] In *Anderson v. Automobile Fund, 391 A.2d 642 (Pa. Super. Ct. 1978) (court equally divided, thus lower court affirmed)*, the Pennsylvania Superior Court had the opportunity to discuss whether a violation of the CDCA voided a loan contract under the equitable doctrine of rescission. *Id., 391 A.2d at 648*. The opinion in support of affirmance and remand, which was the only opinion that discussed this issue, found no violation of the CDCA, so it declined to discuss the effect of a violation of the CDCA on a loan contract stating that it is, "unnecessary to decide whether the civil remedy of rescission of the loan agreement would be a proper remedy for violation of the C.D.C.A." *Id.* However, rescinding a contract is not the same as declaring it void. When a court rescinds a contract, the parties are returned, as nearly as possible, to their original positions. *Baker v. Cambridge Chase Inc., 725 A.2d 757 (Pa.Super.Ct. 1999)*. However, when a contract is declared void, as in *American*, "[t]he law when appealed to will leave the parties just in the condition in which it finds them." *American, 588 A.2d at 495*. Thus, when a contract is declared void, the parties are left in the same position as when they came to court, which, in turn, may result in a windfall for the debtors. It is clear from the foregoing that the court in *Anderson* did not address declaring a CDCA

It is especially important to note that part of the public policy concerns that compelled the Pennsylvania Supreme Court to declare the contract in *American* void were based on the effect such a contract would have on a Pennsylvania administrative agency. As the court states:

> [w]hat we consider controlling, however, on the question of waiver, is that the alleged contract is illegal under a statute enacted in aid of significant public policies identified by the Pennsylvania legislature. The Pennsylvania Workmen's Compensation Act is humanitarian and remedial in its purpose, which is to provide workmen and their families a quick and sure means of payment for workrelated injuries without resort to litigation. *See Wagner v. national Indemnity Co.*, 492 Pa. 154, 422 A.2d 1061 (1980). The insurance Department Act of 1921 empowers the Insurance Commissioner to administer and enforce the insurance laws in large part to insure the solvency of insurance companies, which, in the workers' compensation field, is essential to protect the rights of injured workers. Unauthorized favorable insurance rates, such as ~~those allegedly offered~~ by Casualty in this case, ***undermine the ability of the Insurance Commissioner to protect the sources of compensation benefits which are indispensable to the welfare of injured workers.***

American, 588 A.2d at 495 (emphasis added). Similarly, the purchase of CDCA loan contracts by people who are unauthorized to do so undermines the ability of the Department to protect consumers from excessive charges and abusive loan collection practices.

Fully in line with the Pennsylvania Supreme Court's holding in *American*, and based on similar policy concerns, courts in other states have specifically held that loan contracts issued by money lenders or creditors in violation of state licensing statutes are not enforceable in spite of the fact that the relevant statute did not expressly provide for such a consequence. *See Solomon v. Gilmore, 731 A.2d 280 (Conn. 1999); Derico v. Duncan, 410 So. 2d 27 (Ala. 1982);*[6] *Levison v. Boas, 150 Cal. 185 (1907). See also 29 A.L.R. 4th 884 (1984) ("Annotation: Failure of Moneylender or Creditor Engaged in Business of Making Loans to Procure License or Permit as Affecting Validity or Enforceability of Contract").* Thus, even though the CDCA does not specifically state that loan contracts illegally sold to unauthorized people or entities are void, a

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loan contract void when it referenced rescission and, to the best of the Department's knowledge, no Pennsylvania court has ruled on this issue.

[6] The Alabama legislature subsequently amended the statute in question in *Derico* to reverse, at least in part, the holding of the Alabama Supreme Court in that case. *See Farmer v. Hypo Holdings, 675 So. 2d 387 (Ala. 1996).*

Pennsylvania court might easily conclude that the failure to obtain a CDCA license to buy and sell CDCA loan contracts voids those CDCA contracts.

It appears that, aside from the goal of simply complying with the CDCA and the regulations promulgated thereunder, obtaining the Department's prior approval to acquire CDCA loan contracts may also serve to immunize such a purchaser from acquiring void CDCA loan contracts since that purchaser would lawfully be in possession of such contracts. Thus, in addition to facing criminal penalties, economic hardship could accompany a person or entity that unlawfully buys or sells CDCA loan contracts.

Please note that the consequence of a loan contract becoming void is different from the remedy typically applied in a usury case. Pursuant to the LIPL, a person who has been charged excess interest may refuse to pay such excess interest, 41 P.S. § 501, and may recover triple the amount of excess interest actually paid. 41 P.S. § 502. *See also* 69 P.S. § 631.C (installment sale contract under Motor Vehicle Sales Finance Act not enforceable in so far as prohibited costs or charges are concerned). The difference between the typical usury situation of paying excessive interest and the situation described in this letter may be that a person who buys and sells CDCA loan contracts without the requisite CDCA license has evaded the licensing scheme set up by the General Assembly to protect Pennsylvania consumers and may not in any way ever perform such CDCA contracts in a lawful manner.

There is also another issue that the Department raises for the purpose of recognizing it **but on which the Department finds it unnecessary to take an official position at this time**. Whenever a loan contract is sold, it is typical in the world of lending and finance for other documents to be sold in the same transaction including promissory notes. The question is what effect, if any, does the CDCA have on the sale of promissory notes that are related to CDCA loan transactions? Indeed, the word "contract" in the CDCA is broadly defined to include not only simple loan contracts but also promissory notes and, "any other form of negotiable or nonnegotiable instrument evidencing an agreement to pay a sum certain in money at a fixed or determinable time . . ." 7 P.S. § 6202 ("contract"). It was clearly the intention of the General Assembly for the CDCA to regulate all aspects of a transaction subject to the CDCA, including promissory notes. Indeed, the Department's regulations governing the CDCA apply to promissory notes and the like. *See* 10 Pa. Code § 41.3 (g) and (o).

Pennsylvania's current version of the Uniform Commercial Code ("UCC") governs promissory notes and other similar instruments. One set of defenses to paying on an instrument like a promissory note includes, "duress, lack of legal capacity or ***illegality of the transaction which, under other law, nullifies the obligation of the obligor.***" 13 Pa.C.S. § 3305(a)(1)(ii) (emphasis added). The comments that accompany this statutory text make it clear that other applicable law, and not the UCC, govern the notion of illegality:

> [i]llegality is most frequently a matter of gambling or usury, but may arise in other forms under a variety of

> statutes. The statutes differ in their provisions and the interpretations given them. They are primarily a matter of local concern and local policy. All such matters are therefore left to the local law. If under the law the effect of the duress or the illegality is to make the obligation entirely null and void, the defense may be asserted against a holder in due course. Otherwise it is cut off.

Uniform Commercial Code Comment – 1990, accompanying 13 Pa.C.S. § 3305(a)(1)(ii). It is clear that the effect of the illegality involved must be to completely void the obligation in question for this defense to be effective. As explained above, a CDCA loan contract that is illegally acquired might very well be void. The question remains though as to what effect does an illegal and void CDCA loan contract have on a related promissory note. As one leading commentator has put it:

> [t]ypically the issuing or transferring of commercial paper is one event in a group of related events. Whether illegality with respect to one of the other related events has any effect upon the commercial paper issued or transferred cannot be predetermined because the courts have not articulated any general rule that can be applied.

Ronald A. Anderson, Anderson on the Uniform Commercial Code, § 3-305:154 (3rd ed. 1997) (1998 revision). While some states have held that an illegal transaction also makes the accompanying note void, others have held that the illegality of a transaction does not affect a related note. *Id.* at § 3-305:148 – 169. The Department has been unable to find any decision from a Pennsylvania state court that is directly on point[7] and **the Department does not take an official position on this particular issue at this time** since it is unnecessary to decide the questions presented in your Letter. However, as noted above, by defining the word "contract" broadly to include promissory notes and all other kinds of negotiable and nonnegotiable instruments, 7 P.S. § 6202, the CDCA would not seem to draw a distinction between a CDCA loan transaction and a related promissory note. In addition, a rule that would allow unauthorized people who have illegally bought CDCA loan contracts to enforce the promissory notes that accompanied such CDCA loan contracts might very well defeat the entire regulatory scheme erected by the General Assembly when it enacted the CDCA. This could be an unreasonable, if not absurd, result not intended by the General Assembly. 1 Pa.C.S. § 1922(1). But as noted

[7] As noted above, some cases have discussed the difference between making a loan and the sale of a note. *Medical Dental Business Service of New Jersey, Inc., Professional Service Credit Association, Inc., General Motors Acceptance Corporation, supra.* But the issue in those cases was whether or not the sale of notes and the overall transaction constituted a loan under the CDCA. Those cases did not address the need for licensure to buy and sell loans that fall under the jurisdiction of the CDCA. The same is true for a related line of cases that explains that a purchaser of notes may not use the defense of usury against the person from whom the notes were purchased. *See Seltzer v. Sokoloff, 153 A. 724 (Pa. 1931); Sork v. C. Trevor Dunham, Inc. 163 A. 315 (Pa.Super.Ct. 1932); Personal Discount Company v. Lincoln Tire Company, 67 D.&C. 35 (1949); Musolf v. Central Standard Life Insurance Company, 40 Erie 189 (1956).*

above, **the Department expressly declines to take an official position on what effect an illegal and void CDCA loan contract has on a related promissory note.**

Please note that the Department's interpretation of the word "negotiate" or "negotiating" in this letter is specific to the CDCA and based on the intention of the General Assembly. Whether or not "negotiate" has the same meaning in other statutes under the Department's jurisdiction is a different inquiry requiring an analysis of the General Assembly's intention concerning the particular law in question. For instance, under the Mortgage Bankers and Brokers and Consumer Equity Protection Act, 63 P.S. § 456.101 et seq. ("MBBCEPA"), the definition of a mortgage broker is, "[a] person who directly or indirectly ***negotiates*** or places mortgage loans for others ***in the primary market*** for consideration." 63 P.S. § 456.302 (emphasis added). Since the definition of a mortgage broker is limited to negotiating in the primary market, it is doubtful that the General Assembly intended to govern mortgage brokering in the secondary market by enacting the MBBCEPA. While the Department does not decide this issue at this time, this discussion serves to illustrate the point that the meaning of the word "negotiate" or "negotiating" in a statute is specific to the statute in question and may vary from law to law.

Question #6

You state in your Letter:

> From a review of the CDCA and our conversation, it is my understanding that a license under the CDCA is not needed to purchase (i) lender or bank credit card accounts or (ii) retail merchant or seller credit card accounts, as credit cards are not subject to regulation under the CDCA.

Letter at 4.

Answer

As discussed above, the scope of Section 3.A of the CDCA is very broad and includes, "negotiating or making loans or advances of . . . credit." 7 P.S. § 6203.A. In addition, there are at least two cases[8] decided at the trial court level in Pennsylvania that

[8] *See Medical Dental Business Service of New Jersey, Inc. v. Morrison, 1944 Pa. D. &. C. LEXIS 161, 12* ("[s]urely what petitioner intends to do is to advance money to the payee of the note and advance credit to the maker of the note. To compel the Secretary of the Commonwealth to issue a certificate of authority would put this foreign corporation, whether it negotiates or makes loans or advances of money or credit, in a more fortunate position than domestic corporations, in that a foreign corporation would be free from the control of the Department of Banking while a domestic corporation engaging in the same business would be subject to such control."). *See also Weaver, Grose, Langhart & May Inc. v. Myers, 17 D. & C. 2d 405, 412 (1958)* (emphasis in original) ("[i]n Tyson v. The School Directors of Halifax Township, 51 Pa. 9, (1855), the Supreme Court defined '*advances of money*' as 'furnishing of money or goods for others in expectation of reimbursement.' In Insurance Company v. Dutcher, 95 U.S. 269, 272 (1877), the United States Supreme Court held that the lending of money to a person does not require that such person actually

could lead to the conclusion that, absent some legislative direction to the contrary, credit cards may, depending on the circumstances, fall under the jurisdiction of the CDCA.[9]

Pennsylvania courts have held that the credit stores give to customers who purchase goods is not generally subject to usury laws. As the Pennsylvania Supreme Court has put it:

> [o]f course, all sale or lease contracts which extend credit are, to a certain extent, akin to the making of loans, but where a greater charge is exacted in the case of a sale on credit than in a cash sale it is included in the selling price of the article. It being uniformly held that sellers are free to contract with buyers as to the terms and conditions of sales, the financing [by sellers] of sales of merchandise by the extension of credit has never been considered subject to the prohibition of usury or to regulations applicable to banking and loan transactions.

Geier, 21 A.2d at 58. This doctrine applies to the sale of both goods and services. *Equipment Finance, Inc. v. Grannas, 218 A.2d 81, 82 (Pa.Super.Ct. 1966), citing Melnicoff, supra).* However, since the CDCA broadly applies to any loan or advance of money or credit, 7 P.S. § 6203, it was necessary for the General Assembly to exempt credit sales of personal property from its scope. As the pertinent provision states:

> [t]his act shall not apply to any bona fide sale of personal property by a person regularly engaged in the sale of such personal property, wherein the purchaser may pay any part or all of the purchase price in stated installments, nor to any such bona fide sale under a conditional sale contract, lease or bailment, wherein the purchaser, lessee or bailee has the option of becoming, or is bound to become, the owner of the property upon full compliance with the terms of the agreement.

7 P.S. § 6217. Thus, the General Assembly incorporated the common law doctrine mentioned above (concerning the credit that stores provide to customers) into the CDCA (prior to enacting the Goods and Services Installment Sales Act) insofar as it applied to sellers selling and financing the same sale of personal property since the CDCA would otherwise have abrogated that doctrine.

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receive the moneys loaned, where the lender confers a benefit to the borrower in moneys worth equal to such loan by satisfying an existing indebtedness."

[9] Of course, Section 17 of the CDCA makes it clear that financing transactions that involve the *bona fide* sale of personal property are, under most circumstances, not governed by the CDCA. 7 P.S. § 6217. *See also Geier, 21 A.2d at 58.* So credit cards for those and other purposes excepted in Section 17 of the CDCA would not be governed by that act. Otherwise, it may be possible.

Noticeably absent from the exemptions of Section 17 of the CDCA is a similar exemption for the sale of services. Thus, it would appear that the General Assembly intended to abrogate the common law doctrine referred to above (i.e. that the credit that stores provide to customers who purchase goods is not generally subject to usury laws) by enacting the CDCA insofar as a loan or advance of credit related to the sale of services. "Exceptions expressed in a statute shall be construed to exclude all others." 1 Pa.C.S. § 1924. However, the Pennsylvania courts appear to have ignored that nuance, since cases discussing the CDCA have glossed over or ignored the absence of an exemption for the sale of services. *See, e.g., Professional Service Credit Association, supra.* Any potential conflict or ambiguity was mooted by the enactment of the Goods and Services Installment Sales Act ("GSISA"), 69 P.S. § 1101 *et seq.*

By enacting the GSISA, the General Assembly provided a framework to govern credit sales involving goods and services. In addition, by Act of March 25, 1982, P.L. 199, No. 68, the General Assembly amended the GSISA and made it clear that:

> [n]otwithstanding any other act, this act [the GSISA] shall exclusively govern and regulate the terms and conditions of all extensions of credit by the means of credit cards and credit card operations for the purchase of goods and services within this Commonwealth ***but excluding cash advances.***

69 P.S. § 1104 (emphasis added). Thus, regardless of the CDCA, the GSISA was intended to govern credit cards insofar as they were used to purchase goods and services. However, the use of credit cards for cash advances remained subject to usury laws. *Id.*

Legislation enacted later in time by the General Assembly provided alternative bases for certain lenders to operate credit card programs. For instance, in addition to the authority under the GSISA, Pennsylvania state-chartered banks and, by operation of the National Bank Act, 12 U.S.C. § 85, national banks, may use Section 322 of the Banking Code of 1965, 7 P.S. § 322, as an alternative basis of authority to operate credit card programs. *See* Act of December 28, 1994, P.L. 1424, No. 167, Sections 4-6. *Accord Simplification and Availability of Bank Credit – Statement of Policy, 10 Pa. Code §13.51.* Since Section 322 governs cash advances, this provides broader authority than the GSISA. *Compare* 7 P.S. ? 322 *with* 69 P.S. § 1104.

The Department takes the position that, depending upon the kind of lender involved, there are different bases upon which a credit card program may be operated. Since Client intends to purchase credit card accounts by assignment, the question you present is whether Client may, "stand[s] in the same shoes as the assignor." *Southall, 685 A.2d at 579.* If the credit card accounts purchased by Client are governed by the GSISA, no licensure is required under the CDCA and Client need only follow the GSISA and other applicable laws to collect on those accounts. If, however, the credit card accounts Client intends to purchase are governed by some other authority, such as Section 322 of the Banking Code of 1965, then Client would need to find some way to gain the lawful

authority to stand in the shoes of the originating lender and comply with the governing statute. And if the credit card accounts Client seeks to purchase by assignment involve cash advances, then the GSISA provides no safe harbor, 69 P.S. § 1104, and Client must acquire the lawful authority charge the interest, fees and other charges imposed by the lender for those cash advances.

Question #7

You state in your letter:

> A license under the CDCA also is not needed to acquire retail installment paper or motor vehicle installment paper, as such credit transactions also are not regulated thereunder.

Letter at 4.

Answer

The Department agrees with your assertion with respect to retail installment paper insofar as the contracts in question are governed by the GSISA; otherwise licensure under the CDCA might be required for the sale of services.

The Department also agrees with your assertion with respect to motor vehicle installment paper since the CDCA provides an exemption for such financing. *See* 7 P.S. § 6217. However, generally speaking, the Motor Vehicle Sales Finance Act, 69 P.S. § 601 *et seq.*, governs installment sale contracts for motor vehicles and you are strongly advised to review that act for its applicability to Client's proposed business plans.

Question #8

You state in your letter:

> In addition, as I also understand, a CDCA license would not be needed to purchase accounts subject to the CDCA (such as (i) closed-end installment loans or (ii) revolving loan accounts) from federally or state-chartered financial depository institutions (such as banks, savings banks, savings and loan associations, or credit unions, among others) that originated the loan or the account, as such entities would have authority to originate loans otherwise subject to the CDCA without a license.

Answer

The Department disagrees with your assertion as explained in detail above. Client would need to obtain its own independent statutory authority to charge and receive the interest, fees and other charges imposed by the loan contract and promissory note in question.

Question #9

You state in your letter:

> [m]oreover, it is my understanding that it is also well-settled that a licensing obligation would arise under the CDCA for an entity to acquire closed-end installment loans of $25,000 or less, or revolving loan accounts with a credit line of $25,000 or less, from CDCA licensees who originated such credit obligations only if the acquiring entity intended to charge or collect interest at a note rate that exceeds the six percent general usury ceiling. As the Company would not be seeking to impose, charge, or collect any interest on the balance on the loan once acquired, the Company would not need to be licensed under the CDCA to acquire such credit obligations. If the Company sought to charge interest on these accounts, it could collect up to six percent per year without raising a licensing obligation.

Letter at 4.

Answer

The scope of the CDCA was addressed above and need not be addressed here.

As a general matter, and as stated above, the Department agrees with your assertion that an unlicensed entity does not violate the CDCA or the LIPL if that entity acquires loan contracts originated under the CDCA but only contracts to charge interest, fees and other charges that aggregate to no more than 6% simple interest *per annum*. Of course, the Department would only permit such an unlicensed entity to purchase such CDCA loan contracts pursuant to 7 P.S. § 6214.I and 10 Pa.Code § 41.6(a) if the entity agreed, in writing, to limit itself to charging only up to 6% simple interest *per annum* for all interest, fees and other charges. Aside from simple prudence, the Department would require such a written contract from an acquiring entity so that the entity would not violate the CDCA. Section 3.A of the CDCA makes it unlawful for unlicensed persons to even, "***contract for*** or receive interest, discount, bonus, fees, fines commissions, charges, or other considerations which aggregate in excess of the interest that the lender would otherwise be permitted by law to charge if not licensed under this act . . ." 7 P.S. § 6203.A (emphasis added).

However, despite the Department's general agreement with your assertion, a word of caution is in order. It is the Department's understanding that loan balances owed to CDCA licensees frequently already include the interest owed in the loan balance itself. For example, Client may purchase a loan from a CDCA licensee with a balance owed of $10,000 and that figure would already include the interest and other charges owed that far exceed 6% simple interest *per annum*. If Client is not licensed under the CDCA and not otherwise authorized to impose interest, fees and other charges in excess of 6% simple interest *per annum* as provided for in a loan contract, then Client would need to ensure that every loan contract it acquired did not already include in the balance owed interest, fees and other charges in excess of the general usury limit. If a loan balance did include interest, fees and other charges in excess of the general usury rate, Client would need to determine the amount of principal owed on the loan and would only be able to contract for and receive interest, fees and other charges permissible at the 6% simple interest *per annum* general usury rate.

Question #10

You state in your letter:

> In acquiring the accounts described herein that are subject to the CDCA (closed-end installment loans and revolving loan accounts of $25,000 or less), the Company intends to collect only the outstanding balance on the account, which may include interest that had accrued at a rate in excess of six percent. In our conversation, you suggested that the balance in the account, including the outstanding principal and such accrued interest, possibly could be collected without raising a licensing obligation under the CDCA if the Company did not seek to charge additional interest in excess of six percent on the account once acquired, but that the matter would need to be discussed with the Department's counsel. We would appreciate clarification on this point so that the Company knows the extent of the outstanding balance it can collect without triggering a license obligation.

Letter at 5. You also state in a footnote that, "[b]efore charging any new interest on accounts with accrued interest, the Company, of course, would review Pennsylvania law to ensure that there is no compound interest restriction. Letter at 5 n.1.

Answer

Charging Additional Interest

As explained above, the outstanding balances owed by consumers under CDCA loan contracts may include interest owed at a rate higher than the general usury rate.

Unless Client acquires the statutory authority to charge, contract for or receive interest in excess of the general usury statute, Client may only collect interest at the rate of 6 per cent *per annum* on CDCA loans acquired and only if the Department approves of the transfer of such loan contracts to an unlicensed person or entity pursuant to 7 P.S. ? 6214.I and 10 Pa. Code § 41.6(a).

You also raise the issue of whether additional interest may be charged for a loan after it is in default. The Department notes that you did not explain under what authority Client proposes to charge additional interest on a loan that has already come to maturity and is in default.

Of course, CDCA licensees may extend, defer, renew or refinance loan contracts under the CDCA. 7 P.S. § 6213.K and L. However, your question does not expressly state that it is asked in the context of extending, deferring, renewing or refinancing CDCA loan contracts.

The CDCA comprehensively governs every kind of interest, fee and charge of any kind whatsoever that may be imposed by a licensee on a consumer. As the pertinent provision states:

> [a] licensee shall not charge, contract for, collect or receive interest, discounts, fees, fines, commissions, charges or other considerations in excess of the interest or discount, service charges, extension charges, deferment charges, default charges, recording and satisfaction fees, premiums for insurance, attorney's fees, court costs, repossession expenses, storage charges, and selling expenses authorized by the provisions of this act.

7 P.S. 6214.B. If a charge is not authorized by the CDCA, then it is impermissible to impose it on a consumer, regardless of whether or not the charge constitutes consideration for the loan. For instance, if Client held a CDCA license, it could impose default fees on a debtor. 7 P.S. § 6213.K; 10 Pa. Code §§ 41.3(d), 41.3a. However, if Client, as an unlicensed purchaser and with the Department's prior approval, acquires CDCA loan contracts pursuant to the CDCA without any kind of statutory authority, then it may only collect interest or other charges at a rate of up to six per cent *per annum*, and may not impose any other kind of charge since all charges are regulated by the CDCA.

Compound Interest

In footnote number 1 of your letter, you refer to the charging of additional interest by Client on interest already charged to a debtor on a CDCA loan contract as, "compound interest." Letter at 5 n. 1. The Department notes that the Pennsylvania Supreme Court has held that:

> [i]t is fairly well established that the law in this Commonwealth frowns upon compound interest and as such will only permit compound interest on a debt when the parties have provided for it by agreement or a statute expressly authorizes it.

Powell v. Allegheny County Retirement Board, 246 A.2d 110, 115 (Pa. 1968). See also Pennsylvania State Education Association with Pennsylvania School Service Personnel/PSEA v. Appalachia Intermediate Unit 08, 476 A.2d 360, 363 (Pa. 1984); *Acker v. Provident National Bank, 512 F.2d 729, 739-742 (3rd Cir. 1975)*. As explained above, Since the CDCA governs all kinds of charges that may be imposed by a CDCA licensee, 7 P.S. ? 6214.B, a CDCA licensee and a debtor are not free to contract for compound interest if it is not permitted under the CDCA.

The Department has reviewed the CDCA and takes the position that the CDCA does not specifically authorize "compound interest" as that term is generally understood. The term "compound interest" is broadly understood to mean:

> [i]nterest that is paid not only on the principal, but also on any interest earned but not withdrawn during earlier periods. Interest upon interest; *i.e.*, when the interest of a sum of money is added to the principal, and then bears interest, which thus becomes a sort of secondary principal.

Blacks Law Dictionary, 6th Edition (West 1990). Section 13 of the CDCA governs the interest rate that a CDCA licensee may charge. One method of calculating the interest rate authorized by Section 13 is referred to as the "discount" rate. *See* 7 P.S. § 6213.E and H. The "discount" rate involves calculating the authorized interest rate based on the time balance of a loan contract at the time the loan contract is made to a consumer and not just on the principal amount owed. Part of this calculation does involve interest being charged on interest. However, since the "discount" rate calculation is made at the beginning of the loan contract and all payments are known at the time the loan is made, this does not present the typical situation involving compound interest in which the amount of interest owed continues to balloon geometrically to an amount not specifically agreed to by both parties.

Furthermore, Section 13 of the CDCA does not authorize the kind of "compound interest" that your Client would like to impose. Client is contemplating the possibility of imposing additional interest on CDCA loan contracts that are in default and for which the interest rate has already been calculated. Letter at 5. Nowhere does the CDCA authorize the unilateral imposition of the kind of interest that you suggest in your letter. Assuming Client possessed the requisite statutory authority, and as noted above, a CDCA licensee may extend, defer, renew or refinance loan contracts under the CDCA. 7 P.S. § 6213.K. and L. And, as discussed below, a CDCA licensee may impose default charges. 7 P.S. § 6213.K. But the CDCA provides no authority for a CDCA licensee to unilaterally add interest charges to an existing loan contract.

Charges for the Detention of Money

The United States Court of Appeals for the Third Circuit recently held in *Pollice v. National Tax Funding, 225 F.3d 379 (3rd Cir. 2000)*, that certain charges may be imposed after a loan has matured without running afoul of the LIPL. The Department writes to clarify this area of the law as it relates to the CDCA.

The relevant issue in *Pollice* was whether the LIPL recognizes a distinction between:

> . . . on the one hand, charges imposed on account of a debtor's failure to make timely payment of money when due ("detention"), and on the other, money received by a creditor as consideration for agreeing to refrain from immediately collecting a debt ("forbearance").

Pollice, 225 F.3d at 392-393. The former constitutes the detention of money. The court in Pollice predicted that the Pennsylvania Supreme Court would rule that charges for the "detention" of money are not subject to the LIPL because they are not imposed as consideration for the loan or use of money. *Id., 225 F.3d at 394-395, 399*.

First, the Department respectfully finds the Third Circuit's analysis to be thorough. However, as all federal courts readily acknowledge, the Pennsylvania Supreme Court has the final word on interpreting Pennsylvania law and, to the best of the Department's knowledge, that court has not ruled on the issues decided by the Third Circuit in *Pollice* as they apply to the LIPL[10] or the CDCA. Therefore, the Department reserves judgment on whether the doctrine of law concerning charges imposed for the detention of money exists in Pennsylvania as it relates to the LIPL.

Second, regardless of whether the doctrine concerning the detention of money exists with respect to the LIPL, the Third Circuit in *Pollice* did not discuss the applicability of that doctrine to the CDCA as the Department discusses below.

The Third Circuit held in *Pollice* that usury is founded on an agreement between two parties. *Pollice, 225 F.3d at 394-395*. Thus, according to the court in *Pollice*, an agreement is a necessary predicate in order for usury to exist:

> [a]ll the terms of the statute denote consensual agreements between the parties, indicating that a withholding or detention by the borrower not consented to by the lender is not within the statute's purview. ***The mere fact that the***

[10] It would appear that the Pennsylvania Supreme Court has discussed the detention of money under the 19th Century usury statute that preceded the LIPL. *See In re Kenin's Trust Estate, 23 A.2d 837, 844 n. 4 (Pa. 1942)*.

> ***parties have agreed to the rate to be paid after the debt is due does not make an arrangement a forbearance.***

Pollice, 225 F.3d at 394, quoting Smith Machinery Co. v. Jenkins, 654 F.2d 693, 696 (10th Cir. 1981) (emphasis added).

Without passing upon the correctness of the holding in *Pollice*, charges for the "detention" of money as described in *Pollice* are, in essence, default charges. Default charges are strictly regulated by the CDCA even though they, unlike extension or deferment charges,[11] are not the subject of an agreement between a licensee and a debtor. A licensee may simply impose the permissible default charges after compliance with the requirements of the CDCA:

> [t]his act requires that ***due notice*** of a licensee's intention to collect default charges be given to the consumer in the statement of contract. A licensee may, ***upon notice***, collect a specified default charge on loan contracts at the rate permitted in the act on the amount in default.

10 Pa. Code § 41.3(d) (emphasis added). *See also* 7 P.S. §§ 6213.K, 6215 and 10 Pa. Code § 41.3a. Even though no agreement is in place for a CDCA licensee to impose a default charge, it may nonetheless impose a default charge. Thus, unlike the *Pollice* court's interpretation of the LIPL, the CDCA clearly governs charges for the detention of money even though they are not the subject of an agreement.

The *Pollice* court also noted that consideration for an agreement was necessary in order for usury to attach and fees for the detention of money were not imposed for consideration:

> [Usury statutes] apply only to those contracts which in substance involve a loan of money or forbearance to collect money due, and so, where there is no loan or forbearance, there can be no usury . . . . A charge imposed because of the late payment of a debt comes within the definition of interest under a usury statute only where it is paid as ***consideration*** for the creditor's forbearance of asserting his right of collection.

Pollice, 225 F.3d at 394, quoting 47 C.J.S. Interest & Usury § 122 (1982) (emphasis added). As noted above, the CDCA expressly regulates default charges even though a

[11] "[a]n extension arises from a ***written agreement***, other than the original loan contract, between a consumer and a licensee to alter the payment schedule in the original loan contract or to postpone one or more scheduled payments to the end of the contract. A deferment arises from a ***written agreement***, other than the original loan contract, between a consumer and a licensee to postpone one or more scheduled payments for a specified period of time other than to the end of the contract. Each extension or deferment shall be negotiated separately." 10 Pa. Code § 41.3(e) (emphasis added).

licensee merely imposes them on a debtor and not as part of the consideration given for a CDCA loan agreement.

Although the court in *Pollice* did not address the CDCA, it did note that the rule it approved concerning the detention of money applies, "[i]n the absence of language in the usury statutes that compels a different conclusion . . ." *Pollice, 225 F.3d at 393*. The Department takes the position that the CDCA is the kind of a statute that compels such a different conclusion in that it regulates all charges of any kind whatsoever, including charges for the detention of money.

Question #11

You state in your letter:

> [w]ith each sale and purchase transaction involving a pool of CDCA loans, a CDCA licensee must provide notice to the Department if it sells loans to a licensee, but must obtain approval of the Department to sell loans to a non-licensee. As you have indicated, the Department wants to ensure that a non-licensee has interest rate authority (as would a chartered financial institution) or agrees to not charge interest in excess of six percent per year on the loans acquired, unless licensed. Although this approval is handled on a transaction-by-transaction basis, we respectfully request that the Department consider accepting an annual certification from the Company that, to the extent it acquires loans subject to the CDCA from CDCA licensees and seeks to charge interest on such credit obligations, the Company will not charge or collect interest at a rate that exceeds six percent per year on the outstanding balance.

Letter at 5.

Answer

The Department declines your request to accept an annual certification from Client as stated in your Letter, although the Department reserves the right to reconsider this issue in the future.

Question #12

You state in your letter:

> [f]inally, I also request consideration by the Department of another issue under the Act. As all of the accounts

> purchased by the Company are charged off consumer credit accounts or accounts of a debtor in bankruptcy, arguably the accounts would no longer be subject to the CDCA as there is no agreement to pay a sum certain of money by a fixed or determinable time. As the loans are in default, the agreement by the consumer to pay has been breached. Without an agreement in place, the charged-off accounts do not appear to be subject to the CDCA for purposes of licensing an entity that purchases such charged-off accounts. I would appreciate consideration of this position.

Letter at 6.

Answer

The Department takes the position that the CDCA governs all loan contracts entered into thereunder at all times, including when loan contracts have been breached by one or all of the parties thereto. For instance, a default constitutes a breach of a loan contract[12] and the CDCA, as noted above, nonetheless governs the kinds of charges that may be imposed on a debtor for a default. 7 P.S. §§ 6213.K, 6215; 10 Pa.Code §§ 41.3(d), 41.3a. Charging off a loan is an internal accounting decision made by a lender and does not effect the legal validity of the loan agreement.

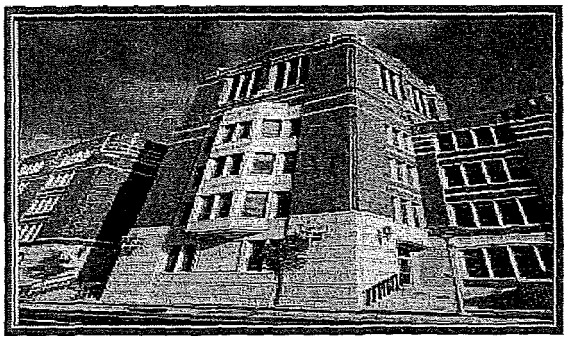
Advisory

Pursuant to the Commonwealth Attorneys Act, 71 P.S. § 732-101 *et seq.*, the undersigned may only give legal advice to the Department and may not divulge that legal advice or other confidential matters, such as attorney-client communications, to anyone without permission from the Department. No such permission has been given in this case. Therefore, this letter represents the policy positions of the Department and is not intended to disclose privileged and confidential legal advice provided by the Office of Chief Counsel. Accordingly, this letter may not be relied upon or construed as constituting legal advice. This letter constitutes a duly authorized statement of the Department's official position regarding the issues discussed herein and has been authorized by the appropriate Department personnel. The Department's analysis is based upon the facts as stated in this letter. Any change in the facts could result in an amendment or reversal of the Department's position.

Sincerely,

David H. Bleicken
Deputy Chief Counsel

[12] The CDCA defines "default" as, "failure to pay a contract when due or failure to pay any stated installment when due." 7 P.S. § 6202.



Defending Junk-Debt-Buyer Lawsuits

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DEFENDING
Junk-Debt-Buyer Lawsuits

By Peter A. Holland

I sued you, you didn't file an answer,
and you didn't come to court.
What more do I need to prove?

—Remark made by an attorney for a junk-debt buyer

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Consumer advocates are well aware of the rise in bogus lawsuits filed by junk-debt buyers.[1] The sheer volume of these cases is astronomical. For example, in Maryland, Midland Funding Limited Liability Company filed more than 7,000 lawsuits in the months of November and December 2011.[2] On March 9, 2011, one lawyer in Maryland filed 130 lawsuits on behalf of LVNV Funding Limited Liability Company.[3] Does anybody expect that Midland Funding or the lawyer mentioned above intend to appear in court and prosecute these cases? Of course not. They are filing these lawsuits based on two historically accurate assumptions: (1) the vast majority of consumers will not show up or contest the lawsuits, and (2) a majority of judges will award a default judgment in the vast majority of cases, based on documents, often inaccurately described as affidavits, submitted by the plaintiff.[4]

[1]This article builds on Clinton Rooney's *Defense of Assigned Consumer Debt*, 43 Clearinghouse Review 542 (March–April 2010). Because Rooney's article is outstanding and remains current, I will avoid significant overlap. I refer the reader to Rooney's article for a more substantive treatment of standing, causes of action for contract and account stated, and the defense of statute of limitation and tolling. Like Rooney, I focus on defense of junk-debt-buyer lawsuits, but many of the same strategies can be employed in the defense of original creditor lawsuits. While some examples in this article are drawn from cases in Maryland, the litigation tactics of junk-debt buyers are substantially similar, if not virtually identical, across the country.

[2]Midland Funding Limited Liability Company, Midland Credit Management Incorporated, Encore Capital Group Incorporated, and related entities paid a fine of $998,000 to the state of Maryland to settle charges against them of alleged illegal conduct (Press Release, Maryland Department of Labor, Licensing and Regulation, Maryland Commissioner of Financial Regulation, Attorney General Announce Settlement Agreement with National Debt Collector (Dec. 17, 2009), http://bit.ly/zdWleO).

[3]As of the date of this article, LVNV Funding Limited Liability Company is subject to a cease-and-desist order from the state of Maryland. Alleged violations include operating without a license, knowingly filing false affidavits, intentionally misrepresenting the amount of claims and collecting impermissible compound interest, knowingly collecting unauthorized attorney fees and prejudgment interest at unauthorized rates, and "filing cases which the relevant assignment documents evidence that LVNV did not have valid title of the consumer claims at issue" (Press Release, Maryland Department of Labor, Licensing and Regulation, Maryland Commissioner of Financial Regulation Suspends Collection Agency Licenses of LVNV Funding LLC and Resurgent Capital Services (Oct. 28, 2011) http://bit.ly/z3r15F).

[4]Depending on your state, this may be described as an affidavit judgment, a default judgment, a summary judgment, or a similar term. Whatever the language, it suggests that a judge has (in theory) read a statement submitted by the plaintiff, made under the penalty of perjury and based on personal knowledge, claiming that the plaintiff owns an account and that the defendant owes money to the plaintiff by virtue of an assignment of the account from the original creditor to one or more intermediary assignees, resulting in the plaintiff's current ownership of the account.

All across the United States, junk-debt-buyer lawsuits have overwhelmed the courts and wrought untold havoc on the lives of consumers. These cases have resulted in homelessness, needless bankruptcies, job loss, marital stress, divorce, depression, hopelessness, and illegal garnishments. That judgments against consumers are part of a zero-sum game is often overlooked. In these cases every bogus judgment deprives a legitimate creditor of the chance to get paid from scarce resources. A Chapter 7 bankruptcy discharge does not discriminate between legitimate and illegitimate unsecured creditors; with very few exceptions, it discharges any debt which is unsecured.[5] Thus the legitimate creditor to whom money is owed is materially harmed by the junk-debt buyer, who extracts money based on an illegitimate claim and forces people into bankruptcy. In short, a broad effort to defend these cases not only will help individual consumers but also could improve the entire U.S. economy by preserving precious resources to pay what is legitimately owed and avoiding paying for what is not. Here I survey the landscape of the junk-debt-buyer industry and advise consumer advocates engaged in the battle against unscrupulous junk-debt buyers.

A Brief Overview of the Junk-Debt-Buyer Industry

Junk debt is assigned debt that is purchased for pennies on the dollar with little or no documentation of the underlying contract, the payment history, or the chain of assignment.[6] Often the consumer does not owe any money at all. Almost universally, even if there is an underlying obligation, as a matter of contract law, the consumer does not owe the amount that is being claimed in the form of interest, late fees, and attorney fees.

At the outset we must distinguish between original creditors and junk-debt buyers. The former had some business transaction with the consumer. The latter are total strangers to the consumer, and, hoping to make a killing, have merely invested in a portfolio of cheap assets. Junk-debt buyers purchase old credit card and other accounts already abandoned by the original creditor, and then the junk-debt buyers sue on them. Not uncommonly someone can get sued twice on the same debt, get sued on an account one never had, get sued long past the statute of limitations, or get sued on a debt already discharged in bankruptcy. In junk-debt-buyer cases, the standards of professionalism for some lawyers are so low that it is no longer news to discover that a lawyer filing a debt-buyer lawsuit robo-signed the complaint, or that documents submitted by the plaintiff contain forged or robo-signed signatures.[7]

Advocates must educate judges and the public about the crucial distinction between traditional debt collection and the attempt to collect on junk debt. Trying to collect money actually owed on a credit card to an original creditor differs greatly from a junk-debt investor trying to collect on its own behalf. Such an investor paid only pennies on the dollar for the consumer's debt and is seeking a windfall of one hundred cents on the dollar. Notably the returns being sought through the use of our nation's court system are attractive on Wall Street. Some publicly traded junk-debt buyers have reported record earnings.[8]

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[5]U.S. Bankruptcy Code, 11 U.S.C. § 524(a)(1).

[6]This section contains a brief overview of the junk-debt-buyer industry. For a more detailed overview, see the following studies: Claudia Wilner & Nasoan Sheftel-Gomes, The Legal Aid Society et al., Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers 13 (May 2010), http://bit.ly/aTIND4; Rachel Terp & Lauren Bowne, East Bay Community Law Center & Consumers Union of United States, Past Due: Why Debt Collection Practices and the Debt Buying Industry Need Reform Now (Jan. 2011), http://bit.ly/GCSUX6; Rick Jurgens & Robert J. Hobbs, National Consumer Law Center, The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts, 21, 23 (July 2010), http://bit.ly/GGthnU; and my *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 Journal of Business and Technology Law 259 (2011), http://bit.ly/GHBLJX.

[7]See *Midland Funding v. Brent*, 644 F. Supp. 2d 961 (N.D. Ohio 2009); Jeff Horwitz, *"Robo" Credit Card Suits Menace Banks*, American Banker, Jan. 30, 2012, http://bit.ly/GFb9vW.

[8]See *infra* notes 30–32.

Sales of accounts to junk-debt buyers occur only after the original creditor makes the business decision not to outsource the collection or pursue the collection itself.[9] In fact, plaintiff's debt-buyer status indicates that the original creditor made a business decision to sell off the account for a few cents on the dollar rather than outsource collection of the account or collect the account in-house.[10] In light of this, every time a junk-debt buyer intones that people should pay the debts it is trying to collect, bear in mind that the original creditor has already decided that the account is not worth pursuing. Therefore the original creditor is not asserting a claim and will receive no benefit if the case is won and no detriment if the case is lost.

The old adage "you get what you pay for" is particularly true in junk-debt-buyer cases. The junk-debt buyers claim to have bought various accounts, but sales of accounts are haphazard at best. As a recent action by a former employee of one major bank revealed, what is being sold is often not what it appears to be.[11] The junk-debt buyers routinely lack the documentation to prove the terms and conditions of underlying credit card contracts and usually lack the proof necessary to show the entire chain of assignment. That the original creditor elected to sell an account is a red flag that the account has defects and little—if any—documentation. Indeed, almost every agreement between original creditor and initial purchaser (and between the original purchaser and each subsequent assignee) is made without representations and warranties, without recourse, and often without any duty on the part of the seller to investigate the accuracy of what it is selling. In sum, once the banks sell off summaries of alleged accounts at fire-sale prices, they do not want to be bothered with them again and no longer have any financial interest in the accounts included in the summary of accounts sold.

A complicating aspect is that much of this junk debt is sold through wholesalers that purchase the junk debt from large institutions and then resell the junk debt to junk-debt buyers. The resold junk debt is often packaged in smaller and more focused bundles such as geographic-specific debt (e.g., debtors with Maryland addresses), type of debt (e.g., auto loans, credit card loans, etc.), and age of debt (i.e., older debt is cheaper than current debt). The criteria for these bundles may include debt discharged in bankruptcy or clearly beyond the statute of limitations for any litigation-based collection effort.

The problems resulting from this overall lack of proof or accuracy are myriad, leading to thousands of dubious judgments entered by default. In recommending changes in Maryland's court rules for collecting assigned debt, the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure stated:

> The problem, which has been well documented by judges, the few attorneys who represent debtors, and the Commissioner of Financial Regulation, is that the plaintiff often has insufficient reliable documentation regarding the debt or the debtor and, had the debtor challenged the action, he or she would have prevailed. In many instances, when a challenge is presented, the case is dismissed or judgment is denied. In thousands of instances, however, there is no challenge, and judgment is entered by default.[12]

[9]For a description of the overall problem of lack of proof in debt-buyer lawsuits, see *The One Hundred Billion Dollar Problem in Small Claims Court*, *supra* note 6.

[10]Although beyond the scope of this article, one part of the decision by the original creditor is the potential for lender's insurance.

[11]See *infra* note 46.

[12]Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure, 171st Rules Committee Report to the Maryland Court of Appeals 7 (July 1, 2011), http://bit.ly/GUNppk.

This observation is validated by the industry itself. Specifically, in a January 19, 2011, letter to the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure, the Association of Credit and Collection Professionals, an industry representative, stated its concern about the requirement that a junk-debt buyer must give the court "a certified or otherwise properly authenticated photocopy or original of certain documentation establishing proof the consumer debt at issue existed."[13] The reason why the industry opposes the requirement of "proof the consumer debt at issue existed" is that, in its own words,

> [t]he above documentation is often unattainable for a variety of reasons, the most important of which is that the original creditor no longer has the information or did not have it when selling an account or turning the account over for collection. Particularly in the context of credit cards, financial institutions are not required under federal law to maintain this type of information beyond two years.[14]

Can a consumer successfully sue an entity for breach of contract without offering any proof of the terms and conditions of the contract? That is what junk-debt buyers presume to do every day, hundreds of thousands of times per year, in courts across our nation.

Tips for Defending Consumers in Junk-Debt-Buyer Lawsuits

I offer the following tips to help CLEARINGHOUSE REVIEW readers protect consumers from illegal and unethical abuse while educating judges about the essential differences between cases brought by original creditors and those brought by junk-debt buyers.[15]

1. Read the Complaint and Supporting Documentation Carefully

Read the complaint and accompanying documents multiple times, highlighter in hand, while looking for intentional deceptions, errors, and omissions that could help your client prevail. First, look for defects on the face of the complaint. For example, the named plaintiff might be a different corporation from the entity named in the supporting documents. This occurs with surprising frequency. Second, if your state requires debt buyers to be licensed as debt collectors, check whether the debt buyer is licensed. Suing without a license creates standing issues, and, according to an increasing number of courts, it constitutes a violation of the Fair Debt Collection Practices Act.[16] The junk-debt buyer is subject to the Fair Debt Collection Practices Act because the junk-debt buyer allegedly acquires the debt after default.

Third, look for the failure to prove the existence of (or the terms and conditions of) the alleged underlying contract. Failure to prove the contract is the rule rather than the exception. Often a contract is not even attached to the complaint. More often, some well-worn photocopy sample of a terms-and-conditions mailer is attached. This sample is often illegible, and almost never signed by the consumer. On close inspection, the printing date on this document often reveals that it was generated years after the account was allegedly opened. Also, the terms and conditions submitted may not be from the original creditor identified by the junk-debt buyer but are presented to make the claim appear supported.

Fourth, the debt buyer is usually unable to prove a complete and unbroken chain of title. Without a valid chain of title, the debt buyer does not have standing to sue.

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[13]Letter from Association of Credit and Collection Professionals to Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure 2 (Jan. 19, 2011) (in my files).

[14]*Id.*

[15]While the scope of this article is limited to junk-debt buyers, many of the same issues are in original creditor cases, as evidenced by the story of Chase Bank and Linda Almonte (see *infra* note 51).

[16]Fair Debt Collection Practices Act § 1692e(5), 15 U.S.C. §§ 1692–1692p; "[T]his Court interprets Section 1692e(5) of the FDCPA to include the taking of 'action that cannot legally be taken'" (*Bradshaw v. Hilco Receivables Limited Liability Company*, 765 F. Supp. 2d 719, 730 (D. Md. 2011)).

Attached to the complaint may be one or more bills of sale that purport to transfer ownership of unspecified accounts, for unspecified consideration, pursuant to unspecified representations and warranties. The lack of account details makes tying in the assignments to the account claimed against the person sued impossible. Closer inspection often reveals discrepancies in the corporations doing the alleged assigning, in the dates of assignment, and other falsehoods and omissions.

Fifth, if the debt buyer cannot prove the terms and conditions of the underlying contract, then it cannot prove any contractual right to receive interest, late fees, or attorney fees. In that case, at best it would be able to prove *quantum meruit* or unjust enrichment. However, because the debt buyer almost never has an accounting of all charges and payments showing how the payments were allocated (interest, principal, and late fees), it is unable to prove damages for *quantum meruit* or unjust enrichment. Further, is the *quantum merit* claim limited to what the junk-debt buyer paid? How does equity support giving the junk-debt buyer more than what it expended?

Sixth, read all documents carefully with an eye toward the statute of limitations. Keep in mind that if your opponent cannot prove a contract governed by the law of some other state, then the statute of limitations of your state is what applies. Further, keep in mind that in many states the statute of limitations is considered procedural. If the junk-debt buyer elected to sue there, it is subject to that state's limitation of actions notwithstanding any choice-of-law provision. Cases are frequently filed outside the statute of limitations.

Seventh, use a highlighter to illuminate misleading statements and omissions in the junk-debt-buyer documents. For example, highlight for the judge the fact that the bill of sale states explicitly that there are no representations or warranties of any kind, including representations about validity, collectability, or the statute of limitations. Similarly, where applicable, highlight the fact that, according to the debt buyer's own records, your client's alleged account was sold to an entity other than the plaintiff who is suing your client. Or you might highlight for the judge all of the places where the junk-debt buyer improperly redacted information, such as the name of the data file it allegedly purchased, the purchase price of the portfolio, and other material information.

There may be other fatal defects, such as obviously forged signatures, whiteouts and blackouts in documents, assertions in the complaint that the plaintiff loaned money to the defendant, and similar indicia of bogus claims.[17] Revealing the defects in these documents does not require a deep background in consumer law. It just requires a cup of coffee, your undivided attention, a yellow highlighter, and a red pen.

2. Know the Elements of an "Account Stated" Cause of Action

Often the complaint is pled as an account stated. This cause of action requires proof of (1) prior transactions that establish a debtor-creditor relationship between the parties, (2) an express or implied agreement between the parties as to the amount due, and (3) an express or implied promise from the debtor to pay the amount due.[18] Proving that there has been a past relationship, an agreement as to the amount due, or an agreement to pay the amount due is impossible because most junk-debt-buyer lawsuits are filed without the plaintiff talking to the consumer ahead of time. Further, unless the junk-debt buyer can prove its status as assignee, the other elements do not even come into play.

The junk-debt buyer often argues that the defendant never objected when the credit card bills were filed, or when the lawsuit was filed, or when the plaintiff sent a demand of payment to the defen-

[17]Because the debt buyer claims to have purchased an account already in default, the debt buyer cannot possibly be the entity that loaned the money.

[18]1 Am. Jur. 2d *Accounts & Accounting* § 26 (2012).

dant. This argument fails because "the mere rendition of an account, by one party to another, does not alone establish an account stated."[19]

3. Scrutinize the Supporting Affidavit

An affidavit in support of summary judgment has very strict requirements. Most states track the federal rule almost verbatim. Federal Rule of Civil Procedure 56(c)(4) states: "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."[20]

Often the affidavit begins by stating that all facts set forth below are based "on my personal knowledge," but then the oath at the end is made merely "to the best of my information, knowledge and belief." Translation: "I have personal knowledge to the best of my information, knowledge and belief." A short motion to strike the affidavit is appropriate in such cases. Moreover, calling this universal defect to the attention of the courts is appropriate because these bogus affidavits are almost always identical in thousands of cases. Judgments based on affidavits that are defective on their face should be denied.

4. Master the Relevant Rules of Evidence

The Federal Rules of Civil Procedure and Evidence are cited here, but you need to determine your state's analogue to the relevant federal rules. First, never forget that an affidavit for summary judgment has three requirements, pursuant to your state's analogue to Federal Rule of Civil Procedure 56(c): (1) it must be based on personal knowledge; (2) it must contain facts admissible in evidence; and (3) it must affirmatively show that the affiant is competent to testify to the matters stated.[21] Most affidavits do not hold up under scrutiny. Even if they purport to be based on personal knowledge (which they often do not), a debt-buyer assignee is highly unlikely to have personal knowledge of the consumer, of the debt, or of the business-record-keeping practices of the original creditor or prior assignees.

Second, most of the debt buyer's documents are just pages or fragments taken from larger documents. For example, the bill of sale is almost always an exhibit to some larger document, and it almost always refers to an asset sale and purchase or forward flow agreement. But those documents, which contain the terms and conditions governing the bill of sale, including any representations, warranties, and disclaimers, are never submitted. The list of accounts described in the bill of sale is never submitted either. Federal Rule of Evidence 106, which deals with the "remainder of or related writings," says that you are entitled to demand that the remainder be introduced.[22] Do not allow the plaintiff to introduce document fragments without insisting that the plaintiff introduce the entire document(s). This applies to monthly statements as well because monthly statements are merely summaries compiled from other documents.

Third, always be mindful of relevance.[23] Whether your client defaulted on a credit card is not relevant unless the junk-debt buyer can prove that it has standing to sue, and vice versa. Fourth, Federal Rules of Evidence 601, 602, and 603 address competency, personal knowledge, and taking an oath or affirmation.[24]

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[19] *Id.* § 29.

[20] Fed. R. Civ. P. 56(c)(4). The Maryland Rules of Civil Procedure track the Federal Rules of Civil Procedure (see Md. R. 3-306 (2012) (The Maryland Rules of Civil Procedure are issued by the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure and are referred to as the "Maryland Rules")). Effective January 1, 2012, Maryland Rule 3-306 has been amended to be more demanding of debt buyers' proof.

[21] Fed. R. Civ. P. 56(c).

[22] Fed. R. Evid. 106.

[23] *Id.* 401.

[24] *Id.* 601, 602, 603.

These rules can be used to demonstrate that evidence is admissible only if there is a witness who can testify on the basis of personal knowledge. Debt buyers literally offer affidavits as testimony at contested trials, and some judges accept them. But remember that, even in an affidavit, competency, personal knowledge, and an oath or affirmation must be affirmatively demonstrated to the courts, pursuant to Federal Rule of Civil Procedure 56(c). Fifth, remember that all documents must be properly authenticated. Tattered, illegible, robo-signed photocopies of the purported business records of third-party entities are not self-authenticating.[25]

Sixth, simplify the hearsay rules. An opposing party's statements are always admissible.[26] A junk-debt buyer should not be able to authenticate, let alone admit into evidence, the records of third-party entities as business records under Federal Rule of Evidence 803(b)(6) because they were not created by the junk-debt buyer.[27] Even if you cannot convince a judge to exclude the records categorically, you can argue to exclude them under Rule 803(b)(6) if the "source of information []or the method or circumstances of preparation of the record indicate a lack of trustworthiness." Put simply, the junk-debt buyer relies on the records of others to prove its case. Keeping these records out of evidence because they are hearsay not subject to any of the hearsay exceptions means that the junk-debt buyer cannot make a prima facie case. Remember that documents can have multiple levels of hearsay and that to be admissible each statement must fit an exception to the hearsay rule.[28]

And, seventh, use Federal Rule of Evidence 201 to ask the court to take judicial notice of facts such as that your junk-debt-buyer plaintiff employs felons, was fined by the Federal Trade Commission, settled a nationwide class action for fraudulent affidavits, or whatever else you deem highly relevant to your case.[29] Give the court the articles cited in this article, and ask it to take judicial notice of the junk-debt industry's practices.

Junk-debt buyers sometimes argue that they are the good guys. They claim that, by holding people accountable for their irresponsible financial behavior, they help keep down the cost of credit for everybody. Again, this is the time to emphasize that your plaintiff is an investor in the equivalent of penny stocks. The fantasy that the debt-buyer system is keeping the cost of credit down evaporated when the bank decided to sell off the debt at a fraction of its face value. For example, in the third quarter of 2011, Asset Acceptance Capital Corporation paid three cents on the dollar for junk debt.[30] Encore Capital Group paid four cents on the dollar in the fourth quarter of 2011.[31] And Portfolio Recovery Associates Incorporated paid seven cents on the dollar in the fourth quarter of 2011.[32]

5. Do Not Fall into the "Rules of Evidence Do Not Apply in Small Claims" Trap

Less than 1 percent of consumers who appear in collection courts are represented by counsel. These courts are unequal playing fields not only because consumers have no lawyers but also because junk-debt buyers have convinced judges, consumers, and consumer attorneys that

[25]Fed. R. Civ. P. 901, 902(11).

[26]Fed. R. Evid. 801.

[27]*Id.* 803(b)(6).

[28]*Id.* 803.

[29]*Id.* 201.

[30]Press Release, Asset Acceptance Capital Corporation, Asset Acceptance Capital Corp. Reports Third Quarter 2011 Results (Nov. 1, 2011), http://bit.ly/HbwMmp ($38.5 million to purchase $1.3 billion face value).

[31]Press Release, Encore Capital Group Inc., Encore Capital Group Announces Fourth Quarter and Full Year 2011 Financial Results (Feb. 9, 2012), http://bit.ly/GUhxBx ($136.7 million to purchase $3.8 billion).

[32]Press Release, Portfolio Recovery Associates Inc., Portfolio Recovery Associates Reports Fourth Quarter and Full Year 2011 Results (Feb. 16 2012) (http://bit.ly/GUdD9w) ($89.9 million to purchase $1.21 billion).

the rules of evidence do not apply in small claims.[33] The junk-debt buyers downplay the fact that, even in a small-claims tribunal, witnesses must be competent to testify on the basis of personal knowledge of the matters asserted. They also downplay the fact that the judges are responsible for gatekeeping functions put in place to ensure due process of law. Yet, on a regular basis, judges in junk-debt-buyer cases admit documents and document fragments into evidence, including documents identified as affidavits, even when there is no witness to authenticate the documents, let alone provide any testimony demonstrating indicia of reliability.

The "anything goes in small-claims court" trap is easily avoided by pointing out to the judge that, even in a small claim, documents can only come into evidence through a witness who is competent to testify to the matters asserted, and whose testimony is based on personal knowledge. For example, in Maryland, Rule 5-101 states that the rules of evidence do not apply in small-claims actions except for those rules relating to the competency of witnesses.[34] Use your state analogue to Federal Rules of Evidence 601, 602, and 603.[35]

Witnesses must be competent to testify to the matters at issue, have personal knowledge, and take an oath, even in small claims where the rules of evidence might not otherwise apply. Further, axiomatic to most (but not all) judges is that documents can be introduced only through a sponsoring witness, who is subject to cross-examination (except cross-examination is not required in summary judgment of affidavit judgment cases).

6. Emphasize the Plaintiff's Lack of Standing

Over the past few years, as robo-signing has become more common, a paradigm shift has occurred. For more and more judges, the image of an assault on the integrity of the courts is replacing the image of deadbeat consumers. Always remember that you are fighting to (1) ensure due process; (2) avoid the very real danger of getting sued twice on the same debt, or sued on someone else's debt (such as in the increasing number of identity theft cases), or sued on time-barred debt; and (3) make sure that if a judgment is entered against your client, it is not illegally inflated by unsubstantiated interest, late fees, or attorney fees. And always remember what you are fighting against: (1) an assault on the integrity of the courts; (2) robo-signing; (3) lawsuit abuse; (4) litigation for profit; and (5) the lawsuit lottery system perpetuated by a business model that is characterized by suing without sufficient proof of standing, liability or damages, and banking on a flooded court system to provide a default judgment in an amount that is between ten and fifty times greater than what was paid for the claim.

7. Research Every Entity and Every Person Who Signed Any Document

As more and more court documents are being scanned by clerk's offices, robo-signing and suspect signatures become easier to detect. For example, type the name of the person who signed your affidavit into Google with the name of the debt buyer, and then compare signatures. Often, you discover that your affiant has somebody else signing his signature. Further, you may come across some deposition testimony online where your affiant admitted that he signed hundreds or even thousands of affidavits a day without verifying anything to which he had sworn.[36]

8. Develop a Strategy for Each Case

In debt-buyer cases, some plaintiffs' lawyers enter their appearances long before trial. Others merely show up when

[33]See Wilner & Sheftel-Gomes, *supra* note 6, at 1, stating that, of a sample of 365 court cases, not a single person was represented by counsel. Anecdotally, in my numerous experiences observing court proceedings, I saw only one consumer represented by an attorney (other than consumers represented by the University of Maryland School of Law's Consumer Protection Clinic).

[34]Md. R. 5-101 (2012).

[35]Fed. R. Evid. 601, 602, 603.

[36]See *Brent v. Midland Funding Limited Liability Company*, 2011 U.S. Dist. LEXIS 98763 (N.D. Ohio Sept. 1, 2011).

the case is called, knowing in advance that the plaintiff will be unprepared to try its case that day, even though court rules state that plaintiffs shall be prepared.[37] This strategy results in a defense verdict before some judges, while other judges merely grant a continuance to allow the plaintiff to secure a witness. Know your judge, and tailor your strategy accordingly.

The same reasoning applies to whether or not to bring your client to the trial. Because the trial is usually about the debt buyer's standing and proof of assignment, your client cannot testify about anything that is relevant. The days when judges would demand that defendants admit that they had credit cards and did not pay their bills are, we hope, coming to an end in more jurisdictions. More and more judges are now willing to begin with the issues of standing and get to the underlying original obligation only after a complete and valid chain of assignment has been established—an occurrence which, by all reports, has never been seen by a consumer attorney.

If discovery is allowed in your case, decide whether you want it or not. The downside of engaging in discovery is that the process forces the plaintiff to prepare. The upside is that, if it does not result in an outright dismissal, you may actually get documents such as the asset sale and forward flow agreement and other documents that debt buyers never want you to see. Consider propounding requests for admission, if applicable in your state.

Decide if you want to file a pretrial motion to dismiss or engage in other motion practice. A good way to educate judges about junk-debt buyers is simply to file trial briefs that are clear enough to be understood by a first-year law clerk.[38] Consider developing a Brandeis brief that you can use in every case, accompanied by a specific bench memorandum that describes the evidentiary deficiencies in the junk-debt buyer's case.[39]

9. Determine at the Outset Whether Your Client Is Judgment Proof

Many people victimized by junk-debt buyers are elderly or disabled and survive on government benefits. Exemptions from judgment include social security, pensions, Veterans' Administration benefits, and (in Maryland) $1,000 in family or household goods, $5,000 for tools of the trade, and a $6,000 wild card.[40] If your client is judgment proof, communicate this to the other side and, if necessary, file a notice of exempt income with the court prior to trial. Some junk-debt buyers will dismiss the case once they are apprised of the defendant's judgment-proof status because they may have hardship status guidelines for dismissal. If this tactic is not successful, then you should mount a vigorous defense to avoid further impairment of credit and to alleviate psychological stress for the client.

10. Communicate with Opposing Counsel

Even in a small-claims case, maintaining respect and civility can result in the other side's willingness to send you what it has in terms of documentation. Once you have the relevant documents, you may consider calling opposing counsel and asking them to dismiss. This sometimes has very quick results, especially if you couple an argument about the weaknesses of the plaintiff's case with your client having no nonexempt assets.

11. Master the Most Common Defenses

Issues such as securitization (who is the real party in interest?), standing to sue (do you really own this debt?), and injury in fact (they invested 2 cents on the dollar but are suing for the full 100 cents on

[37]In Maryland, "[i]f the defendant files a timely notice of intention to defend pursuant to Rule 3-307, the plaintiff shall appear in court on the trial date prepared for a trial on the merits" (Md. R. 3-306(e)(1) (2012)).

[38]As the saying goes, "Argue for the judge. Write for the clerk."

[39]Brandeis briefs contain statistics and information relevant to the issues at hand, in addition to general legal arguments that can be applied to multiple cases.

[40]Md. Code Ann. Cts. & Jud. Proc. § 11-504 (2012).

the dollar; how have they been injured 100 cents on the dollar?) can raise profound and fascinating jurisdictional issues that should not be overlooked. But these cases are easily won by reading the documents carefully, employing common sense, understanding some basic legal principles, and maintaining a determination to turn around a train that sometimes seems to have already left the station. Here are the common defenses that you need to master:

Contract Not Proven. Use your civil pattern jury instructions and demand that the plaintiff prove each element of a contract, each element of a material breach, and each element of damages and mitigation of damages. The plaintiff may have a difficult time proving mitigation of damages when it is merely an investor that paid only pennies on the dollar as an investment under a buyer-beware contract, and the plaintiff cannot claim that the consumer caused any damages. Rather, the entire enterprise was speculation on the part of the investor.

Account Stated Not Proven. Account stated requires a new relationship between the junk-debt buyer and the consumer, and a specific agreement by the consumer to pay a specific amount. Usually the consumer has no recollection of any demand being made by the junk-debt buyer, let alone the terms of the alleged agreement.

Assignment Not Proven. The yellow highlighter will take care of this. In hundreds of cases reviewed, I have never seen an instance where the junk-debt buyer could prove a valid chain of assignment from the original creditor to the junk-debt buyer.

Damages Not Proven. Damages, like liability, must be proven by a preponderance of the evidence, and they cannot be speculative or based on guesswork. The plaintiff is hard put to argue that damages are anything other than speculative when there is no contract in evidence setting forth the actual terms and conditions of the original contract (such as interest and late fees allowed) and no complete history of all payments setting forth the usage of the card, breaking down payments into principal versus interest. In most states, one may not collect interest (excluding prejudgment interest), late fees, or attorney fees except pursuant to specific terms in the contract. Often the junk-debt buyer has only a charge-off amount with no hint of what portions are principal, interest, junk fees, and attorney fees.[41] If the junk-debt buyer has added interest charges, it is charging interest on interest. There is no way the junk-debt buyer can explain this if all it received was a balance.

Statute of Limitations. Violations of the statute of limitations are rampant. In fact, a junk-debt buyer can target debt that is time-barred; this type of debt is much cheaper to buy. While the statute of limitations may vary from state to state, the date of default is fairly easy to ascertain. Given that the charge-off occurs 180 days after default, we can safely assume that the date of default was at least 180 days prior to when the original creditor first sold the account.[42] Always remember that suing on a time-barred account—or even the threat to do so—is likely a Fair Debt Collection Practices Act violation.[43]

Identity Theft. The Federal Trade Commission's most recently published edition of the *Consumer Sentinel Network Data Book* states that identity theft was the most common complaint received by the Consumer

[41] "Charge-off amount" is an industry term without a clear definition. Practitioners generally define the term as the balance on the account on the date that the bank wrote off or charged off the account. The Maryland Rules define "charge-off" as "the act of a creditor that treats an account receivable or other debt as a loss or expense because payment is unlikely" (Md. R. 3-306(a)(1) (2012)).

[42] The Uniform Retail Credit Classification and Account Management Policy sets the charge-off at 180 days after delinquency (Federal Financial Institutions Examination Council, Uniform Retail Credit Classification and Account Management Policy: Final Notice, 65 Fed. Reg. 36903 (June 12, 2000), http://1.usa.gov/GTwzVz). See also Internal Revenue Code, Bad Debts, 26 U.S.C. § 166 (2012) (providing deduction for worthless debt); 26 C.F.R. § 1.166-2(d) (2012) (evidence of worthlessness of debt as applied to banks); Rev. Rul. 2001-59, http://1.usa.gov/GU4UGw (Craig Wojay, Office of the Associate Chief Counsel (Financial Institutions and Products), is the principal author of this revenue ruling).

[43] "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt" (15 U.S.C. § 1692(e)); see, e.g., *Kimber v. Federal Financial Corporation*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) ("a debt collector's filing of a lawsuit on a debt that appears to be time-barred, without the debt collector having first determined after a reasonable inquiry that that limitations period has been or should be tolled, is an unfair and unconscionable means of collecting the debt").

Sentinel Network in 2010, accounting for 19 percent of all complaints.[44] Debt collection was the runner-up, accounting for 11 percent of all complaints. The Federal Trade Commission "estimates that as many as 9 million Americans have their identities stolen each year."[45] Despite this fact, some junk-debt buyers will not dismiss their claims when these consumers appear in court *pro se*.

Usury. Any interest rate over about 30 percent used to be considered usurious. Thanks to the U.S. Supreme Court, today anything goes.[46] Interest rates of 500, 600, or 700 percent may be shocking to the conscience, but they are no longer the exclusive province of street-corner loan sharks. Some of our nation's biggest banks are behind the Internet firewall of many payday lenders.[47] While principles of National Bank Act preemption apply to certain entities, there are still plenty of instances where the originators of these loans were not exempt from state usury caps, and thus the junk-debt buyer is not entitled to collect.

Authorized User Not Liable. Cosigners are joint obligors on a loan. Authorized users are not. Junk-debt buyers frequently sue authorized users, perhaps because the data files do not always differentiate between authorized users and cosigners. Raising and proving authorized user status means no liability.

Fraud and Illegality. Still valid—and highly relevant—in junk-debt-buyer cases are two common-law defenses: fraud and illegality. One increasingly documented problem is the hiring of convicted felons. For example, in 2011 the Minnesota Department of Commerce took action against eight collection agencies and stated that, "[i]n numerous instances, credit card numbers, bank accounts, and personal financial information of vulnerable, financially stressed people were handed over to criminals. It should come as no surprise what happened next."[48] More recently, the same watchdog fined NCO Financial Systems Inc. $250,000.00 for employing convicted felons.[49]

12. Screen Every Case for Affirmative Claims

The Fair Debt Collection Practices Act and many state consumer protection acts prohibit a wide range of unfair or deceptive practices in the collection of alleged debts.[50] At the initial interview and beyond, inquire about any contacts the consumer has had with the junk-debt buyer or its lawyers. Knowingly suing on time-barred debt, threats of jail, abusive lan-

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[44]Federal Trade Commission, Consumer Sentinel Network Data Book for January–December 2010, at 3 (March 2011), http://1.usa.gov/GUnWuR.

[45]Federal Trade Commission, Fighting Back Against Identity Theft (n.d.), http://1.usa.gov/Habech.

[46]A national bank may export the home state's interest rate, regardless of state usury caps, the U.S. Supreme Court held in 1978 (*Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*, 439 U.S. 299, 308 & n.24 (1978)). For a fascinating look at the predictable consequences of this holding, see Patrick McGeehan, *Soaring Interest Compounds Credit Card Pain for Millions,* New York Times, Nov. 21, 2004, http://nyti.ms/H8oqNJ, and *Secret History of the Credit Card*, Frontline (Nov. 23, 2004), http://to.pbs.org/H8B7dV. There is no federal cap on interest rates, nor are there state caps in the following states, which are home to the following credit card companies: South Dakota (Citibank), Utah (American Express), Virginia (Capital One), Delaware (Chase, MBNA, Morgan Stanley, HSBC), or New Hampshire (Providian) (Frontline, Map: Snapshot of the Industry (Nov. 23, 2004), http://to.pbs.org/GToyDJ).

[47]Nathaniel Popper, *Big Banks Play Key Role in Financing Payday Lenders,* Los Angeles Times, Sept. 15, 2010, http://lat.ms/GTCyag. For a discussion of banks' direct involvement in originating payday loans, see Rebecca Borné et al., Center for Responsible Lending, Big Bank Payday Loans: High-Interest Loans Through Checking Accounts Keep Customers in Long-Term Debt (July 2011), http://bit.ly/HeScOP.

[48]Press Release, Minnesota Department of Commerce, Commerce Takes Action Against Eight Collection Agencies (Oct. 6, 2011), http://bit.ly/HbpPSw.

[49]Press Release, Minnesota Department of Commerce, Commerce Department Working to Keep Convicted Felons out of Your Wallet (Feb. 17, 2012), http://bit.ly/Hdu8Ov. According to NCO's website, the company uses the "NCO Trigger Program" to "help companies recover accounts after all collection efforts have been exhausted and the accounts have been charged off" (NCO, Collection Services (2012), http://bit.ly/HeU8qy).

[50]Fair Debt Collection Practices Act, 15 U.S.C. § 1692d–f.

guage, contacting employers, and other blatantly illegal conduct are on the rise. Often the junk-debt buyer takes payments prior to suing and then fails to credit those payments (or even mention them) in the lawsuit. As noted above, these junk-debt buyers are not immune from the Fair Debt Collection Practices Act.

13. Consider Subpoenaing the Forward Flow Agreement

As with some of the prior tips, the argument against subpoenaing the forward flow agreement is that it may force the plaintiff to prepare and hurt your client's case. Anecdotal experience, however, is that junk-debt buyers never want you to see all of the disclaimers contained in the forward flow agreement. In essence, the agreement and related documents show no warranty of anything at all, and sometimes there is an express representation that no investigation has been made by the seller to verify the validity or accuracy of any account being sold. Reports concerning the sale of charged-off debt by JP Morgan Chase show the depth of this problem. In 2010 the *New York Times* reported the story of Linda Almonte, who blew the whistle on JP Morgan Chase's sale of 23,000 delinquent accounts, which had a face value of $200 million:

> "We found that with about 5,000 accounts there were incorrect balances, incorrect addresses," she said. "There were even cases where a consumer had won a judgment against Chase, but it was still part of the package being sold."[51]

Stories like this underscore that most sales of junk debt are made without any representations or warranties and often without any duty by the seller to investigate the validity of the debt or the accuracy of its records.

14. Settlements of Affirmative Claims Should Include Certain Terms

One of the biggest problems of junk debt is its zombielike nature. It just keeps reappearing and is hard to kill. Thus, whenever you settle an affirmative claim, the concept of finality should be foremost in your mind. You want judgment in favor of your client (and release of judgment against your client, if applicable). You should also insist on deletion of the trade line with the three credit reporting agencies.[52] In the settlement agreement include language stating that this is the settlement of a disputed debt. If your client did not owe the money as alleged, it should not be portrayed as otherwise. The agreement should also include a statement that no IRS Form 1099 will be issued (which is sent when an undisputed debt is forgiven, possibly resulting in taxable income to your client).[53]

15. Use Manuals and Listservs

The National Consumer Law Center's manuals addressing junk-debt-buyer cases, *Collection Actions* and *Fair Debt Collection*, are essential references for any consumer advocate.[54] To these invaluable resources, add a copy of your state's court rules. Keep these items on your desk, and use them often. The National Consumer Law Center also maintains valuable listservs on debt defense and the Fair Debt Collection Practices Act. Join them.

Final Thoughts

Until now junk-debt buyers have faced little to no opposition. They have had little financial incentive to verify the validity of their claims. They have flooded the courts with bogus documents to ex-

[51]David Segal, *Debt Collectors Face a Hazard: Writer's Cramp*, New York Times, Nov. 1, 2010, at A1, http://nyti.ms/HhzFnK.

[52]Keep in mind that the same debt may appear more than once on your client's credit report. It may have been reported by the original creditor and by more than one junk-debt buyer. A dismissal may allow the junk-debt buyer to continue reporting the debt because there has been no determination by the court of the validity of the debt. If the court enters judgment for the alleged debtor, there has been a determination and any reference on the credit report to the debt and the junk-debt buyer should be deleted.

[53]See Robert J. Hobbs et al., National Consumer Law Center, The Practice of Consumer Law 153–70 (2d ed. 2006).

[54]Jonathan Sheldon et al., National Consumer Law Center, Collection Actions (2d ed. 2011); Robert J. Hobbs et al., National Consumer Law Center, Fair Debt Collection (7th ed. 2011).

tract hundreds of millions of dollars from unsophisticated consumers, fewer than 1 percent of whom are represented by a lawyer.[55] Allowing debt buyers to run roughshod over consumers and the courts is a denial of due process. It enriches junk-debt buyers at the expense of consumers, legitimate creditors, and our judicial system. I hope that the tips offered here will be of some guidance in going out and restoring access to justice for the consumers and families who often are being forced—wrongly—to decide between paying legitimate creditors, paying junk-debt buyers, and filing for bankruptcy. Trying and winning these cases will have the systemic impact of helping restore a sense of justice and fairness which lies trapped beneath the heavy weight of the junk-debt buyer.

Author's Acknowledgments

Thank you to all of my colleagues and former students who continue the pursuit of justice and due process, sometimes in the face of ridicule and disdain, often with financial sacrifice.

[55]Wilner & Sheftel-Gomes, *supra* note 6, at 3, 9. In a study of New York City debt collection cases, researchers found that creditors obtained default judgment in 81.4 percent of cases in their sample. Less than 1 percent of people sued by creditors had legal counsel (*id.* at 7–8). In my experience, in Maryland less than 1 percent of defendants are represented in debt-buyer cases.

Pre-Trial Procedures in Breach of Contract Actions
Filed in the Philadelphia Municipal Court

This memorandum sets forth the procedures in breach of contract actions filed in the Philadelphia Municipal Court to be followed by litigants, court personnel and trial commissioners prior to trial before a judge. In promulgating these procedures, the court is mindful of the requirements and limitations set forth in the Pennsylvania and Philadelphia Municipal Court Rules of Civil Procedure and the fact that there are no answers, new matter or preliminary objections in the Philadelphia Municipal Court.

With the exception of contracts controlled by the Statute of Frauds, breach of contract actions may be based on oral or written contracts. Pa.R.Civ.P. 1019(i) requires that "[w]hen any claim...is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient to so state, together with the reason, and to set forth the substance in writing." Philadelphia Municipal Court Rule of Civil Procedure 109(a)(4) is consistent with Pa.R.Civ.P. 1019(i) and provides that:

> Where the claim is based upon a writing, a copy of the writing or pertinent portions thereof shall be attached. If the writing is not available, it is sufficient to so state, together with reasons, and to set forth the substance of the writing.

Additionally, Philadelphia Municipal Court Rule of Civil Procedure 109(a)(2) requires that a statement of claim contain an "[i]temization of the sums claimed" and an "attached copy of an invoice or statement of account."

The Philadelphia Municipal Court has a pre-printed affidavit for the convenience of the plaintiff in those instances in which the writing upon which the breach of contract action is based or the pertinent invoice or statement of account is unavailable at the time

that the Statement of Claim is filed. The affidavit is titled "General Affidavit for Municipal Court Rule #109." It requires the affiant to check off a box stating that the invoice, statement of account, writing or contract is unavailable and to explain the reason that it is unavailable. Too often, the appropriate box is checked off without any explanation of the reason for the document's unavailability.

Pa.R.Civ.P. 1037 provides the procedure for the entry of a default judgment and for the assessment of damages. Rule 1037(b) provides that "[t]he prothonotary, on praecipe of the plaintiff, shall enter judgment against the defendant for failure to file within the required time a pleading to a complaint which contains a notice to defend...for any relief admitted to be due by the defendant's pleading." In the Philadelphia Municipal Court, a defendant is not required to file an answer to the statement of claim and does not have the opportunity to set forth new matter or challenge the statement of claim by filing preliminary objections. Additionally, there is no requirement in the Philadelphia Municipal Court that the plaintiff serve a ten-day letter before seeking a default judgment. See Pa.R.Civ.P. 237.

In many breach of contract actions, the amount claimed by the plaintiff is a sum certain or an amount that can be made certain by computation. When, however, a sum certain is not claimed, Rule 1037(b)(1) provides that damages shall be assessed at trial. Rule 1037(b)(1) provides that:

> The prothonotary shall assess damages for the amount to which the plaintiff is entitled if it is a sum certain or which can be made certain by computation, but if it is not, the damages shall be assessed at a trial at which the issues shall be limited to the amount of the damages.

Rule 1037 also provides a procedure in those cases in which damages are sought for the cost of repairs to property. In such cases, damages may be assessed in the amount

set forth in an affidavit by the person making the repairs. Pursuant to Rule 1037(b)(2)(ii), the affidavit "shall contain an itemized repair bill setting forth the charges for labor and materials used in the repair of the property; it shall also state the qualifications of the person who made or supervised the repairs, that the repairs were necessary, and that the prices for labor and material were fair and reasonable and those customarily charged." Additionally, Rule 1037(b)(2)(iii) requires that the plaintiff provide a copy of the affidavit to the defendant within ten days of the hearing.

I. The Statement of Claim

In a breach of contract claim, the Statement of Claim shall set forth, at a minimum, the following: (1) the name and last known address of the parties; (2) an averment of the date on which the alleged contract was entered into by the parties; (3) an averment of the material terms of the alleged contract and whether or not the alleged contract is oral or written; (4) an averment that the alleged contract was breached and an explanation of the nature of the alleged breach; and (5) an averment that the plaintiff suffered damages as a result of the alleged breach and an itemization of the alleged damages, separated by the categories of principal, interest, late fees, attorney's fees, collection fees and any other amount.

The following must be attached as exhibits to the Statement of Claim: (1) the last statement or last invoice and (2) a copy of the contract or the material part of the contract if the contract is alleged to be in writing. When the plaintiff is not the original creditor and the last statement or last invoice is not available, a verification from the original or present creditor in the form attached to this memorandum may be used in place of the last statement or last invoice. If the last statement, last invoice, verification or contract is not

accessible to the plaintiff at the time of filing, the plaintiff shall so state and provide the reason for the unavailability of any of those documents. The plaintiff may use the Philadelphia Municipal Court affidavit titled "General Affidavit for Municipal Court Rule #109."

Philadelphia Municipal Court personnel do not review every Statement of Claim that is filed. The Philadelphia Municipal Court retains the authority to reject a Statement of Claim at the time that it is filed or at a later time if it fails on its face to meet the above criteria. A review of whether or not a Statement of Claim meets the above criteria, however, will ordinarily not be made until the case is before a trial commissioner or judge.

II. Listing Before a Trial Commissioner

Cases based on contract claims will ordinarily be scheduled initially before a trial commissioner. In the event that there is service on the defendant, the defendant fails to appear and the plaintiff seeks a default judgment, the trial commissioner will examine the Statement of Claim and attached documents to determine whether or not the pleader has complied with the requirements set forth above. In the event that the plaintiff has averred that certain documents were unavailable at the time of filing or filed an affidavit pursuant to Rule 109, the pleader may submit to the trial commissioner the required documents that were missing at the time that the Statement of Claim was filed. If the plaintiff does not have the required documents, the trial commissioner shall dismiss the matter without prejudice unless the plaintiff withdraws the matter without prejudice.

The trial commissioner shall not accept any document intended to show the amount allegedly due that was generated by an attorney's office or any entity other than a

document generated by the original creditor or a verification in the form attached to this memorandum. In the event that there is a disagreement between the trial commissioner and a plaintiff as to whether or not the trial commissioner should accept a document, the case shall be transferred to a judge who will decide whether or not the document is acceptable.

If the Statement of Claim sets forth the necessary averments and has attached to it the necessary documents, the trial commissioner shall enter a default judgment in the amount that is supported by the documentation submitted by the plaintiff. For example, assume that a plaintiff seeks the principal amount of $1,000, interest in the amount of $60 and attorney's fees in the amount of $250, and that the supporting documentation provides for the recovery of the claimed principal and interest at a certain rate, but not for attorney's fees. In that situation, the trial commissioner shall enter a default judgment in the amount of $1,060 plus court costs, which is the principal and interest but not the attorney's fees.

The plaintiff does not need to include a calculation of how the amounts claimed were computed and the trial commissioner does not need to calculate those amounts. Therefore, in the example in the preceding paragraph, the plaintiff need only aver that $60 interest is due and attach supporting documentation showing that interest at a certain rate is permitted. The plaintiff does not have to include calculations showing that $60 as opposed to $40 in interest is due and the trial commissioner does not have to make such calculations before entering a judgment that includes a $60 interest award.

In the event that damages are not for a sum certain or for an amount that can be made certain by computation, the trial commissioner shall refer the matter to a judge for

an assessment of damages hearing. Additionally, in the event that the plaintiff disagrees with the amount of the judgment that the trial commissioner intends to enter, the matter shall be referred to a judge to make a decision as to the amount.

The plaintiff also may seek to withdraw the case without prejudice. If the defendant appears, the parties may settle the case and have it marked settled, discontinued and ended; enter into a judgment by agreement; or have the case tried before a judge.

III. Conclusion

The procedures set forth above are meant to be consistent with the applicable rules of civil procedure and to provide guidance to those litigants who bring contract claims in the Philadelphia Municipal Court and continuity in the manner in which such claims are handled prior to trial. These procedures are not meant to apply to trials of breach of contract claims before judges of the Philadelphia Municipal Court.

/s/ Bradley K. Moss
BRADLEY K. MOSS, S.J.

Dated: January 21, 2009
Effective as of: February 23, 2009

Verification

(To be used by a person associated with the original creditor)

I, *[name of person making Verification]*, hereby verify that:

1. I am employed by *[name of original creditor]* as *[title]* and am authorized to make this Verification on behalf of *[name of original creditor]*.

2. I reviewed the following [check all that are applicable]: [ ] (a) computerized documents; [ ] (b) hard copy documents; and [ ] (c) other (specify) _____ _____ relating to Account No. _____. The foregoing Account was opened on *[date]* in the name of *[name of debtor]*.

3. Based on my review of the foregoing documents, there is due and payable the principal sum of $_____, exclusive of interest, late fees, collection fees and any other additional fees permitted under the terms of the agreement with the debtor named in paragraph 3 above and *[name of the original creditor]*. The documents that I reviewed were produced by *[name of original creditor]*.

4. Based on my review of the foregoing documents, there are no payments that have not been credited.

5. The facts set forth in this Verification are true and correct to the best of my knowledge, information and belief. This Verification is made subject to the penalties for making an unsworn falsification to authorities in violation of 18 Pa. C.S. § 4904.

_____

[name of person making Verification]

Date: _____

Verification

(To be used by a person associated with the present creditor)

I, *[name of person making Verification]*, hereby verify that:

1. I am employed by *[name of present creditor]* as *[title]* and am authorized to make this Verification on behalf of *[name of present creditor]*. *[Name of present creditor]* is the successor in interest to *[name of original creditor]*.

2. I reviewed the following [check all that are applicable]: [ ] (a) computerized documents; [ ] (b) hard copy documents; and [ ] (c) other (specify) _____ _____ relating to Account No. _____. The foregoing Account of *[name of original creditor]* was opened on *[date]* in the name of *[name of debtor]*. The documents that I reviewed were produced by *[name of original creditor]*.

3. Based on my review of the foregoing documents, there is due and payable the principal sum of $_____, exclusive of interest, late fees, collection fees and any other additional fees permitted under the terms of the agreement with the debtor named in paragraph 3 above and *[name of the original creditor]*.

4. Based on my review of the foregoing documents, there are no payments that have not been credited.

5. The facts set forth in this Verification are true and correct to the best of my knowledge, information and belief. This Verification is made subject to the penalties for making an unsworn falsification to authorities in violation of 18 Pa. C.S. § 4904.

_____

[name of person making Verification]

Date: _____

Verification

(To be used by a person associated with the present creditor)

I, *[name of person making Verification]*, hereby verify that:

1. I am employed by *[name of present creditor]* as *[title]* and am authorized to make this Verification on behalf of *[name of present creditor]*. *[Name of present creditor]* is the successor in interest to *[name of original creditor]*.

2. I reviewed the following [check all that are applicable]: [ ] (a) computerized documents; [ ] (b) hard copy documents; and [ ] (c) other (specify) _____ relating to Account No. _____. The foregoing Account of *[name of original creditor]* was opened on *[date]* in the name of *[name of debtor]*. The documents that I reviewed were produced by *[name of original creditor]*.

3. Based on my review of the foregoing documents, there is due and payable the principal sum, known as "the charge off balance," of $_____. This amount includes the following (check all that are appropriate): [ ] interest; [ ] late fees; [ ] collection fees; and [ ] any other additional fees permitted under the terms of the agreement with the debtor named in paragraph 3 above and *[name of the original creditor]*. This sum does not include the following (check all that are appropriate): [ ] interest; [ ] late fees; [ ] collection fees; and [ ] any other additional fees permitted under the terms of the agreement with the debtor named in paragraph 3 above and *[name of the original creditor]*.

4. Based on my review of the foregoing documents, there are no payments that have not been credited.

5. The facts set forth in this Verification are true and correct to the best of my knowledge, information and belief. This Verification is made subject to the penalties for making an unsworn falsification to authorities in violation of 18 Pa. C.S. § 4904.

_____

[name of person making Verification]

Date: _____

HUMAN RIGHTS WATCH

RUBBER STAMP JUSTICE

US Courts, Debt Buying Corporations, and the Poor

proceedings in the district court in Upper Marlboro, Maryland and in Philadelphia's municipal court. We have also received reports of similar proceedings in courts in Texas, Georgia, and Tennessee.[162] In our view, this approach to resolving debt buyer lawsuits is inherently abusive. In a very literal sense, it allows debt buyers to commandeer the machinery and coercive power of the court in service of their claims.

Philadelphia's "Judgeless Courtroom"

On a typical afternoon in courtroom 5 of Philadelphia's Municipal Court, more than 120 alleged debtors were summoned to appear in court. The majority were being sued by debt buyers. None of the 20 or so defendants who appeared had lawyers.

The first people to arrive—a tired-looking mother pushing a baby stroller and a woman who came limping down the corridor with a walker—looked confused. They were a few minutes late, but the courtroom was empty aside from five men in suits chatting at the front of the room. These were the attorneys for the debt buyers, and some of them had thirty or more cases on the docket that day. The attorneys brusquely directed the arriving defendants to a sign-in sheet and told them to sit down and wait.

Eventually another man in a shirt and tie entered the room. He shook hands and exchanged pleasantries with the plaintiffs' attorneys, then busied himself putting a sheaf of new paper into the printer and loading paper cups into the water cooler. He was a trial commissioner, the only employee of the court in the room and the person nominally in charge of these proceedings. At no point during the afternoon did he introduce himself to the defendants in the room, explain why they were there, or tell them that they had a right to a hearing in front of a judge if they wanted one. In fact, he did not address the room at all.

The attorneys began working their way down the sign-in sheet, taking the defendants one-by-one into a small meeting room at the back of the court, out of the trial commissioner's earshot. From the corridor outside the courtroom it was possible to listen in on some of these conversations. "You have been summoned here because you owe a debt that you failed to repay," one debt buyer attorney sternly admonished an elderly man. "You can have a trial if you want one but believe me, it will be better for you if you just agree to a payment plan with me right now." The man stammered that he did once have the credit card at issue in the case, but that the amount of the alleged debt struck him as impossibly high. "It's called compound interest," the attorney replied acidly. He produced no evidence in support of his

[162] Email correspondence and telephone interviews with consumer rights attorneys (names withheld), August and September 2015. See also, Jessica Silver-Greenberg, "In Debt Collecting, Location Matters," *Wall Street Journal*, July 18, 2011, http://www.wsj.com/articles/SB10001424052702303365804576433763597389214 (accessed October 28, 2015).

claim. The defendant agreed to pay the full amount he allegedly owed, in installments of $50 per month.[163]

No one gets a trial unless they make it through this gauntlet unscathed. As one Pennsylvania defense attorney complained, for all practical purposes the court is allowing debt buyers to "just use the court as one of their collection tools."[164]

The trial commissioner on duty the day Human Rights Watch attended these proceedings said that defendants wind up agreeing to pay the plaintiffs about 80 percent of the time. While the plaintiffs' attorneys busied themselves trying to pry payment agreements out of their defendants, the trial commissioner sat quietly at the front of the room entering default judgments against more than 100 people who had failed to appear.[165]

In September 2015, the municipal court started a pilot program that allows defendants summoned to these proceedings to access independent legal advice and representation provided by volunteer attorneys. Initially limited in scope to just 30 defendants once per month—a tiny fraction of the total—the program could mark a responsible step forward if it is ultimately ramped up and expanded to bolster the rights of all defendants. This, however, would require a significant commitment of public resources.[166]

In Maryland's Prince George's County, the district court has attracted controversy for this practice.[167] Several times a month, the court summons defendants *en masse* to courtrooms that no judge presides over. A judge initiates the proceedings, explains to defendants why they are there, and informs them that they are entitled to a hearing if they want one.[168] Once the proceedings are underway, though, the judge leaves the room.

At this point, plaintiffs' attorneys call defendants forward one at a time to tables set up inside the courtroom and attempt to persuade them to agree to pay the plaintiffs' claims.

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[163] Human Rights Watch court observation, Philadelphia Municipal Court, February 4, 2015.

[164] Human Rights Watch interview with defense attorney (name and location withheld), December 18, 2014.

[165] Human Rights Watch court observation, Philadelphia Municipal Court, February 4, 2015.

[166] Human Rights Watch telephone interview with attorney (name and location withheld), October 28, 2015. Human Rights Watch requested comment from Supervising Judge Bradley Moss. However, after initially expressing willingness to respond to written questions, Judge Moss failed to reply to our correspondence or to acknowledge multiple follow-up emails and phone calls. Letter and email correspondence on file with Human Rights Watch.

[167] Maria Aspan, "Courthouse 'Rocket Dockets' Give Debt Collectors Edge over Debtors," *American Banker*, February 11, 2014, http://www.americanbanker.com/issues/179_29/rocket-dockets-judge-less-courts-give-debt-collectors-edge-over-debtors-1065545-1.html?zkPrintable=1&nopagination=1 (accessed October 9, 2015).

[168] This had not been the case in the past, and seems to represent a reform undertaken following publication of the American Banker expose cited above.

PHILADELPHIA MUNICIPAL COURT
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

34 South 11th Street, Philadelphia, PA. 19107

Marsha H. Neifield, President Judge Patricia R. McDermott, Deputy Court Administrator

STATEMENT OF CLAIM

Code: Consumer Purchase - (4) SC/CP: # S [redacted]

Asset Acceptance, LLC 28405 Van Dyke WARREN, MI 48093	[redacted] PHILADELPHIA, PA 19138
Plaintiff(s)	*Defendant(s)*

Service Address (information) if other than above:

To the Defendant: Plaintiff is seeking a money judgment against the Defendant(s) based on the following claim:

AND NOW, comes Plaintiff, by and through its attorneys, Fulton, Friedman & Gullace, LLP, and files this Complaint and in support avers as follows:
1. Plaintiff is the current owner of, and/or successor to, the obligation sued upon, and was assigned all rights, title and interest to defendant's NEW YORK & COMPANY / World Financial Network National Bank account XXXXX1759 (ASSET ACCEPTANCE LLC Number [redacted]) (hereinafter "the account").
2. Upon information and belief, Defendant(s), [redacted], has a last known address(es) of: [redacted] PHILADELPHIA PA 19138
3. Upon information and belief, the account is based on a written credit agreement entered into between Defendant and the original grantor; as provided to Plaintiff, the material terms of the agreement applicable to accounts issued by NEW YORK & COMPANY / World Financial Network National Bank are attached hereto.
4. Upon information and belief, defendant(s) used or authorized the use of the account to obtain loans from the original credit grantor for the purpose of obtaining goods, and/or services and/or

(more)

Summons to the Defendant

You are hereby ordered to appear at a hearing scheduled as follows:

Citation al Demandado

Por la presenta, Usted esta dirljido a presentarse a la siguiente:

34 South 11th Street
Philadelphia, PA 19107
Hearing Room: 4A

August 24th, 2011

01:00 PM

Amount Claimed

Principal	$	1255.85
Interest	$	0.00
Attorney Fees	$	0.00
Other Fees	$	0.00
Subtotal	$	1255.85
Service	$	27.00
State Fee	$	10.00
Automation Fee	$	5.50
Convenience Fee	$	5.00
JCS St. Add. Surcharge	$	11.25
JCS St. Add. Fee	$	2.25
Court Costs	$	22.00
TOTAL CLAIMED	$	1338.85

Date Filed: 06/24/2011

I am an attorney for the plaintiff(s), the plaintiff's authorized representative or have a power of attorney for the plaintiff(s) in this statement of claims action. I hereby verify that I am authorized to make this verification; that I have sufficient knowledge, information and belief to take this verification or have gained sufficient knowledge, information and belief from communications with the plaintiff or the persons listed below and that the facts set forth are true and correct to the best of my knowledge, information and belief. I nnderstand that this verification is made subject to the penalties set forth in 18 Pa. C.S. § 4904, which concerns the making of unsworn falsifications to authorities. If I am an authorized representative or have a power of attorney, I have attached a completed Philadelphia Municipal Court authorized representative form or a completed power of attorney form.

DAVID R. GALLOWAY
Signature Plaintiff/Attorney
Atty ID #: 087326

Address & 130B GETTYSBURG PIKE
Phone MECHANICSBURG, PA 17055
866-563-0809

NOTICE TO THE DEFENDANT, YOU HAVE BEEN SUED IN COURT. PLEASE SEE ATTACHED NOTICES

AVISO AL DEMANDADO LE HAN DEMANDADO EN CORTE. VEA POR FAVOR LOS AVISOS ASOCIADOS.

If you wish to resolve this matter without appearing in court, please contact the attorney shown above immediately.

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PHILADELPHIA MUNICIPAL COURT
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

34 South 11th Street, Philadelphia, PA. 19107

Marsha H. Neifield, President Judge Patricia R. McDermott, Deputy Court Administrator

SMALL CLAIMS COMPLAINT

SC-11-[redacted]

Asset Acceptance, LLC 28405 Van Dyke WARREN, MI 48093 *Plaintiff*	[redacted] PHILADELPHIA, PA 19138 *Defendant(s)*

DESCRIPTION OR NATURE OF VIOLATION

cash advances.
5. Defendant(s) failed to make full payment of the amount owed on the account.
6. Upon information and belief, the last payment posted to the account on 07/30/2007.
7. The account shows that the Defendant(s) owe(s) a balance of $1255.85.

WHEREFORE, Plaintiff respectfully requests this Honorable Court enter Judgment in favor of the Plaintiff and against Defendant(s) in the amount of $1255.85, plus costs of this action, and any other relief as this Court deems just and reasonable.

Verification

I, PAMELA McCULLOUGH, hereby verify that:

1. I am employed by ASSET ACCEPTANCE LLC as SUPERVISOR and am authorized to make this Verification on behalf of Plaintiff. ASSET ACCEPTANCE LLC is the successor in interest to NEW YORK & COMPANY / World Financial Network National Bank.

2. I reviewed the following:

[X] (a) computerized documents;

[ ] (b) hard copy documents; and

[ ] (c) other (*specify*) _____ relating to Account No. XXXXX1759. The foregoing Account was opened on 09/22/2000 in the name of [redacted].

3. Based on my review of the foregoing documents, there is due and payable the principal sum of $1255.85, inclusive of interest, late fees, collection fees and any other additional fees permitted under the terms of the agreement with the debtor named in paragraph 2 above and ASSET ACCEPTANCE LLC. This sum does not include any attorney's fees and court costs, which may be awarded by a Court.

4. Based on my review of the foregoing documents, there are no payments that have not been credited.

5. The facts set forth in this Verification are true and correct to the best of my knowledge, information and belief. This Verification is made subject to the penalties for making an unsworn falsification to authorities in violation of 18 Pa. C.S. § 4904.

Pamela McCullough

Date: MAR 25 2011

FFG# 267648

Credit Card Terms and Conditions

IMPORTANT RATE, FEE AND OTHER COST INFORMATION	
ANNUAL PERCENTAGE RATE FOR PURCHASES	22.8%
GRACE PERIOD FOR REPAYMENT OF BALANCES FOR PURCHASES	25 days for Regular Revolving Purchases; 25 days minimum for Promotional Credit Plans
METHOD OF COMPUTING THE BALANCE FOR PURCHASES	Average Daily Balance (including new purchases)
ANNUAL FEES	None
MINIMUM FINANCE CHARGE	$1.00 for any Billing Period in which a Finance Charge of less than $1.00 would otherwise be imposed.
LATE PAYMENT FEE	None if your Account Balance is less than $20.00; $20.00 if your Balance is $20.00 to $99.99; $25.00 if your Balance is $100.00 to $349.99; $29.00 if your Balance is equal to or greater than $350.00.

CHANGES. We may add, change or delete any of the terms of your Account and the corresponding Credit Card Agreement (including, but not limited to, Annual Percentage Rate and fees), at any time with or without notice, except as may be required by applicable federal and Ohio law. If notice is required, it will be mailed to you at least fifteen (15) days prior to the effective date of the change. These additions, changes or deletions of terms wil apply to new purchases and to all amounts you already owe us.

The information about costs of the credit card account described in this application is accurate as of August 1, 2008. This information may have changed after that date. To find out what may have changed, please call or write us at:

World Financial Network National Bank
PO Box 182122
Columbus, Ohio 43218-2122

1-800-889-0494 (TDD/TTY 1-800-695-1788)

The **Ohio laws** against discrimination require that all creditors make credit equally available to all creditworthy customers, and that credit reporting agencies maintain separate credit histories on each individual upon request. The Ohio civil rights commission administers compliance with this law.

California Residents: If you are married, you may apply for a separate account. To receive an application, please write to:

World Financial Network National Bank
PO Box 182122
Columbus, Ohio 43218-2122

New York Residents: A consumer credit report may be ordered in connection with the processing of an application, or subsequently with the update, renewal or extension of credit. Upon your request, you will be informed of whether or not a consumer credit report was ordered, and if it was, you will be given the name and address of the consumer-reporting agency that furnished the report.

Rhode Island and Vermont Residents: A consumer credit report may be ordered in connection with the processing of an application, or subsequently for purposes of review or collection of the account, increasing the credit line on the account, or other legitimate purposes associated with the account.

Wisconsin Residents: No provision of any marital property agreement, unilateral statement under Section 766.59 of the Wisconsin statutes or court order under Section 766.70 adversely affects the interest of the creditor, World Financial Network National Bank, unless the Bank, prior to the time credit is granted is furnished a copy of the agreement, statement or decree or has actual knowledge of the adverse provision when the obligation to the Bank is incurred.

I am applying to World Financial Network National Bank (WFNNB) for, and hereby request, a New York & Company credit card account for personal, family or household use. I hereby authorize WFNNB to investigate my credit record. The information that I have supplied is true and correct. I acknowledge that I am a permanent resident of the United States. I agree that a credit report may be obtained for any lawful purpose, including in connection with the processing of an application, or subsequently with the update, renewal or extension of credit. Upon my request, I will be informed of whether or not a consumer credit report was ordered, and if it was, I will be given the name and address of the consumer-reporting agency that furnished the report. I agree to be bound by the terms of the Credit Card Agreement. I acknowledge that I will receive a Credit Card Agreement upon approval. I also acknowledge that there is no agreement between WFNNB and me until WFNNB approves my credit application and accepts the Credit Card Agreement at its office in Ohio and that the Credit Card Agreement is deemed to be made in Ohio. Cards are issued and credit is extended by WFNNB, Gahanna, Ohio.

PLEASE NOTE:
BY SUBMITTING THIS CREDIT APPLICATION, YOU ARE AGREEING TO THE FOLLOWING WITH RESPECT TO CERTAIN CONSUMER INFORMATION ABOUT YOU.

You hereby authorize World Financial Network National Bank ("us" or "we") to furnish our decision to issue an account to you to New York and Company. You hereby authorize us to furnish, if your application is approved, information concerning your account to credit bureaus, other creditors and New York and Company.

Check your information before submitting. We cannot process any submission without a complete and accurate name, address, date of birth and social security number. By submitting this Application you are acknowledging having read and understood the IMPORTANT RATE, FEE AND OTHER COST INFORMATION and, if approved, agreeing to be bound by them.

CLOSE

B3

PHILADELPHIA MUNICIPAL COURT
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

34 South 11th Street, Philadelphia, PA. 19107

Marsha H. Neifield, President Judge Patricia R. McDermott, Deputy Court Administrator

SC-1[redacted]

Petitioner/Plaintiff:	Hearing Date:
Asset Acceptance, LLC 28405 Van Dyke WARREN, MI 48093	08/24/2011
Respondent/Defendant: [redacted] PHILADELPHIA, PA 19138	**Defendant #:** [redacted] — **Courtroom/Time:** 4A 01:00 PM

Notice of Intent to Defend: No

AFFIDAVIT OF SERVICE

1) I served _____ on 7/1/11, at 5:38 P.M.

2) Location of Service Address [redacted] Phila Pa. 19138

☑ at home ☐ place of business ☐ other

3) (fill in one box)

- ☐ Defendant personally served.
- ☐ Adult family member with whom said Defendant(s) reside(s).
- ☐ Adult in charge of Defendant(s) residence.
- ☐ Adult in charge of Defendant(s) residence who refuses to give name or relationship.
- ☐ Manager/Clerk of Place of Lodging In Which Defendant(s) Reside(s).
- ☐ Agent or person in charge of Defendant(s) office or usual place of business.
- ☐ Other _____

Name _____ Title/Relationship _____

Age 31 Height 5'0" Weight 135 Race Blk Sex Female

AFFIDAVIT OF NO SERVICE

1) ___/___/___, at _____, ___M. ☐ Moved ☐ Unknown ☐ No Answer ☐ Vacant ☐ Other

2) ___/___/___, at _____, ___M. ☐ Moved ☐ Unknown ☐ No Answer ☐ Vacant ☐ Other

3) ___/___/___, at _____, ___M. ☐ Moved ☐ Unknown ☐ No Answer ☐ Vacant ☐ Other

If Other _____
(Explanation)

I VERIFY that: 1) I am a competent adult over the age of eighteen, 2) I am not a party to this action, not an employee of a party in the action or of an attorney to the action, and 3) that all of the statements made herein are true and correct and I acknowledge that I am subject to the penalties of 18 PA C.S. §4904 relating to Unsworn Falsification to Authorities.

Signature of Server: [signature] Print or Type:

Name of Server: K. Dukes

Address: 301 Spring Garden St.

Phone Number: (215) 925-6600

SC-10005/01

10003-1292022-10-tC

WW

PHILADELPHIA MUNICIPAL COURT
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

1339 Chestnut Street, 10th Floor, Philadelphia, PA 19107

Marsha H. Neifield, President Judge Patricia R. McDermott, Deputy Court Administrator

STATEMENT OF CLAIM

Code: Consumer Purchase - (4) SC/CP: #

LVNV FUNDING, LLC 15 SOUTH MAIN ST GREENVILLE, SC 29601	
Plaintiff(s)	*Defendant(s)*

Service Address (information) if other than above:

To the Defendant: Plaintiff is seeking a money judgment against the Defendant(s) based on the following claim:

Plaintiff, LVNV FUNDING, LLC, is the Assignee and Successor in Interest of Account number ending in 7829; and, said credit account was issued to Defendant(s) by HSBC Bank Nevada, N.A./ALLIANCE CARDS IN BRANCHES, the Original Creditor. Defendant received, accepted and used the account to its benefit. This account is in default due to defendant's failure to make timely payments. Although demand has been made, Defendant has failed to make payment of the amount due and owing. The amount due and owing as of this date is $921.77.

Summons to the Defendant

You are hereby ordered to appear at a hearing scheduled as follows:

Citation al Demandado

Por la presenta, Usted esta dirljido a presentarse a la siguiente:

1339 Chestnut Street 6th Floor
Philadelphia, PA 19107
Hearing Room: 5

2014

01:00 PM

Amount Claimed

Principal	$	921.77
Interest	$	0.00
Attorney Fees	$	0.00
Other Fees	$	0.00
Subtotal	$	921.77
Service	$	0.00
State Fee	$	10.00
Automation Fee	$	5.50
Convenience Fee	$	5.00
JCS St. Add. Surcharge	$	11.25
JCS St. Add. Fee	$	2.25
Court Costs	$	22.00
TOTAL CLAIMED	$	977.77

Date Filed: ____

a an attorney for the plaintiff(s), the plaintiff's authorized representative or have a power of attorney for the plaintiff(s) in this statement of claims action. I hereby ify that I am authorized to make this verification; that I have sufficient knowledge, information and belief to take this verification or have gained sufficient knowledge, ormation and belief from communications with the plaintiff or the persons listed below and that the facts set forth are true and correct to the best of my knowledge, ormation and belief. I understand that this verification is made subject to the penalties set forth in 18 Pa. C.S. § 4904, which concerns the making of unsworn ifications to authorities. If I am an authorized representative or have a power of attorney, I have attached a completed Philadelphia Municipal Court authorized esentative form or a completed power of attorney form.

DAVID J APOTHAKER

Signature Plaintiff/Attorney
Atty ID #: 038423

Address & Phone
520 FELLOWSHIP ROAD SUITE C-306
MT. LAUREL, NJ 08054
1-800-672-0215

NOTICE TO THE DEFENDANT, YOU HAVE BEEN SUED IN COURT. PLEASE SEE ATTACHED NOTICES

AVISO AL DEMANDADO LE HAN DEMANDADO EN CORTE. VEA POR FAVOR LOS AVISOS ASOCIADOS.

If you wish to resolve this matter without appearing in court, please contact the attorney shown above immediately.

371217

VERIFICATION

I, Amy Wood, hereby verify that:

1. I am employed by Resurgent Capital Services master servicer for LVNV Funding LLC with full authority to make this Verification on behalf of LVNV Funding LLC. LVNV Funding LLC is the successor in interest to HSBC Bank Nevada, N.A.

2. For Account # XXXXXXXXXXXX7829 I reviewed the following:

- [x] Computerized Documents
- [ ] Hard Copy Documents; and
- [ ] Other: Business System of Records

3. The foregoing account was opened on 7/27/2004 in the name of . The documents that I reviewed were produced by HSBC Bank Nevada, N.A., ALLIANCE CARDS IN BRANCHES.

4. Based on my review of the foregoing documents, at the time of the sale and assignment of the said account by HSBC Bank Nevada, N.A., there was due and owing the purchased balance of $921.77 and counsel has incorporated the facts by reference in the foregoing Complaint in Civil Action. The language in the Complaint is that of counsel and not of Plaintiff so to the extent that the contents of the Complaint are that of counsel, Plaintiff has relied upon counsel in making this verification.

5. Based on my review of the foregoing documents, there are no payments that have not been credited and the debtor named in paragraph 3 above has not asserted any counterclaims or setoffs.

6. The facts set forth in this Verification are true and correct to the best of my knowledge, information and belief. This Verification is made subject to the penalties for making an unsworn falsification to authorities in violation of 18 Pa. C.S. § 4904.

Authorized Representative

DATE: Friday, November 22, 2013

The foregoing affidavit was signed to and subscribed before me this Friday, November 22, 2013

(Notary Public)

DAYLE JOHNSON NOTARY PUBLIC SOUTH CAROLINA My Commission Expires 8-22-2022

This is an account summary. It is not a credit card statement from the originating creditor and has not previously been provided to the consumer.

Account Number: XXXXXXXXXXXX7829
Internal Account Identifier: 534633777
Portfolio ID: 19841

Current Owner: LVNV Funding LLC
Original Creditor: HSBC Bank Nevada, N.A.
Previous Owner: Capital One Bank (USA), N.A.
Summary Closing Date: 10/24/2013
Acquisition Date: 04/16/2013
Account Origination Date: 07/27/2004
Last Payment Date: 01/19/2011

***-**,

Philadelphia, PA 191

Account number	XXXXXXXXXXXX7829		
	Owing	Collected	Balance
Principal	$ 921.77	$ -	$ 921.77
Interest	$ -	$ -	$ -
Atty Fee	$ -	$ -	$ -
Misc Cost	$ -	$ -	$ -
New Balance	**$ 921.77**	**$ -**	**$ 921.77**

PAYMENT TRANSACTIONS

Transaction Date	Description	Amount

This is not from the original creditor and has not been previously provided to the customer.

This is an account summary. It is not a credit card statement. This summary has been generated on behalf of LVNV Funding LLC, account owner.

This communication is from a debt collector and this is an attempt to collect a debt. Any information obtained will be used for that purpose.

El objeto de la presente notificación es gestionar el cobro de la deuda, y toda información obtenida será utilizada a tal fin. La presente comunicación proviene de un agente de cobro de deudas.

Because interest, payments, credits, fees, and/or other permissible charges can continue to cause your account balance to vary from day to day, please contact us at 1-888-665-0374 to obtain up-to-date balance information.

DEBT COLLECTION AND BANKRUPTCY

WHAT IS BANKRUPTCY?

A practical definition: A proceeding brought in federal court by a "debtor" to discharge debts (relieve the debtor of personal liability) and/or reorganize financial affairs. Most individuals file a case under either Chapter 7 or Chapter 13 of the Bankruptcy Code.

Chapter 7

A "straight bankruptcy" in which assets of a debtor are theoretically liquidated by a Chapter 7 trustee. Creditors who file claims are then paid off with the proceeds on a pro rata basis. In reality, most individual Chapter 7 cases are declared “no-asset” cases, with no distribution made to creditors. From beginning to end, case usually lasts 3-4 months, after which the debtor is discharged of his obligation to pay most debts.

Income requirement. It is possible to earn too much to be eligible for Chapter 7, but this is not likely for most VIP clients.

Debtors can be “cash poor” but have assets that can be sold, so analysis of a debtor’s assets is crucial.

Chapter 7 is generally is not helpful when there are defaults on secured debts such as mortgages or car loans. The purpose of Chapter 7 is to discharge personal liability only. As a general rule, liens “ride through” the bankruptcy unaffected. Mortgage and auto loan creditors are routinely allowed, upon request the bankruptcy court, to proceed with enforcing lien rights if the loan is in default. Sometimes judgment liens can be avoided.

Chapter 13

A reorganization in which a debtor with "regular income" may present a good faith plan to make payments to creditors over a period of time (five years maximum). Income can be from any source, including unemployment compensation, public benefits, and contributions from friends/family. “Regular” does not preclude seasonable income. At the end of the payment period, most unpaid debts are discharged.

Chapter 13 debtors are allowed to use estate property. Chapter 13 trustee’s purpose is to collect monthly payments from the debtor and distributes to creditors.

The amount you pay is generally based upon your income minus your reasonable living expenses, called your disposable income. Excess home equity or assets like a second property, may require that a debtor pay more into the Chapter 13.

IMPORTANT CONCEPTS

1. **The Automatic Stay** - Few other legal steps can provide this immediate and powerful protection of bankruptcy. Functionally, the automatic stay is an injunction that springs into existence upon the filing of the bankruptcy petition. Prevents any attempt to enforce claims against the debtor or property of the debtor or property of the estate. It freezes a foreclosure proceeding and will prevent a sheriff's sale if notice is provided to sheriff and creditor prior to sale.

    a. Effect of Prior Bankruptcies - If debtor had one or more bankruptcies within the prior year, automatic stay may expire 30 days after petition or may not spring into existence at all. If debtor has abused bankruptcy in the past, there may also be prohibitions put in place by the bankruptcy judge.

    b. Duration- typically the length of the case, but a creditor may seek relief from the stay for cause. Relief from stay routinely granted in Chap 7 for mortgage companies where the loan is not current. In Chapter 13, relief from stay will be granted unless the plan proposes to pay arrears and current payments are maintained.

2. **The Bankruptcy Estate** - The bankruptcy estate is created by the filing of the petition. It is broadly construed to include any and all property rights of the debtor, generally as of the date of the petition. In Chapter 13 it includes property rights obtained post-petition. This includes expectant, contingent, and inchoate rights such as causes of action, expected inheritances.

    a. Exemptions - Debtor is allowed to exempt (carve out) certain amounts of property out of the estate under either the Bankruptcy Code exemptions or under non-bankruptcy and state law. Generally the federal exemptions are more generous than Pennsylvania exemptions. Exception: entireties property (owned by spouses) under PA law is immune to individual creditors of each individual spouse. Doesn't apply to joint debt.

3. **The Discharge and Exceptions to Discharge** - Entered at the end of a bankruptcy case, the discharge absolves the debtor of personal liability on most debts as well as providing other protections, including a continuing injunction against collection of discharged debts. Some debts are excluded from being discharged in bankruptcy, such as, alimony, child-support, taxes, and student loans. Some of these debts may be paid back in a Chapter 13 bankruptcy.

    a. After a discharge in Chapter 7, another Chapter 7 discharge is not possible until 8 years after that case was filed. But a Chapter 13 case filed four years after the prior Chapter 7 can give the Debtor a discharge.

BASIC PROCEDURE AND TIMELINE

1. Pre-Bankruptcy Credit Counseling Course- an absolute prerequisite to filing a bankruptcy case. Can be done online, over telephone, or in person.

2. Paperwork. A bankruptcy case is initiated by a 7-page Petition. In an emergency, this is all that needs to be filed, along with a certification that credit counseling was obtained, or exigent circumstances excused the failure to get it.

    a. Supporting schedules and statements must be filed within 14 days unless extension sought. At least one extension is usually granted. These are very in-depth documents designed to get full disclosure of a debtor's financial circumstances, including a list all debts, assets, income, living expenses and prior financial activities.

    b. Means testing: A form added after Bankruptcy Code was amended in 2005. Applies to debtors whose debts are primarily consumer (i.e. personal vs. business). Essentially looks at a debtor's income for the six months prior to filing the bankruptcy. Used to determine whether a debtor should be in Chapter 7 or Chapter 13 and the minimum length of a Chapter 13 plan. Generally not an issue for VIP clients.

3. Fees: Chapter 7 filing fee is $335, payable in installments or *in forma pauperis* application is an option.

4. Meeting of creditors. Generally held 30-45 days following the filing of the petition. Creditors are invited to attend but rarely do. In most cases, this is the only proceeding a debtor has to attend. The Trustee (Chapter 7 or 13) questions debtor regarding her petition. In Chapter 13, the Trustee also wants to ensure that the debtor's proposed plan is feasible, i.e. the debtor can afford the payments, and the plan is funded sufficiently to pay the claims that need to be paid.

5. Discharge

    a. In Chapter 7, the discharge order is generally entered about 60 days following the meeting of creditors. The case is closed.

    b. In Chapter 13, discharge is entered after all plan payments are completed, generally three to five years after the petition date.

    c. After the case is closed, the automatic stay ends, but the discharge injunction still protects debtor from collection of discharged debts.

ANALYSIS OF A VIP CLIENT FOR BANKRUPTCY

A thorough bankruptcy analysis should always be reviewed by a practitioner with experience, but the following are some factors to consider in determining whether your client should be referred to Philadelphia Legal Assistance for a bankruptcy intake.

1. **The Total Amount of Debt.** Bankruptcy is a powerful tool, hence the availability of a Chapter 7 discharge only once every 8 years. Client should consider whether the amount of debt is worth using bankruptcy to address.

2. **Is Your Client "Collection Proof"?** In Pennsylvania, wages cannot be directly garnished for most judgment debts. However, money in a bank account can be garnished unless it is Social Security benefits or retirement income. Unless the client owns real estate, a judgment against them may not have much of a consequence.

3. **Can Your Client Handle the Stress of Collection Activity?** Sometimes the emotional relief of the automatic stay and discharge injunction may be enough reason to file.

4. **Chapter 7 Asset Liquidation Analysis**. For most VIP clients, the biggest asset is their home. Only the debtor's interest in property becomes part of the bankruptcy estate, so if the client owns only a percentage of the property (i.e. with a spouse or relative), only that portion is considered.

    a. Sample liquidation analysis: Property value minus liens and exemption

Value of the Property:	$140,000.00
Costs of sale (10% minimum in Philly):	$ 14,000.00
1st Mortgage:	$ 75,500.00
2nd Mortgage:	$ 14,000.00
Water liens:	$ 2,135.00
Gas liens:	$ 750.00
LVNV Judgment lien:	$ 1,245.00
Equity:	$ 32,370.00
Minus Bankruptcy exemption (per debtor):	$ 25,150.00
Potential Non-exempt equity	**$ 7,220.00**

b. Valuing Property - This can be tricky. Values can range depending on the source you use

   i. Websites:
   www.zillow.com
   www.eppraisal.com
   https://property.phila.gov/

   ii. Condition of the property is very relevant. Ask client to take pictures on their phone. Many VIP clients live in properties that are in great need of repairs.

   iii. Appraisal. This is ideal, but an appraisal can cost $300 to $400.

c. Non-bankruptcy exemption: Property owned by spouses (tenancy by the entireties) is fully exempt from non-joint creditors.

5. The Chapter 13 Option:

a. If a prior Chapter 7 case in last eight years
b. A way to get discharge of the majority of unsecured debt where a small amount of non-exempt equity is an issue.
c. Free representation generally not an option.
d. Costs: Filing fee ($310); credit counseling courses ($15- $25 ave); attorney fees (anywhere between $3,000 to $4,500 for basic bankruptcy services)
   i. Philadelphia bar association referral service has list of attorneys that may charge less

USTED ESTA ORDENADO COMPARECER EN Arbitration Hearing 1880 JFK Blvd. 5th fl. at 09:15 AM -
You must still comply with the notice below. USTED TODAVIA DEBE CUJPLIR CON EL AVISO PARA DEFENDERSE.
This matter will be heard by a Board of Arbitrators at the time, date and place specified but, if one or more parties is not present at the hearing, the matter may be heard at the same time and date before a judge of the court without the absent party or parties.
There is no right to a trial denovo on appeal from a decision entered by a Judge.

Filed and Attested by PROTHONOTARY 12-11-2015 PROTHONOTARY

Jorge M. Pereira, Esq.
JMPereira@marinoslaw.com
Atty. I.D. #75242
Douglas M. Marinos, P.C.
101 N. Cedar Crest Blvd.
Allentown, PA 18104
(610) 434-2814

THIS IS AN ARBITRATION MATTER
NO ASSESSMENT OF DAMAGES HEARING REQUIRED

This matter will be heard by a by a board of arbitrators at the time, date and place specified but, if one or more parties is not present at the hearing, the matter may be heard at the same time and date before a Judge of the Court without the absent party or parties. There is no right to a trial de novo on appeal from a decision entered by a Judge.

CAVALRY SPV I, LLC, AS ASSIGNEE OF BANK OF AMERICA/FIA CARD SERVICES, N.A.,	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
Plaintiff	:	
	:	TERM
vs.	:	
	:	
	:	NO.:
Defendant	:	

CIVIL ACTION
CODE NO.: 10
NOTICE

NOTICE

You have been sued in court. If you wish to defend against the claim set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en les paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objectiones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo avis o notificacion. Ademas, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de estas demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

LLEVES ESTA DEMANDA A UN ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE DE PAGAR TAL SERVICO. VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

Lawyer Reference Service
One Reading Center, Philadelphia, PA 19107
Telephone: 215-238-6333

Case ID:

Jorge M. Pereira, Esq.
JMPereira@marinoslaw.com
Atty. I.D. #75242
Douglas M. Marinos, P.C.
101 N. Cedar Crest Blvd.
Allentown, PA 18104
(610) 434-2814

THIS IS AN ARBITRATION MATTER
NO ASSESSMENT OF DAMAGES HEARING REQUIRED

This matter will be heard by a by a board of arbitrators at the time, date and place specified but, if one or more parties is not present at the hearing, the matter may be heard at the same time and date before a Judge of the Court without the absent party or parties. There is no right to a trial de novo on appeal from a decision entered by a Judge.

CAVALRY SPV I, LLC, AS ASSIGNEE OF BANK OF AMERICA/FIA CARD SERVICES, N.A.,	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
Plaintiff	:	
	:	TERM
vs.	:	
	:	
	:	NO.:
Defendant	:	

CIVIL ACTION

1. Plaintiff, Cavalry SPV I, LLC, As Assignee of Bank of America/FIA Card Services, N.A., ("Cavalry") is a limited liability company with an address of 500 Summit Lake Drive, Suite 400, Valhalla, New York, 10595.

2. Defendant, an adult individual with an address of Philadelphia, Philadelphia County, Pennsylvania 191 .

COUNT I
BREACH OF CONTRACT

3. On or about June 19, 2007, upon Defendant's oral request, Bank of America/FIA Card Services, N.A. issued the Defendant credit, account ending in 9587, subject to the terms and conditions of the Cardholder Agreement ("Agreement"). A true and correct copy of the Agreement is attached hereto, made a part hereof and marked as Exhibit "A".

Case ID:

4. On or about September 28, 2011, Cavalry SPV I, LLC purchased the account from Bank of America/FIA Card Services, N.A.. A true and correct copy of the Bill of Sale is attached hereto, made a part hereof and marked as Exhibit "B".

5. As of October 31, 2009, Defendant had incurred charges for purchases, interest, cash advances and/or finance charges in the amount of TEN THOUSAND EIGHTY-EIGHT AND 75/100 DOLLARS ($10,088.75). True and correct copies of account statements are attached hereto, made a part hereof and marked as Exhibit "C".

6. Defendant's obligations are based on a subsisting debt, were in writing and arise from a preexisting account.

7. Pursuant to the Agreement, Cavalry may declare all amounts due under the Agreement immediately due and payable without notice or demand.

8. As of May 7, 2013, Defendant is indebted to Cavalry under the Agreement in the amount of EIGHTEEN THOUSAND NINE HUNDRED SIXTY-ONE AND 19/100 DOLLARS ($18,961.19)(comprised of the charge-off amount of TEN THOUSAND EIGHTY-EIGHT AND 75/100 DOLLARS ($10,088.75) plus interest accruing at the rate of 24.99% from the charge-off date of October 31, 2009 through May 7, 2013 in the amount of EIGHT THOUSAND EIGHT HUNDRED SEVENTY-TWO AND 44/100 DOLLARS ($8,872.44)).

WHEREFORE, Cavalry demands judgment against the Defendant in the amount of EIGHTEEN THOUSAND NINE HUNDRED SIXTY-ONE AND 19/100 DOLLARS ($18,961.19) plus interest from and after May 7, 2013, at the per annum rate of 24.99% and costs of suit.

COUNT II
BREACH OF CONTRACT IMPLIED IN LAW

9. Cavalry incorporates paragraphs 1 though 8 as if fully set forth herein.

10. Pursuant to the account statements attached hereto as Exhibit "C", Defendant agreed and confirmed the account balances stated in the statements, and made payments toward said balances.

11. On each and every statement provided to Defendant, the Previous Balance, Payments and Credits, Purchases and Adjustments and Periodic Rate Finance Charges were clearly stated.

12. Additionally, on each and every statements provided to Defendant, the interest rate, both Daily Periodic and Annual Percentage, were clearly stated.

13. Defendant's course of conduct clearly established Defendant's acceptance of the terms and conditions set forth in the Agreement.

14. On or about May 23, 2009, Defendant made a payment on the account in the amount of EIGHTY-FIVE AND 00/100 DOLLARS ($85.00) and has defaulted on his/her obligation to make payments to Cavalry by failing to make monthly payments from and after June 28, 2009.

15. Pursuant to the Agreement, Cavalry may declare all amounts due under the Agreement immediately due and payable without notice or demand.

16. As of May 7, 2013, Defendant is indebted to Cavalry under the Agreement in the amount of EIGHTEEN THOUSAND NINE HUNDRED SIXTY-ONE AND 19/100 DOLLARS ($18,961.19)(comprised of the charge-off amount of TEN THOUSAND EIGHTY-EIGHT AND 75/100 DOLLARS ($10,088.75) plus interest accruing at the rate of 24.99% from the charge-off date of October 31, 2009 through May 7, 2013 in the amount of EIGHT THOUSAND EIGHT HUNDRED SEVENTY-TWO AND 44/100 DOLLARS ($8,872.44)).

WHEREFORE, Cavalry demands judgment against the Defendant in the amount of EIGHTEEN THOUSAND NINE HUNDRED SIXTY-ONE AND 19/100 DOLLARS ($18,961.19) plus interest from and after May 7, 2013, at the per annum rate of 24.99% and costs of suit.

THE LAW OF BUSINESS, P.C.

By: _____
Jorge M. Pereira, Esquire
Atty. I.D. #75242
Attorney for Plaintiff

Case ID:

ATTORNEY VERIFICATION

I, JORGE M. PEREIRA, ESQUIRE, do hereby verify that I am the Attorney for Plaintiff, Cavalry SPV I, LLC, As Assignee of Bank of America/FIA Card Services, N.A., that I am fully authorized to make this verification on its behalf and that the Plaintiff is unavailable to make this Verification as they are located in New York and that the facts set forth in the attached pleading are true and correct to the best of my knowledge, information and belief and that the source of my information is interviews with my client and the Plaintiff's filed documents.

Verifier understands that false statements herein made are subject to the penalties of 18 Pa. C.S. Section 4904, relating to unsworn falsification to authorities.

Dated: 11/__/__

Jorge M. Pereira, Esquire

Case ID:

Case ID:

EXHIBIT A

Gold Card

CREDIT CARD AGREEMENT

CONTENTS (Selected Sections)

Case ID:

BANK OF AMERICA PRIVACY POLICY FOR CONSUMERS 2007

Trust. Respect. Integrity.
Our privacy commitment to you

To learn more about how Bank of America manages Customer Information and what actions you can take, please continue reading.

We are committed to respecting and protecting our customers' privacy.

This document includes information about:

1. **Making the security of information a priority**
2. **Collecting information**
3. **Managing information**
4. **Making sure information is accurate**
5. **Honoring your preferences**
6. **Actions you can take**
7. **Guarding your own information**
8. **Bank of America companies**

This policy covers Customer Information, which means personally identifiable information about a consumer or a consumer's current or former customer relationship with Bank of America. This policy is provided to you as required by the Federal Financial Privacy Law* and applies to our companies identified in Section 8: *Bank of America Companies.*

***15 U.S.C 68016810**

1. Making the security of information a priority

Keeping financial information secure is one of our most important responsibilities. We maintain physical, electronic and procedural safeguards to protect Customer Information. Appropriate employees are authorized to access Customer Information for business purposes only. Our employees are bound by a code of ethics that requires confidential treatment of Customer Information and are subject to disciplinary action if they fail to follow this code.

2. Collecting information

We collect and use various types of information about you and your accounts to service your accounts, save you time and money, better respond to your needs, and manage our business and risks.

Customer Information is categorized in the following six ways:

A. Identification Information - information that identifies you such as name, address, telephone number and Social Security number.

B. Application Information - information you provide to us on applications and through other means that will help us determine if you are eligible for products you request. Examples include assets, income and debt.

C. Transaction and Experience Information - information about transactions and account experience, as well as information about our communications with you. Examples include account balances, payment history, account usage, and your inquiries and our responses.

D. Consumer Report Information - information from a consumer report. Examples include credit score and credit history.

Case ID:

E. Information from Outside Sources -Information from outside sources regarding employment, credit and other relationships that will help us determine if you are eligible for products you request. Examples include employment history, loan balances, credit card balances, property insurance coverage and other verifications.

F. Other General Information - Information from outside sources, such as data from public records, that is not assembled or used for the purpose of determining eligibility for a product or service.

As required by the USA PATRIOT Act, we also collect information and take actions necessary to verify your identification.

3. Managing Information

We manage how and when information is shared:

- Within Bank of America
- With companies that work for us
- With third parties
- In other situations

Managing information within Bank of America

Bank of America is made up of a number of companies, including financial service providers such as our brokerage company and credit card company, and nonfinancial companies such as our operations and servicing subsidiaries.

Bank of America may share any of the categories of Customer Information among our companies. For example, sharing information allows us to use information about your ATM, credit card and check card transactions to identify any unusual activity and then contact you to determine if your card has been lost or stolen.

Case ID:

We occasionally receive medical or health information from a customer if, for example, a customer applies for insurance from us. We also may obtain information from insurance support organizations not affiliated with Bank of America that prepare and provide reports to others as well as to us. We do not share medical or health information among our companies, except to maintain or collect on accounts, process transactions, service customer requests or perform insurance functions, to the extent permitted by law.

Managing information with companies that work for us

We may share any of the categories of Customer Information with companies that work for us, including companies located outside the United States. All nonaffiliated companies that act on our behalf and receive Customer Information from us are contractually obligated to keep the information we provide to them confidential, and to use the Customer Information we share only to provide the services we ask them to perform. These companies may include financial service providers such as payment processing companies, and nonfinancial companies such as check printing and data processing companies.

In addition, we may share any of the categories of Customer Information with companies that work for us in order to provide marketing support and other services, such as a service provider that distributes marketing materials. These companies may help us to market our own products and services, or other products and services that we believe may be of interest to you. Please note that some of our own companies may provide marketing support and other services for us as well.

Sharing information with third parties for customers with **credit cards** and **Sponsored Accounts only**

We may share Identification Information, Transaction and Experience Information, as well as Other General Information we collect about each of your (1) Bank of America credit card account(s) and (2) Sponsored Accounts at Bank of America, with selected third parties.

1. Credit card account information, whether co-branded or not, may be shared with third parties; and
2. Sponsored Account information may be shared with third parties. Sponsored Accounts are non-credit card accounts or services provided by Bank of America that are also endorsed, co-branded or sponsored by other organizations. Examples of these organizations include colleges, sporting teams, retailers and other affinity organizations, such as charities. Sponsored Accounts may include deposit accounts or other banking services provided by Bank of America, such as a savings account co-branded with an automobile club. You will know whether an account is a Sponsored Account by the appearance of the name or logo of the sponsoring organization on account materials, such as statements, applications and online forms.

We may share information about credit cards and Sponsored Accounts with selected third parties including:

- Financial services companies (such as insurance agencies or companies and mortgage brokers, and organizations with whom we have agreements to jointly market financial products);
- Nonfinancial companies (such as retailers, travel companies and membership organizations); and
- Other companies (such as nonprofit organizations).

Case ID:

Information shared, as described in this section, is limited to credit card and Sponsored Account information only. You may elect to opt out of this sharing. Please see Section 5, *Honoring Your Preferences*.

Disclosing information in other situations

We also may disclose any of the categories of Customer Information to credit bureaus and similar organizations and when required or permitted by law. For example, Customer Information may be disclosed in connection with a subpoena or similar legal process, fraud prevention or investigation, risk management and security, and recording of deeds of trust and mortgages in public records. Customer Information may also be disclosed to companies that process your requests for products or services or in connection with the sale of your account to another financial institution. We also may share any of the categories of Customer Information outside Bank of America companies when we have your consent, such as when you request a specific insurance rate quote from a third-party insurer.

4. Making sure information is accurate

Keeping your account information accurate and up to date is very important. You have access to your account information, which includes your contact information, account balances and transactions and similar information, which we provide to you through various means, such as account statements, telephone banking, Online Banking and in response to specific requests. If your account information is incomplete, inaccurate or not current, please call or write to us at the telephone number or appropriate address for such changes listed on your account statement,

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bank records or other account materials. We will promptly update or correct any erroneous information.

5. Honoring your preferences

You have choices when it comes to how Bank of America shares and uses information.

Options for sharing with third parties for customers with credit cards and Sponsored Accounts only

If you have a Bank of America credit card or Sponsored Account, you may request that we not share information about these accounts with third parties. If you are unsure whether any of your accounts are Sponsored Accounts, please contact 1.888.341.5000. If you request that we not share information with third parties, we may still share information:

- where permitted or required by law as discussed in Section 3 under *Disclosing information in other situations*; and
- with our service providers as discussed in Section 3 under *Managing information with companies that work for us*; and
- with other financial companies with whom we have joint marketing agreements.

If you do not have a credit card or Sponsored Account, this section does not apply to you.

If you have multiple credit cards or Sponsored Accounts, you will need to express your preference for each account separately. When any customer on a joint account requests that we not share with third parties, we apply that preference to the entire account. *California residents — see additional information at the end of this policy.*

Sharing among Bank of America companies

You may request that Application Information, Consumer Report Information and Information from Outside Sources not be shared among Bank of America companies. Information is shared among Bank of America companies to complete applications for new products or services that you request, thereby saving you time, and to manage our business and risks. During the normal course of doing business, we will continue to share Identification Information, Transaction and Experience Information, as well as Other General Information among our companies. *Vermont residents — see additional information at the end of this policy.*

For sharing among Bank of America companies, each customer may tell us his or her preferences individually, or you may tell us the preferences for any other customers who are joint account owners with you.

Direct marketing

You may choose not to receive direct marketing offers - sent by postal mail, telephone and/or e-mail - from Bank of America. These preferences apply to all marketing offers from us and from companies working for us. To minimize the amount of telephone solicitation our customers receive, Bank of America does not offer nonfinancial products and services through telephone solicitations. Direct marketing offers from us may include information about products and services we believe may be of interest to you. If you choose not to hear from us, you may not learn about beneficial offers.

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If you elect not to receive direct marketing offers by postal mail, telephone and/or e-mail, please note that we may continue to contact you as necessary to service your account and for other nonmarketing purposes. You may also be contacted from your client relationship manager or assigned account representative if applicable. Bank of America may also continue to provide marketing information in your regular account mailings and statements, including online and ATM communications.

Each customer may opt out of each direct marketing option individually. Since marketing programs may already be in progress, it may take up to twelve weeks in some situations for your opt out to be fully effective. When you opt out of direct marketing by postal mail or telephone, your opt out will last for five (5) years. After that, you may choose to renew your opt out for another five year period.

6. Actions you can take

You can tell us your preferences by:

- Notifying us at www.bankofamerica.com/privacy and entering your information on a secure Web site
- Calling us toll free at 1.888.341.5000
- Talking to a customer representative at a banking center or to your client relationship manager

When you contact us, please be prepared to provide the following information for each individual:

- First name, middle initial and last name
- Address, city, state and ZIP code
- Account or reference number for third party sharing opt-outs
- Telephone number (if applicable)
- E-mail address (if applicable)

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If any of these pieces of information change, other than your account number, please notify us to ensure that your preferences are consistently honored.

Reducing direct marketing from other companies

You may contact the following agencies if you want to reduce the amount of advertising you receive from companies outside Bank of America:

CREDIT REPORTING INDUSTRY. TO HAVE YOUR NAME TAKEN OFF ALL PRE-APPROVED credit solicitations (not just Bank of America solicitations), you may call the credit reporting industry Prescreening Opt-Out number at 1.888.5OPTOUT (1.888.567.8688).

NATIONAL DO NOT CALL REGISTRY. BANK OF AMERICA SUPPORTS THE NATIONAL DO Not Call Registry. To have your phone number added to the National Do Not Call Registry, you may call 1.888.382.1222 or register at donotcall.gov. While this will stop most calls, you may still receive calls from businesses where you are a customer.

7. GUARDING YOUR OWN INFORMATION

Bank of America recommends that you take the following precautions to guard against the disclosure and unauthorized use of your account and personal information:

- Review your monthly account statements thoroughly and report any suspicious activity to us **immediately**.
- Report lost or stolen checks, credit or debit cards immediately.
- Do not preprint your driver's license or Social Security number on checks.

- Safeguard ATM, credit and debit cards. Memorize PINs (personal identification numbers) and refrain from writing PINs, Social Security numbers or credit card numbers where they could be found.
- Tear up or shred any pre-approved credit offers to which you do not respond.
- Review your credit report at least once every year. Make sure all information is up to date and accurate, and have information relating to fraudulent transactions deleted. For a free copy of your credit bureau report, contact www.annualcreditreport.com or call 1.877.322.8228.
- If you think you have been a victim of identity theft or fraud, contact one of the three major credit bureaus to place a fraud alert on your account. You may also contact the Federal Trade Commission (FTC) to report any incidents of identity theft and to receive additional guidance on steps you can take to protect yourself. You may contact the FTC at www.consumer.gov/idtheft or 1.877.438.4338.

Keeping up to date with our Privacy Policy

As required by law, Bank of America will provide notice of our Privacy Policy annually, as long as you maintain an ongoing relationship with us. To receive the most up-to-date Privacy Policy, you can visit our Web site at: **www.bankofamerica.com/privacy** or call us at 1.888.341.5000.

We may make changes to this policy at any time and will inform you of changes, as required by law.

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8. Bank of America companies

This Privacy Policy applies to the following companies that have consumer customer relationships with Bank of America:

Banks and Trust Companies

Bank of America, N.A.
Bank of America Trust Company of Delaware, N.A.
MBNA America

Credit Card

Bank of America Consumer Card Services, LLC.
Bank of America
Fleet Credit Card Services, L.P.
MBNA America

Brokerage and Investments

BACAP Alternative Advisors, Inc.
Bank of America Capital Advisors LLC
Banc of AmericaFinance Services, Inc.
Banc of America Investment Advisors, Inc.
Banc of America Investment Services, Inc.
Banc of America Securities LLC
Columbia Management Advisors, LLC
Columbia Management Distributors, Inc.
Columbia Wanger Asset Management, L.P.
Marsico Capital Management, LLC
White Ridge Investment Advisors LLC

Insurance and Annuities

BA Agency, Inc.
BA Insurance Services, Inc.
Banc of America Agency, LLC
Banc of America Agency of Nevada, Inc.

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Banc of America Agency of Texas, Inc.
Banc of America Insurance Services, Inc., dba Banc of America Insurance Agency
Banc of America Corporate Insurance Agency, LLC
Bank of America Reinsurance Corporation
General Fidelity Insurance Company
General Fidelity Life Insurance Company
IFIA Insurance Services, Inc., dba IFIA Insurance Agency
NationsBanc Insurance Company, Inc.

Real Estate

HomeFocus Services, LLC
NationsCredit Financial Services Corporation

Automobile Financing
Banc of America Auto Finance Corp.

For a current list of Bank of America companies that have consumer customer relationships and to which this policy applies, please visit our Web site at www.bankofamerica.com/privacy. This policy applies to consumer customer relationships established in the United States and is effective January 1, 2007. **This notice constitutes the Bank of America Do Not Call Policy** under the Telephone Consumer Protection Act for all consumers and is pursuant to state law.

You may have other privacy protections under state laws, such as Vermont and California. To the extent these state laws apply, we will comply with them with regard to our information practices.

For Nevada residents only, Nevada law requires that we also provide you with the following contact information: Bureau of Consumer Protection, Office of the Nevada

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Attorney General, 555 E. Washington St., Suite 3900, Las Vegas, NV 89101; Phone number — 702.486.3132; e-mail: BCPINFO@ag.state.nv.us. Bank of America, PO Box 25118, FL1—300—02—07, Tampa, Florida 33633— 0900.

For Vermont and California residents only. The information-sharing practices described above are in accordance with federal law. Vermont and California law place additional limits on sharing information about Vermont and California residents so long as they remain residents of those states.

Vermont: In accordance with Vermont law, Bank of America will not share information we collect about Vermont residents with companies outside of Bank of America except as permitted by law, such as with the consent of the customer, to service the customer's accounts or to other financial institutions with which we have joint marketing agreements. Bank of America will not share Application Information, Consumer Report Information and Information from Outside Sources about Vermont residents among the Bank of America companies except with the authorization or consent of the Vermont resident.

California: In accordance with California law, Bank of America will not share information we collect about California residents with companies outside of Bank of America except as permitted by law, such as with the consent of the customer, to service the customer's accounts, to fulfill on rewards or benefits and otherwise as permitted. We will limit sharing among our companies to the extent required by applicable California law.

Estas normas están disponibles en español a través de la sucursal bancaria de su localidad.

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We reserve the right to change the terms of this Agreement at any time, as further described in the following sections: *Balance Categories* and *We May Amend This Agreement.*

YOUR CONTRACT WITH US

Your Agreement with us consists of this Credit Card Agreement and any changes we make to it from time to time. The terms of this Agreement apply to you if any of you applied for and were granted an account, used the account, maintained the account, and/or otherwise accepted the account. You agree to the terms and conditions of this Agreement.

WORDS USED OFTEN IN THIS AGREEMENT

"Access check" means an access check we provide to you to make a Check Cash Advance on your account.

"Agreement" or "Credit Card Agreement" means this document and any changes we make to this document from time to time.

"APR" means the corresponding Annual Percentage Rate. The APR corresponds to the Daily Periodic Rate ("DPR") which is calculated by dividing the corresponding APR by 365.

"Card" means all the credit cards we issue to you and to any other person with authorization for use on this account pursuant to this Agreement.

"Cash Advance" means the use of your account for a loan obtained:

1. at an automated teller machine ("ATM Cash Advance");

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2. by a transfer of funds initiated by us at your request ("Balance Transfer");
3. at any financial institution (e.g., to obtain cash, money orders, or travelers checks), including overdraft transactions if this account is eligible for and properly enrolled in an overdraft protection program, at any non-financial institution (to obtain cash), or for any payment you make to us that is returned to us unpaid for any reason, including the related finance charges ("Bank Cash Advance");
4. by an access check you sign as drawer ("Check Cash Advance").

"Cash Advance" includes Transaction Fees and adjustments associated with any Cash Advance.

"Default Rate" means the APR which may be applied without further notice to your account in certain instances of your default, as described in the section titled, *Annual Percentage Rates*.

"Foreign Transaction" means any transaction made in a foreign currency (including, for example, online purchases from foreign merchants).

"Grace Period" means the period of time during a billing cycle when you will not accrue Periodic Rate Finance Charges on certain transactions or balances.

"New Balance Total" means the total billed amount as of the Closing Date of a billing cycle, as shown on your monthly statement. To determine the New Balance Total, we start with the total balance at the beginning of the billing cycle, which is the "Previous Balance." Then we subtract payments and credits. Then we add Cash Advances, Purchases and finance charges.

"Pay in Full" or "Paid in Full" means payments and credits in a billing cycle totaling at least your previous billing cycle's New Balance Total. In general, Pay in Full must be made by the Payment Due Date in order to get a Grace Period.

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"Promotional Rate" means a temporary APR that may be offered on a balance category for a designated time period, and may be subject to other conditions.

"Purchase" means the use of your card or account number to:

1. buy or lease goods or services;
2. buy "Cash Equivalents" (i.e., foreign currency, money orders or travelers checks from a non-financial institution, or wire transfers, person to person money transfers, out-of-network bill payments made through Bank of America's online bill payment service, bets, lottery tickets, or casino gaming chips) from any seller other than a financial institution;
3. make a transaction that is not otherwise a Cash Advance.

"Purchase" includes Account Fees, as well as Transaction Fees and adjustments associated with any Purchase.

"We", "us", "our", and "FIACS" means FIA Card Services, N.A., also known as Bank of America.

"You" and "your" mean each and all of the persons who are granted, accept or use an account we hold. "You" and "your" also mean any other person who has guaranteed payment of this account, when used in the sections titled, *Your Contract With Us*, *We May Monitor and Record Telephone Calls*, and *Arbitration and Litigation*, and when used in each of the sections relating to payment of this account (e.g., *Your Promise to Pay*, and *How We Allocate Your Payments*).

We will use the definitions described under the section heading *Words Used Often in This Agreement* or as otherwise defined in this Agreement. If we use a capitalized term in this document but we do not define the term in this document, the term has the meaning as used in your monthly statement.

We use section headings (e.g., *Words Used Often in This Agreement*) to organize this Agreement. The headings are for reference purposes only.

BALANCE CATEGORIES

When a Cash Advance or Purchase transaction occurs, we add the amount of the transaction and any associated finance charges, to one of the following balance categories:

Category A - Balance Transfers and Check Cash Advances
Category B - ATM Cash Advances and Bank Cash Advances
Category C - Purchases
Category D - Other Balances

From time to time, we may move certain balances from one category to another (for example, so we can accommodate promotional terms), and we will tell you when we do.

Each balance category has its own APR. All rates are subject to change. In addition to the *Annual Percentage Rate* section, please see how we may change the rates on your account in the section titled, *We May Amend This Agreement.*

ANNUAL PERCENTAGE RATES

Category A Balance Transfers and Check Cash Advances :
Promotional Rate

The current corresponding ANNUAL PERCENTAGE RATE for Category A balances is a promotional 1.90%(0.005205% DPR) in effect through your statement Closing Date in March 2008.

This promotional period will end sooner if there is a "promotion turn-off event." A promotion turn-off event means: (1) that any Total Minimum Payment Due is not received by its Payment Due Date; or (2) that your total outstanding balance exceeds your credit limit on any statement Closing Date. If a promotion turn-off event occurs, then this promotional period will end as

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of the first day of that billing cycle. This means that this promotional APR will not be in effect in that billing cycle.

Rate after the promotional period

When the promotional period ends, all new and outstanding Category A balances will have a variable rate, unless we increase the APR due to Default Pricing (see below *Default Pricing*). The variable APR will be calculated using the variable APR formula (see below *Variable Rate Information*) with a margin of 10.99 percentage points; this currently results in a 19.24%corresponding ANNUAL PERCENTAGE RATE (0.052712% DPR).

Default Pricing: The Default Rate for Category A balances is up to 29.99% corresponding ANNUAL PERCENTAGE RATE(0.082164% DPR). We may increase the APR on all new and outstanding Category A balances up to the Default Rate, without giving you additional notice, each time: (1) we do not receive the Total Minimum Payment Due by its Payment Due Date; or (2) your total outstanding balance exceeds your credit limit on any statement Closing Date. Each such increase will be effective as of the first day of that billing cycle, but after any applicable Category A promotional period has ended (see above *Promotional Rates*). Default Pricing does not use the variable APR formula.

Category B ATM Cash Advances and Bank Cash Advances:

The current APR for Category B balances is a variable rate. This variable APR is calculated using the variable APR formula (see below *Variable Rate Information*) with a margin of 15.99 percentage points; this currently results in a 24.24%corresponding ANNUAL PERCENTAGE RATE (0.066410% DPR). The APR will change if we increase the APR due to Default Pricing (see below *Default Pricing*).

Default Pricing: The Default Rate for Category B balances is up to 29.99% corresponding ANNUAL PERCENTAGE RATE(0.082164% DPR). We may increase the APR on all new and outstanding Category B balances up to the Default Rate, without giving

you additional notice, each time: (1) we do not receive the Total Minimum Payment Due by its Payment Due Date; or (2) your total outstanding balance exceeds your credit limit on any statement Closing Date. Each such increase will be effective as of the first day of that billing cycle, but after any applicable Category B promotional period has ended. Default Pricing does not use the variable APR formula.

Category C Purchases:

Promotional Rate

The current corresponding ANNUAL PERCENTAGE RATE for Category C balances is a promotional 1.90%(0.005205% DPR) in effect through your statement Closing Date in March 2008.

This promotional period will end sooner if there is a "promotion turn-off event." A promotion turn-off event means: (1) that any Total Minimum Payment Due is not received by its Payment Due Date; or (2) that your total outstanding balance exceeds your credit limit on any statement Closing Date. If a promotion turn-off event occurs, then this promotional period will end as of the first day of that billing cycle. This means that this promotional APR will not be in effect in that billing cycle.

Rate after the promotional period

When the promotional period ends, all new and outstanding Category C balances will have a variable rate, unless we increase the APR due to Default Pricing (see below *Default Pricing*). The variable APR will be calculated using the variable APR formula (see below *Variable Rate Information*) with a margin of 10.99 percentage points; this currently results in a 19.24%corresponding ANNUAL PERCENTAGE RATE (0.052712% DPR).

Default Pricing: The Default Rate for Category C balances is up to 29.99% corresponding ANNUAL PERCENTAGE RATE(0.082164% DPR). We may increase the APR on all new and outstanding Category C balances up to the Default Rate, without giving you additional notice, each time: (1) we do not receive the Total Minimum Payment Due by its Payment Due Date; or (2) your total outstanding

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balance exceeds your credit limit on any statement Closing Date. Each such increase will be effective as of the first day of that billing cycle, but after any applicable Category C promotional period has ended (see above *Promotional Rates*). Default Pricing does not use the variable APR formula.

Category D Other Balances:

The current APR for Category D balances is a variable rate. This variable APR is calculated using the variable APR formula (see below *Variable Rate Information*) with a margin of 10.99 percentage points; this currently results in a 19.24%corresponding ANNUAL PERCENTAGE RATE (0.052712% DPR). The APR will change if we increase the APR due to Default Pricing (see below *Default Pricing*).

Default Pricing: The Default Rate for Category D balances is up to 29.99% corresponding ANNUAL PERCENTAGE RATE (0.082164% DPR). We may increase the APR on all new and outstanding Category D balances up to the Default Rate, without giving you additional notice, each time: (1) we do not receive the Total Minimum Payment Due by its Payment Due Date; or (2) your total outstanding balance exceeds your credit limit on any statement Closing Date. Each such increase will be effective as of the first day of that billing cycle, but after any applicable Category D promotional period has ended. Default Pricing does not use the variable APR formula.

VARIABLE RATE INFORMATION

The variable APR formula is calculated by adding together an index and a margin. The index is the highest U.S. Prime Rate as published in the "Money Rates" section of The Wall Street Journal on the last publication day of each month. The index used to calculate the variable rates in this Agreement is 8.25% and was published on May 31, 2007. The margin for each balance category is described above in the *Annual Percentage Rates* section.

An increase or decrease in the index will cause a corresponding increase or decrease in your APRs on the first day of your billing cycle

that begins in the same month in which the index is published. For example, if your billing cycle generally begins in the middle of the month, the index published on September 30th will apply to your account for the entire billing cycle from mid-September to mid-October. An increase in the index means that you will pay higher periodic rate finance charges and have a higher Total Minimum Payment Due.

If The Wall Street Journal does not publish the U. S. Prime Rate, or if it changes the definition of the U.S. Prime Rate, we may, in our sole discretion, substitute another index.

CALCULATION OF PERIODIC RATE FINANCE CHARGES

We calculate Periodic Rate Finance Charges for each balance category by multiplying its Balance Subject to Finance Charge by the applicable DPR and that result by the number of days in the billing cycle.

BILLING CYCLE

Your billing cycle ends each month on a Closing Date determined by us. Each billing cycle begins on the day after the Closing Date of the previous billing cycle. Each monthly statement reflects a single billing cycle.

WHEN PERIODIC RATE FINANCE CHARGES BEGIN TO ACCRUE

Each new Category A and Category B Cash Advance begins to accrue Periodic Rate Finance Charges on its transaction date. Category A and Category B balances remaining from previous billing cycles accrue Periodic Rate Finance Charges from the first day of the billing cycle. The transaction date for Check Cash Advances and Balance Transfers made by check is the date the check is first deposited or cashed. The transaction date for a returned payment (a Bank Cash Advance) is the date that the corresponding payment posted to your account.

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Unless subject to a Grace Period, each new Category C Purchase and each new Category D Other Balance begins to accrue Periodic Rate Finance Charges on its transaction date or the first day of the billing cycle, whichever date is later. Unless subject to a Grace Period, Category C balances and Category D balances remaining from previous billing cycles accrue Periodic Rate Finance Charges from the first day of the billing cycle.

When applicable, Periodic Rate Finance Charges accrue daily and compound daily on new balances, and balances remaining from previous billing cycles, in each balance category. Periodic Rate Finance Charges will continue to accrue even though you have paid the full amount of any related balances in a balance category because we include any accrued but unpaid finance charges in the calculation of the Balance Subject to Finance Charge.

Your Payment Due Date will be at least 20 days from your statement Closing Date.

GRACE PERIOD

You do not have a Grace Period for Category A or Category B Cash Advances. You will have a Grace Period on new Category C Purchases and new Category D Other Balances, in a billing cycle in which you Pay in Full, from the day after the Pay in Full date until the end of that billing cycle. You will have a Grace Period for an entire billing cycle on new Category C Purchases and new Category D Other Balances and on Category C and Category D balances remaining from previous billing cycles if you Pay in Full by the Payment Due Date in that billing cycle and if during the previous billing cycle you Paid in Full.

CALCULATION OF BALANCES SUBJECT TO FINANCE CHARGE

Categories A and B—Average Balance Method (including new Cash Advances):

We calculate separate Balances Subject to Finance Charge for Category A balances and Category B balances. We calculate the Balance

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Subject to Finance Charge for each of these balance categories by: (1) calculating a daily balance for each day in the current billing cycle; (2) calculating a daily balance for each day prior to the current billing cycle that had a "Pre-Cycle Cash Advance" balance—a Pre-Cycle Cash Advance is a Cash Advance with a transaction date prior to the current billing cycle but with a posting date within the current billing cycle; (3) adding all the daily balances together; and (4) dividing the sum of the daily balances by the number of days in the current billing cycle.

To calculate the daily balance for each day in the current billing cycle, we take the beginning balance, add an amount equal to the applicable Daily Periodic Rate multiplied by the previous day's daily balance, add new Cash Advances and Transaction Fees, and subtract applicable payments and credits. If any daily balance is less than zero we treat it as zero.

To calculate a daily balance for each day prior to the current billing cycle that had a Pre-Cycle Cash Advance balance, we take the beginning balance attributable solely to Pre-Cycle Cash Advances (which will be zero on the transaction date of the first Pre-Cycle Cash Advance), add an amount equal to the applicable Daily Periodic Rate multiplied by the previous day's daily balance, and add only the applicable Pre-Cycle Cash Advances, and their related Transaction Fees. We exclude from this calculation all transactions posted in previous billing cycles.

Categories C and D—Average Daily Balance Method (including new transactions):

We calculate separate Balances Subject to Finance Charge for Category C balances and Category D balances. We calculate the Balance Subject to Finance Charge for each of these balance categories by: (1) calculating a daily balance for each day in the current billing cycle; (2) adding all the daily balances together; and (3) dividing the sum of the daily balances by the number of days in the current billing cycle.

To calculate the daily balance for each day in the current billing cycle, we take the beginning balance, add an amount equal to the applicable Daily Periodic Rate multiplied by the previous day's daily balance, add, unless subject to a Grace Period, new transactions, new Account Fees, and new Transaction Fees, and subtract applicable payments and credits. If any daily balance is less than zero we treat it as zero. If in the current billing cycle you Pay in Full, then on the day after that Pay in Full date, we exclude from the beginning balance new transactions, new Account Fees, and new Transaction Fees which posted on or before the Pay in Full date.

We include the costs for credit card debt cancellation or credit insurance purchased through us in calculating the beginning balance for the first day of the billing cycle after the billing cycle in which such costs are billed.

TRANSACTION FEE FINANCE CHARGES

If you obtain an ATM Cash Advance, we will assess a transaction fee (FINANCE CHARGE) equal to 3.00% of the U.S. dollar amount of each such Cash Advance (Fee: Min. $10.00).

If you obtain a Balance Transfer, we will assess a transaction fee (FINANCE CHARGE) equal to 3.00% of the U.S. dollar amount of each such Cash Advance (Fee: Min. $10.00).

If you obtain a Bank Cash Advance (other than through an overdraft transaction), we will assess a transaction fee (FINANCE CHARGE) equal to 3.00% of the U.S. dollar amount of each such Cash Advance (Fee: Min. $10.00). This fee is not assessed for a Bank Cash Advance resulting from any payment you make to us that is returned to us unpaid for any reason.

If you have enrolled this account to provide overdraft protection, we will assess a transaction fee (FINANCE CHARGE) equal to 3.00% of the U.S. dollar amount of each such overdraft transaction that posts to this account (Fee: Min. $10.00).

If you use your card to purchase Cash Equivalents, we will assess a transaction fee (FINANCE CHARGE) equal to 3.00% of the U.S. dollar amount of each such Cash Equivalent (Fee: Min. $10.00). This fee does not apply to out-of-network bill payments made through Bank of America's online bill payment service.

If you obtain a Check Cash Advance, we will assess a transaction fee (FINANCE CHARGE) equal to 3.00% of the U.S. dollar amount of each such Cash Advance (Fee: Min. $10.00).

If you make a Foreign Transaction, we will assess a transaction fee (FINANCE CHARGE) equal to 3.00% of the U.S. dollar amount of each such Foreign Transaction. This is in addition to any other applicable transaction fees.

ACCOUNT FEES

The following fees are assessed as Purchases in the billing cycle in which the fees accrue:

There is no Annual Fee.

An Overlimit Fee in each billing cycle when your total outstanding balance exceeds your credit limit. The Overlimit Fee will be assessed even if fees or finance charges assessed by us cause your total outstanding balance to exceed your credit limit. The Overlimit Fee will be assessed as of the first day in the billing cycle that your total outstanding balance was over your credit limit. No more than one Overlimit Fee will be charged in each billing cycle.

If your Previous Balance exceeds your credit limit at the beginning of a billing cycle, you will have an opportunity to avoid an Overlimit Fee in that billing cycle. To avoid an Overlimit Fee in that billing cycle, your total outstanding balance must be less than or equal to your credit limit on the 20th day of the billing cycle and must remain below the credit limit for the rest of that billing cycle. If your total outstanding balance exceeds your credit limit on the 20th day of that billing cycle you will be assessed an Overlimit Fee as of the 20th day. If your total outstanding balance is

less than your credit limit on the 20th day of that billing cycle but exceeds your credit limit on any day after the 20th day, you will be assessed an Overlimit Fee as of the first day after the 20th day in which your total outstanding balance exceeds your credit limit.

The amount of the Overlimit Fee is based on the amount of your total outstanding balance on the date as of which the Overlimit Fee is assessed and is as follows:

- if the total outstanding balance is $500.00 or less, the Overlimit Fee will be $15.00;
- if the total outstanding balance is greater than $500.00 but $1,000.00 or less, the Overlimit Fee will be $29.00;
- if the total outstanding balance is greater than $1,000.00, the Overlimit Fee will be $39.00.

A Late Fee, if the Total Minimum Payment Due shown on your monthly statement is not received by us on or before its Payment Due Date. On the Late Fee transaction date:

- if the total outstanding balance is $100.00 or less, the Late Fee will be $15.00;
- if the total outstanding balance is greater than $100.00 but $250.00 or less, the Late Fee will be $29.00;
- if the total outstanding balance is greater than $250.00, the Late Fee will be $39.00.

A Returned Payment Fee of $39.00 if a payment on your account is returned for insufficient funds or for any other reason, even if it is paid upon subsequent presentment (if we elect to re-present the payment).

A Returned Check Cash Advance Fee of $39.00 if we return an access check unpaid for any reason, even if the access check is paid upon subsequent presentment.

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A Copy Fee of $5.00 for each copy of a monthly statement or sales draft, except that the six most recent monthly statements and one sales drafts will be provided for free.

An Abandoned Property Fee equal to any costs incurred by us for complying with state abandoned property laws, unless prohibited by applicable law.

OVERDRAFT PROTECTION

If your checking account with Bank of America is linked to this account, this overdraft protection feature will allow funds to be transferred ("overdraft protection transfers") from this account into your designated checking account with Bank of America ("checking account") when transactions occur on your checking account, such as checks or other debits, that if paid would cause the checking account to be overdrawn ("overdraft transactions"). Overdraft protection transfers include automatic transfers to cover checking account fees. Overdraft protection transfers are processed after close of business Monday through Friday and are treated as Category B Cash Advances. Each day's overdraft transactions will be totaled and rounded to the next $100 ($25 if you opened your checking account in Washington or Idaho; $50 if your checking account is opened with Military Bank) increment up to your available credit limit, regardless of who initiated the overdraft transactions. For example, if your checking account has a balance of $1.00 and a check or other debit item for $125 is presented for payment, which if paid would cause your checking account to be overdrawn, an overdraft protection transfer of $200 will be made to your checking account and a Bank Cash Advance of $200 will post to this account. The amount of available credit on this account must be sufficient to cover the total amount of overdraft transactions (received by Bank of America that day) rounded to the next $100 increment (but excluding any overdraft protection fee); otherwise one or more of the overdraft transactions for that day will be rejected. However, if the available credit on this account is greater than the overdraft transaction amount, but the available

credit is insufficient for the overdraft transaction amount to be rounded to the next $100 increment, then the amount of the overdraft transaction will be rounded to the highest whole dollar amount of your available credit. (And in such an event, the accrued finance charges may result in an Overlimit Fee.) We may permit or refuse to permit any overdraft protection transfer that would cause you to exceed the credit limit on this account; but if we permit it, you may be assessed an Overlimit Fee during the billing cycle in which the transfer occurs. This overdraft protection feature will automatically be cancelled if this account is closed by either you or us, or at any time upon your request. Your overdraft transactions remain subject to the terms of your checking account with Bank of America, any related enrollment agreement, and this Agreement.

SIGN YOUR CARD

You should sign your card before you use it.

HOW TO USE YOUR ACCOUNT

You may obtain credit in the form of Purchases and Cash Advances by using cards, access checks, your account number, or other credit devices.

WE MAY MONITOR AND RECORD TELEPHONE CALLS

You consent to and authorize Bank of America, any of its affiliates, or its marketing associates to monitor and/or record any of your telephone conversations with our representatives or the representatives of any of those companies. Where you have provided a cell phone number directly to us, or placed a cell phone call to us, you consent and agree to accept collection calls to your cell phone from us. For any telephone or cell phone calls we place to you, you consent and agree that those calls may be automatically dialed and/or use recorded messages.

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CREDIT REPORTING AGENCIES; COLLECTING AND SHARING INFORMATION

You authorize us to collect information about you in order to conduct our business and deliver the top quality service you expect, including information we receive about you, information we receive from third parties such as credit reporting agencies and information about your transactions with us and other companies. You authorize us to share such information about you or your account with our affiliates and others. You may have the right to opt out of some information sharing. For more details, please refer to our *Privacy Policy*.

If you believe we have furnished inaccurate or incomplete information about you or your account to a credit reporting agency, write to us at: FIA Card Services, N.A., Credit Reporting Agencies, P.O. Box 17054, Wilmington, DE 19884-7054. Please include your name, address, home phone number, and account number, and explain what you believe is inaccurate or incomplete.

PURPOSES FOR USING YOUR ACCOUNT

You may use your account for personal, family, or household purposes. You may not use your account for business or commercial purposes. You may not use a Check Cash Advance, or any other Cash Advance, to make a payment on this or any other credit account with us or our affiliates. You may not use or permit your account to be used to make any illegal transaction. You will only use your account for transactions that are legal where you conduct them. For example, Internet gambling transactions may be illegal in your state. Display of a payment card logo by an online merchant does not mean that an Internet transaction is legal where you conduct it. We may charge your account for such transactions. We will not be liable if you engage in an illegal transaction. We may deny authorization of any transaction identified as Internet gambling.

PERSONS USING YOUR ACCOUNT

If you permit any person to use your card, access checks, account number, or other credit device with the authorization to obtain credit on your account, you may be liable for all transactions made by that person including transactions for which you may not have intended to be liable, even if the amount of those transactions causes your credit limit to be exceeded. Authorized users of this account may have the same access to information about the account and its users as the account holders. We may send account materials (cards, statements and notices) to any liable party, and that person will be responsible for delivering those materials to the other liable parties and authorized users. Notice to any of you will be considered notice to all of you. You may allow authorized users on your account in the following ways: (1) by notifying us that you want someone added to your account as an authorized user; (2) by lending your card or account number to another; or (3) by any other ways in which you would be legally considered to have allowed another to use your account or to be legally prevented from denying that you did so. You must think carefully before you allow anyone to become an authorized user. By doing so, you authorize the person to use your account to the same extent you can, including but not limited to making any purchases, cash advances, balance transfers and allowing others to use your account. Your account does not permit you to limit the nature or amount of authority you give to any authorized user and you will not attempt to do so. An authorized user's authority will continue until you both notify us that you are terminating the authority and you physically retrieve the card. If you cannot retrieve the card, you will remain liable for any transactions that we cannot prevent after you notify us.

YOUR PROMISE TO PAY

You promise to pay us the amounts of all credit you obtain, which includes all Purchases and Cash Advances. You also promise to pay us all the amounts of finance charges, fees, and any other transactions we charge to your account. If a bank branch or office sponsors your account,

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you promise to pay it any unpaid account balance it pays us within 30 days.

PAYMENTS ON YOUR ACCOUNT

You must pay each month at least the Total Minimum Payment Due shown on your monthly statement by its Payment Due Date. Your Payment Due Date may vary from month to month. Payments must conform to the requirements set out on that monthly statement; these requirements may vary without prior notice. You may pay the entire amount you owe us at any time. Payments made in any billing cycle that are greater than the Total Minimum Payment Due will not affect your obligation to make the next Total Minimum Payment Due. If you overpay or if there is a credit balance on your account, we will not pay interest on such amounts. We will reject payments that are not drawn in U.S. dollars and those drawn on a financial institution located outside of the United States. We reserve the right to reject any payment if your account has a credit balance as of the day we receive that payment. Payment of your Total Minimum Payment Due may not avoid the assessment of Overlimit Fees. Generally, credits to your account, such as those generated by merchants or by person-to-person money transfers, are not treated as payments and will not reduce your Total Minimum Payment Due.

We process most payment checks electronically. We use the information on your check to create an electronic funds transfer. Each time you send a check, you authorize a one-time electronic funds transfer. You also authorize us to process your check as a check or paper draft, as necessary. Funds may be withdrawn from your account as soon as the same day we receive your payment. You will not receive your cancelled check because we are required to destroy it. We will retain an electronic copy. For more information or to stop the conversion of your checks into electronic funds transfers, call us at the phone number listed on (the front of) your monthly statement or on your card. You may also write to us at: P.O. Box 15019, Wilmington, DE 19850-5019.

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TOTAL MINIMUM PAYMENT DUE

You may pay your total outstanding balance at any time. Each billing cycle, you must pay at least the Total Minimum Payment Due shown on your monthly statement by its Payment Due Date. The Total Minimum Payment Due is the sum of all past due amounts plus the Current Payment.

The Current Payment for each billing cycle includes three amounts: (1) 1.00% of your balance (your New Balance Total except for any new Periodic Rate Finance Charges, and Late Fee), and (2) new Periodic Rate Finance Charges, and (3) new Late Fee. The Current Payment is capped. Generally, the lowest it will be is $15.00 and the highest it could be is 5% of your New Balance Total. We round the payment amount down to the nearest dollar. If a payment is credited to your account but is returned unpaid in a later billing cycle, we will recalculate the Total Minimum Payment Due for the billing cycle in which the payment was originally credited.

WHEN YOUR PAYMENT WILL BE CREDITED TO YOUR ACCOUNT

We credit payments as of the date received, if the payment is: (1) received by 5 p.m. Eastern time; (2) received at the address shown in the upper left-hand corner of the front of your monthly statement; (3) paid with a check drawn in U.S. dollars on a U.S. financial institution or a U.S. dollar money order; and (4) sent in the return envelope with only the top portion of your statement accompanying it. Payments received after 5 p.m. Eastern time on any day including the Payment Due Date, but that otherwise meet the above requirements, will be credited as of the next day. Credit for any other payments may be delayed up to five days.

HOW WE ALLOCATE YOUR PAYMENTS

We will allocate your payments in the manner we determine. In most instances, we will allocate your payments to balances (including transactions made after your latest statement) with lower APRs before balances with higher APRs. This will result in balances with lower

APRs (such as new balances with promotional APR offers) being paid before any other existing balances.

PROMISE TO PAY APPLIES TO ALL PERSONS

All persons who initially or subsequently request, accept, guarantee or use the account are individually and together responsible for any total outstanding balance. If you and one or more persons are responsible to pay any total outstanding balance, we may refuse to release any of you from liability until all of the cards, access checks, and other credit devices outstanding under the account have been returned to us and you repay us the total outstanding balance owed to us at any time under the terms of this Agreement.

DEFAULT

You will be in default of this Agreement if: (1) you fail to make any required Total Minimum Payment Due by its Payment Due Date; (2) your total outstanding balance exceeds your credit limit; or (3) you fail to abide by any other term of this Agreement. Our failure to exercise any of our rights when you default does not mean that we are unable to exercise those rights upon later default.

WHEN WE MAY REQUIRE IMMEDIATE PAYMENT

If you are in default, then in addition to our other remedies under this Agreement, we can require immediate payment of your total outstanding balance and, unless prohibited by applicable law and except as otherwise provided under the *Arbitration and Litigation* section of this Agreement; we can also require you to pay the costs we incur in any collection proceeding, as well as reasonable attorneys' fees if we refer your account for collection to an attorney who is not our salaried employee.

OTHER PAYMENT TERMS

We can accept late payments, partial payments, or payments with any restrictive writing without losing any of our rights under this

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Agreement. This means that no payment, including those marked with "paid in full" or with any other restrictive words, shall operate as an accord and satisfaction without the prior written approval of one of our senior officers. You may not use a postdated check to make a payment. If you do postdate a payment check, we may elect to honor it upon presentment or return it uncredited to the person that presented it, without in either case waiting for the date shown on the check. We are not liable to you for any loss or expense incurred by you arising out of the action we elect to take.

PAYMENT HOLIDAYS AND REDUCED PAYMENT OFFERS

We may allow you, from time to time, to omit a monthly payment or make a reduced payment. We will notify you when these options are available. If you omit a payment or make a reduced payment, finance charges, applicable fees, and other regular transactions, if any, will accrue on your account balances in accordance with this Agreement. The reduced payment amount may be less than your finance charges. You must make the reduced payment on time to avoid a late fee. You must resume making your regular Total Minimum Payment Due each month following a payment holiday or reduced payment offer.

YOUR CREDIT LIMIT

Your credit limit is disclosed to you when you receive your card and, generally, on each monthly statement. We may change your credit limit from time to time. The amount shown on your monthly statement as Cash or Credit Available does not take into account any Purchases, Cash Advances, finance charges, fees, any other transactions, or credits which post to your account after the Closing Date of that monthly statement. Such transactions could result in your credit limit being exceeded and result in the assessment of Overlimit Fees and loss of Promotional Rates.

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WHAT WE MAY DO IF YOU ATTEMPT TO EXCEED YOUR CREDIT LIMIT

The total outstanding balance on your account plus authorizations at any time must not be more than your credit limit. If you attempt a transaction which results in your total outstanding balance (plus authorizations) exceeding your credit limit, we may: (1) permit the transaction without raising your credit limit; (2) permit the transaction and treat the amount of the transaction that is more than the credit limit as immediately due; or (3) refuse to permit the transaction.

If we refuse to permit the transaction, we may advise the person who attempted the transaction that it has been refused. If we refuse to permit a Check Cash Advance or Balance Transfer, we may do so by advising the person presenting the Check Cash Advance or Balance Transfer that credit has been refused, that there are insufficient funds to pay the Check Cash Advance or Balance Transfer, or in any other manner.

If we have previously permitted you to exceed your credit limit, it does not mean that we will permit you to exceed your credit limit again. If we decide to permit you to exceed your credit limit, which could trigger a promotion turn-off event, we may also charge an Overlimit Fee and/or apply Default Pricing as provided in this Agreement.

WE MAY AMEND THIS AGREEMENT

We may amend this Agreement at any time. We may amend it by adding, deleting, or changing provisions of this Agreement. We may increase or decrease any or all of your APRs. We may increase any or all of your APRs to rates which exceed the Default Rate. When we amend this Agreement we will comply with the applicable notice requirements of federal and Delaware law that are in effect at that time. The amended Agreement (including any higher rate or other higher charges or fees) will apply to the total outstanding balance, including the balance existing before the amendment became effective. If an amendment gives you the opportunity to reject the change, and if you reject the change in

the manner provided in such amendment, we may terminate your right to receive credit and may ask you to return all credit devices as a condition of your rejection. We may replace your card with another card at any time.

WE MAY SUSPEND OR CLOSE YOUR ACCOUNT

We may suspend or close your account or otherwise terminate your right to use your account. We may do this at any time and for any reason. Your obligations under this Agreement continue even after we have done this. You must destroy all cards, access checks or other credit devices on the account when we request.

YOU MAY CLOSE YOUR ACCOUNT

You may close your account by notifying us in writing or by telephone, and destroying all cards, access checks or other credit devices on the account. Your obligations under this Agreement continue even after you have done this.

TRANSACTIONS AFTER YOUR ACCOUNT IS CLOSED

When your account is closed, you must contact anyone authorized to charge transactions to your account, such as internet service providers, health clubs or insurance companies. These transactions may continue to be charged to your account until you change the billing. Also, if we believe you have authorized a transaction or are attempting to use your account after you have requested to close the account, we may allow the transaction to be charged to your account.

REFUSAL TO HONOR YOUR ACCOUNT

We are not liable for any refusal to honor your account. This can include a refusal to honor your card or account number or any check written on your account. We are not liable for any retention of your card by us, any other financial institution, or any provider of goods or services.

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HOW YOU MAY STOP PAYMENT ON AN ACCESS CHECK

You may request a stop payment on an access check by providing us with the access check number, dollar amount, and payee exactly as they appear on the access check. Oral and written stop payment requests on an access check are effective for six months from the day that we place the stop payment.

YOU MAY NOT POSTDATE AN ACCESS CHECK

You may not issue a postdated access check on your account. If you do postdate an access check, we may elect to honor it upon presentment or return it unpaid to the person that presented it to us for payment, without in either case waiting for the date shown on the access check. We are not liable to you for any loss or expense incurred by you arising out of the action we elect to take.

TRANSACTIONS MADE IN FOREIGN CURRENCIES

If you make a transaction in a foreign currency, the transaction will be converted by Visa International or MasterCard International, depending on which card you use, into a U.S. dollar amount in accordance with the operating regulations or conversion procedures in effect at the time the transaction is processed. Currently, those regulations and procedures provide that the currency conversion rate to be used is either (1) a wholesale market rate or (2) a government-mandated rate in effect one day prior to the processing date. The currency conversion rate in effect on the processing date may differ from the rate in effect on the transaction date or posting date.

BENEFITS

We may offer you certain benefits and services with your account. Any benefits or services are not a part of this Agreement, but are subject to the terms and restrictions outlined in the benefits brochure and other official documents provided to you from time to time by or on behalf of Bank of America. While any

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benefits or services described in the previous sentence are not a part of this Agreement, any claim or dispute related to any such benefit or service shall be subject to the *Arbitration and Litigation* section of this Agreement. We may adjust, add, or delete benefits and services at any time and without notice to you.

WE MAY SELL YOUR ACCOUNT

We may at any time, and without notice to you, sell, assign or transfer your account, any sums due on your account, this Agreement, or our rights or obligations under your account or this Agreement to any person or entity. The person or entity to whom we make any such sale, assignment or transfer shall be entitled to all of our rights and/or obligations under this Agreement, to the extent sold, assigned or transferred.

YOU MUST NOTIFY US WHEN YOU CHANGE YOUR ADDRESS

We strive to keep accurate records for your benefit and ours. The post office and others may notify us of a change to your address. When you change your address, you must notify us promptly of your new address.

WHAT LAW APPLIES

This Agreement is made in Delaware and we extend credit to you from Delaware. This Agreement is governed by the laws of the State of Delaware (without regard to its conflict of laws principles) and by any applicable federal laws.

THE PROVISIONS OF THIS AGREEMENT ARE SEVERABLE

If any provision of this Agreement is found to be invalid, the remaining provisions will continue to be effective.

OUR RIGHTS CONTINUE

Our failure or delay in exercising any of our rights under this Agreement does not mean that we are unable to exercise those rights later.

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UNAUTHORIZED USE OF YOUR CARD

Please notify us immediately of the loss, theft, or possible unauthorized use of your account at 1-800-421-2110.

ARBITRATION AND LITIGATION

This Arbitration and Litigation provision applies to you unless you were given the opportunity to reject the Arbitration and Litigation provisions and you did so reject them in the manner and timeframe required. If you did reject effectively such a provision, you agreed that any litigation brought by you against us regarding this account or this Agreement shall be brought in a court located in the State of Delaware.

Any claim or dispute ("Claim") by either you or us against the other, or against the employees, agents or assigns of the other, arising from or relating in any way to this Agreement or any prior Agreement or your account (whether under a statute, in contract, tort, or otherwise and whether for money damages, penalties or declaratory or equitable relief), shall, upon election by either you or us, be resolved by binding arbitration. The arbitrator shall resolve any Claims, including the applicability of this Arbitration and Litigation Section or the validity of the entire Agreement or any prior Agreement, except for any Claim challenging the validity of the Class Action Waiver, which shall be decided by a court.

In addition, we will not choose to arbitrate an individual Claim that you bring against us in small claims court or an equivalent court, if any. But if that Claim is transferred, removed or appealed to a different court, we then have the right to choose arbitration.

Arbitration shall take place before a single arbitrator and on an individual basis without resort to any form of class action. Arbitration may be selected at any time unless a judgment has been rendered or the other party would suffer substantial prejudice by the delay in demanding arbitration.

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The arbitration shall be conducted by the National Arbitration Forum ("NAF"), under the Code of Procedure in effect at the time the Claim is filed. Rules and forms of the National Arbitration Forum may be obtained and Claims may be filed at any National Arbitration Forum office, www.arb-forum.com, or P.O. Box 50191, Minneapolis, Minnesota 55405, telephone 1-800-474-2371. If the NAF is unable or unwilling to act as arbitrator, we may substitute another nationally recognized, independent arbitration organization that uses a similar code of procedure. At your written request, we will advance any arbitration filing fee, administrative and hearing fees which you are required to pay to pursue a Claim in arbitration. The arbitrator will decide who will be ultimately responsible for paying those fees. If you file a claim against us, in no event will you be required to reimburse us for any arbitration filing, administrative or hearing fees in an amount greater than what your court costs would have been if the Claim had been resolved in a state court with jurisdiction.

Any arbitration hearing at which you appear will take place within the federal judicial district that includes your billing address at the time the Claim is filed. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§1-16 ("FAA"). Judgment upon any arbitration award may be entered in any court having jurisdiction. The arbitrator shall follow existing substantive law to the extent consistent with the FAA and applicable statutes of limitations and shall honor any claims or privilege recognized by law. If any party requests, the arbitrator shall write an opinion containing the reasons for the award.

No Claim submitted to arbitration is heard by a jury or may be brought as a class action or as a private attorney general. You do not have the right to act as a class representative or participate as a member of a class of claimants with respect to any Claim submitted to arbitration (Class Action Waiver). The parties to this Agreement acknowledge that the Class Action Waiver is material and essential to the arbitration

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of any disputes between the parties and is nonseverable from this agreement to arbitrate Claims. If the Class Action Waiver is limited, voided or found unenforceable, then the parties' agreement to arbitrate (except for this sentence) shall be null and void with respect to such proceeding, subject to the right to appeal the limitation or invalidation of the Class Action Waiver. The Parties acknowledge and agree **that under no circumstances will a class action be arbitrated.**

This Arbitration and Litigation Section applies to all Claims now in existence or that may arise in the future. This Arbitration and Litigation Section shall survive the termination of your account with us as well as any voluntary payment of the debt in full by you, any bankruptcy by you or sale of the debt by us.

For the purposes of this Arbitration and Litigation Section, "we" and "us" means FIA Card Services, N.A., its parent, subsidiaries, affiliates, licensees, predecessors, successors, assigns, and any purchaser of your account, and all of their officers, directors, employees, agents and assigns or any and all of them. Additionally, "we" or "us" shall mean any third party providing benefits, services, or products in connection with the account (including but not limited to credit bureaus, merchants that accept any credit device issued under the account, rewards or enrollment services, credit insurance companies, debt collectors and all of their officers, directors, employees and agents) if, and only if, such a third party is named by you as a co-defendant in any Claim you assert against us.

YOU UNDERSTAND AND AGREE THAT IF EITHER YOU OR WE ELECT TO ARBITRATE A CLAIM, THIS ARBITRATION SECTION PRECLUDES YOU AND US FROM HAVING A RIGHT OR OPPORTUNITY TO LITIGATE CLAIMS THROUGH COURT, OR TO PARTICIPATE OR BE REPRESENTED IN LITIGATION FILED IN COURT BY OTHERS. EXCEPT AS OTHERWISE PROVIDED ABOVE, ALL CLAIMS MUST BE RESOLVED THROUGH

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ARBITRATION IF YOU OR WE ELECT TO ARBITRATE.

YOUR BILLING RIGHTS

Keep This Notice for Future Use: This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

Notify Us in Case of Errors or Questions About Your Bill: If you think your bill is wrong, or if you need more information about a transaction on your bill, write us on a separate sheet (or use a copy of the form provided on your bill) at Bank of America, P.O. Box 15026, Wilmington, DE 19850. Write to us as soon as possible. Do not send the notice on or with your payment. We must hear from you no later than 60 days after we sent you the first bill on which the transaction or error appeared. You can telephone us, but doing so will not preserve your rights. In your letter, give us the following information: (1) your name and account number; (2) the dollar amount of the suspected error; (3) the posting date of the transaction in question; and (4) a description of the error and an explanation, if you can, of why you believe there is an error. If you need more information, describe the item you are not sure about.

If you have authorized us to pay your credit card bill automatically from your savings or checking account with us, you can stop the payment on any amount you think is wrong. To stop the payment your letter must reach us three business days before the automatic payment is scheduled to occur.

Your Rights and Our Responsibilities After We Receive Your Written Notice: We must acknowledge your letter within 30 days, unless we have corrected the error by then. Within 90 days, we must either correct the error or explain why we believe the bill was correct.

After we receive your letter, we cannot try to collect any amount you question or report you as delinquent. We can continue to bill you for the amount you question, including finance charges,

and we can apply any unpaid amount against your credit limit. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find that we made a mistake on your bill, you will not have to pay any finance charges related to any questioned amount. If we did not make a mistake, you may have to pay finance charges, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date that it is due.

If you fail to pay the amount that we think you owe, we may report you as delinquent. However, if our explanation does not satisfy you and you write to us within twenty-five (25) days telling us that you still refuse to pay, we must tell anyone we report you to that you have a question about your bill, and we must tell you the name of anyone we report you to. We must tell anyone we report you to that the matter has been settled between us when it finally is.

If we do not follow these rules, we cannot collect the first $50 of the questioned amount, even if your bill was correct.

Special Rule for Credit Card Purchases: If you have a problem with the quality of the property or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the property or services. There are two limitations on this right:

(1) You must have made the purchase in your home state or, if not within your home state, within 100 miles of your current mailing address and;

(2) The purchase price must have been more than $50.

These limitations do not apply if we own or operate the merchant, or if we mailed you the advertisement for the property or services.

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Case ID:

EXHIBIT B

Case ID:

Bank of America

EXHIBIT C

BILL OF SALE AND ASSIGNMENT OF LOANS

The undersigned Assignor ("Assignor") on and as of the date hereof hereby absolutely sells, transfers, assigns, sets-over, quitclaims and conveys to Cavalry SPV I, LLC a limited liability company organized under the laws of Delaware ("Assignee") without recourse and without representations or warranties of any type, kind, character or nature, express or implied, subject to Buyer's repurchase rights as set forth in Sections 8.1 and 8.2, all of Assignor's right, title and interest in and to each of the loans identified in the loan schedule ("Loan Schedule") attached hereto (the "Loans"), together with the right to all principal, interest or other proceeds of any kind with respect to the Loans remaining due and owing as of the Cut-Off Date applicable to such Loans as set forth in the Loan Sale Agreement pursuant to which the Loans are being sold (including but not limited to proceeds derived from the conversion, voluntary or involuntary, of any of the Loans into cash or other liquidated property).

DATED: September 28, 2011

ASSIGNOR: FIA CARD SERVICES, N.A.

Name: Debra L. Pellicciaro
Title: Vice President

RCHASE_DATE	ACCT_NO	CONTRACT_DATE	ORIG_LAST_PAY_DATE
9/28/2011	[redacted]9587	6/19/2007	5/23/2009

CREDITOR	INITIAL_BALANCE
Bank of America/FIA Card Services, N.A.	10088.75

MAKER_NAME	MAKER_SSN	COMAKER_NAME	COMAKER_SSN
	[redacted]		

Case ID:

Case ID:

Bank of America

Prepared for:

Account Number: [redacted]9587

May 2009 Statement
Credit Line: $8,000.00
Cash or Credit Available:

Customer Service

For Information on Your Account Visit:
www.bankofamerica.com
Call toll-free 1-800-626-2556
TDD hearing-impaired 1-800-346-3178

Mail Payments to:
BANK OF AMERICA
P.O. BOX 15019
WILMINGTON, DE 19886-5019

Mail Billing Inquiries to:
BANK OF AMERICA
P.O. BOX 15026
WILMINGTON, DE 19850-5026

Account Information

Summary of Transactions		
Previous Balance		$8,532.80
Payments and Credits	-	$0.00
Purchases and Adjustments	+	$39.00
Periodic Rate Finance Charges	+	$227.42
Transaction Fee Finance Charges	+	$0.00
New Balance Total		$8,799.22

Billing Cycle and Payment Information		
Days in Billing Cycle		32
Closing Date		05/05/09
Payment Due Date		05/29/09
Current Payment Due		$351.00
Past Due Amount	+	$723.00
Total Minimum Payment Due		$1,074.00

Purchases and Adjustments

Purchases and Adjustments	Promotional Offer ID	Posting Date	Transaction Date	Reference Number	Account Number	Amount
LATE FEE FOR PAYMENT DUE 04/30		04/30	04/30	8532		39.00

Important Information About Your Account

YOUR PAYMENT WAS NOT RECEIVED BY THE DUE DATE. TO AVOID FUTURE FEES OR RATE INCREASES, PLEASE MAKE YOUR PAYMENTS ON TIME AND REMAIN UNDER YOUR CREDIT LIMIT. REMEMBER, IF TWICE IN 12 MONTHS YOUR PAYMENT IS RECEIVED AFTER THE DUE DATE AND/OR YOUR CREDIT LIMIT IS EXCEEDED, YOUR APR MAY INCREASE.

OUR RECORDS SHOW YOUR ACCOUNT IS PAST DUE

Interest Charge Calculation

Category	*Promotional Transaction Types*	*Daily Periodic Rate*	*Corresponding Annual Percentage Rate*	*APR Type*	*Balance Subject to Finance Charge*
Balance Transfers		0.082164%	29.99%	S	$0.00
Cash Advances		0.082164%	29.99%	S	$0.00
Purchases		0.082164%	29.99%	S	$8,649.69

Annual Percentage Rate for this Billing Period: 29.99%
(Includes Periodic Rate Finance Charges and Transaction Fee Finance Charges that results in an APR which exceeds the Corresponding APR above.)

APR Type Definitions: APR Type: S= Standard APR (APR normally in effect)

05 00879922001074000002000000[redacted]9587

BANK OF AMERICA
P.O. BOX 15019
WILMINGTON, DE 19886-5019

PHILADELPHIA PA 191

☐ Check here for a change of mailing address or phone number(s). Please provide all corrections on the reverse side.

Payment Information

ACCOUNT NUMBER: [redacted]9587
NEW BALANCE TOTAL: $8,799.22
PAYMENT DUE DATE: 05/29/09
TOTAL MINIMUM PAYMENT DUE $1,074.00
Enter Payment Amount Enclosed: $

Mail this payment coupon along with a check or money order payable to: BANK OF AMERICA

1:5240222501:68 9587" Case ID:

IMPORTANT INFORMATION ABOUT THIS ACCOUNT USE211 Rev. 04/08

CUSTOMER STATEMENT OF DISPUTED ITEM – *Please call toll free 1.866.266.0212 Monday-Thursday 8am-9pm (Eastern Time), Friday 8am-7pm (Eastern Time) and Saturday 8am-6pm (Eastern Time). For prompt service please have the merchant reference number(s) available for the charge(s) in question.*

PLEASE DO NOT ALTER WORDING ON THIS FORM AND DO NOT MAIL YOUR LETTER OR FORM WITH YOUR PAYMENT. Choose only one dispute reason.

Your Name: _____
Transaction Date: _____ Posting Date: _____
Amount $: _____ Disputed Amount $: _____

Account Number: _____
Reference Number: _____
Merchant Name: _____

☐ 1. The amount of the charge was increased from $_____ to $_____ or my sales slip was added incorrectly. Enclosed is a copy of the sales slip that shows the correct amount.

☐ 2. I certify that the charge listed above was not made by me or a person authorized by me to use my card, nor were the goods or services represented by the transaction received by me or a person authorized by me.

☐ 3. I have not received the merchandise that was to be shipped to me on ___/___/___ (MM/DD/YY). I have asked the merchant to credit my account.

☐ 4. I was issued a credit slip that was not shown on my statement. A copy of my credit slip is enclosed. The merchant has up to 30 days to credit your account.

☐ 5. Merchandise that was shipped to me has arrived damaged and/or defective. I returned it on ___/___/___ (MM/DD/YY) and asked the merchant to credit my account. Attach a letter describing how the merchandise was damaged and/or defective and a copy of the proof of return.

☐ 6. Although I did engage in the above transaction, I have contacted the merchant, returned the merchandise on ___/___/___ (MM/DD/YY) and requested a credit. I either did not receive this credit or it was unsatisfactory. Attach a letter explaining why you are disputing this charge with a copy of the proof of return. If you are unable to return the merchandise, please explain.

☐ 7. I certify that the charge in question was a single transaction, but was posted twice to my statement. I did not authorize the second transaction. Sale #1 $ _____ Reference # _____ Sale #2 $ _____ Reference # _____

☐ 8. I notified the merchant on ___/___/___ (MM/DD/YY) to cancel the pre-authorized order (reservation). Please note cancellation # and if available, enclose a copy of your contract and a copy of your telephone bill showing date and time of cancellation. Reason for cancellation/cancellations: _____

☐ 9. Although I did engage in the above transaction, I have contacted the merchant for credit. The services to be provided on ___/___/___ (MM/DD/YY) were not received or were unsatisfactory. Attached a letter describing the services expected, your attempts to resolve with the merchant and a copy of your contract.

☐ 10. I certify that I do not recognize the transaction. Merchants often provide telephone numbers next to their name on your billing statement. Please attempt to contact the merchant for information.

☐ 11. If your dispute is for a different reason, please contact us at the above telephone number.

Signature (required): _____ Date: _____
Best contact telephone #: _____ Home #: _____

Billing rights are only preserved by written inquiry. To preserve your billing rights, please return a copy of this form and any supporting information regarding the merchant charge in question to: Attn: Billing Inquiries, P.O. Box 15026, Wilmington, DE 19850-5026, USA.

PLEASE KEEP THE ORIGINAL FOR YOUR RECORDS AND SEND A COPY OF THIS STATEMENT.

GRACE PERIOD

"Grace Period" means the period of time during a billing cycle when you will not accrue Periodic Rate Finance Charges on certain transactions or balances. There is no Grace Period for Balance Transfers and Cash Advances. If you pay in full this statement's New Balance Total by its Payment Due Date and if you paid in full this statement's Previous Balance in this statement's billing cycle, then you will have a Grace Period during the billing cycle that began the day after this statement's Closing Date on the Purchase portions of this statement's New Balance Total.

During a 0% Promotional Rate Offer: 1) no Periodic Rate Finance Charges accrue on balances with the 0% Promotional Rate; and 2) you must pay the Total Minimum Payment Due by its Payment Due Date (and avoid any other "promotion turn-off event" as defined in your Credit Card Agreement) to maintain the 0% Promotional Rate.

** If a corresponding Annual Percentage Rate in the Finance Charge Schedule on the front of this statement contains a "**" symbol, then with respect to those balances: 1) the 0% Promotional Rate will expire at the end of the next billing cycle, and 2) you must pay this statement's New Balance Total by its Payment Due Date to avoid Periodic Rate Finance Charges after the end of the 0% Promotional Rate Offer on those balances existing as of the Closing Date of this statement.

CALCULATION OF BALANCES SUBJECT TO FINANCE CHARGE

Average Balance Method (including new Balance Transfers and new Cash Advances): We calculate separate Balances Subject to Finance Charge for Balance Transfers, Cash Advances, and for each Promotional Offer balance consisting of Balance Transfers or Cash Advances. We do this by: (1) calculating a daily balance for each day in this statement's billing cycle; (2) calculating a daily balance for each day prior to this statement's billing cycle that had a "Pre-Cycle balance" – a Pre-Cycle balance is a Balance Transfer or Cash Advance with a transaction date prior to this statement's billing cycle but with a posting date within this statement's billing cycle; (3) adding all the daily balances together; and (4) dividing the sum of the daily balances by the number of days in this statement's billing cycle.

To calculate the daily balance for each day in this statement's billing cycle, we take the beginning balance, add an amount equal to the applicable Daily Periodic Rate multiplied by the previous day's daily balance, add new Balance Transfers, new Cash Advances and and Transaction Fees, and subtract applicable payments and credits. If any daily balance is less than zero we treat it as zero.

To calculate a daily balance for each day prior to this statement's billing cycle that had a Pre-Cycle balance, we take the beginning balance attributable solely to Pre-Cycle balances (which will be zero on the transaction date of the first Pre-Cycle balance), add an amount equal to the applicable Daily Periodic Rate multiplied by the previous day's daily balance, and add only the applicable Pre-Cycle balances, and their related Transaction Fees. We exclude from this calculation all transactions posted in previous billing cycles.

Average Daily Balance Method (including new Purchases): We calculate separate Balances Subject to Finance Charge for Purchases and for each Promotional Offer balance consisting of Purchases. We do this by: (1) calculating a daily balance for each day in the billing cycle; (2) adding all the daily balances together; and (3) dividing the sum of the daily balances by the number of days in the billing cycle.

To calculate the daily balance for each day in this statement's billing cycle, we take the beginning balance, add an amount equal to the applicable Daily Periodic Rate multiplied by the previous day's daily balance, add new Purchases, new Account Fees, and new Transaction Fees, and subtract applicable payments and credits. If any daily balance is less than zero we treat it as zero. If the Previous Balance shown on this statement was paid in full in this statement's billing cycle, then on the day after that payment in full date, we exclude from the beginning balance new Purchases, new Account Fees, and new Transaction Fees which posted on or before that payment in full date, and we do not add new Purchases, new Account Fees, or new Transaction Fees which post after that payment in full date.

We include the costs for the credit card debt cancellation plan or credit insurance purchased through us in calculating the beginning balance for the first day of the billing cycle after the billing cycle in which such costs are billed.

TOTAL PERIODIC RATE FINANCE CHARGE COMPUTATION

Periodic Rate Finance Charges accrue and are compounded on a daily basis. To determine the Periodic Rate Finance Charges, we multiply each Balance Subject to Finance Charge by its applicable Daily Periodic Rate and that result by the number of days in the billing cycle. To determine the total Periodic Rate Finance Charge for the billing cycle, we add the Periodic Rate Finance Charges together. Each Daily Periodic Rate is calculated by dividing its corresponding Annual Percentage Rate by 365.

HOW WE ALLOCATE YOUR PAYMENTS

We will allocate your payments in the manner we determine. In most instances, we will allocate your payments to balances (including transactions made after this statement) with lower APRs before balances with higher APRs. This will result in balances with lower APRs (such as new balances with promotional APR offers) being paid before any other existing balances.

Payment Due Dates and Keeping Your Account in Good Standing

Your Payment Due Date will not fall on the same day each month. In order to help maintain any promotional rates, to avoid the imposition of Default Rates (if applicable), to avoid late fees, and to avoid overlimit fees, we must receive at least the Total Minimum Payment Due by its Payment Due Date each billing cycle and you must maintain your account balance below your Credit Limit each day.

Important Information about Payments by Phone

When using the optional Pay-by-Phone service, you authorize us to initiate an electronic payment from your account at the financial institution you designate. You must authorize the amount and timing of each payment. For your protection, we will ask for security information. A fee may apply. To cancel, call us before the scheduled payment date. Same-day payments cannot be edited or canceled.

MISCELLANEOUS

For the complete terms and conditions of your account, consult your Credit Card Agreement. FIA Card Services is a tradename of FIA Card Services, N.A. This account is issued and administered by FIA Card Services, N.A.

PAYMENTS

We credit payments as of the date received, if the payment is 1) received by 5 p.m. (Eastern Time), 2) received at the address shown in the bottom left-hand corner of the front of this statement, 3) paid with a check drawn in U.S. dollars on a U.S. financial institution or a U.S. dollar money order, and 4) sent in the enclosed return envelope with only the bottom portion of this statement accompanying it. Payments received after 5 p.m. on any day including the Payment Due Date, but that otherwise meet the above requirements, will be credited as of the next day. We will reject payments that are not drawn in U.S. dollars; and those drawn on a financial institution located outside of the United States. Credit for any other payments may be delayed up to five days. No payment shall operate as an accord and satisfaction without the prior written approval of one of our Senior Officers.

We process most payment checks electronically by using the information found on your check. Each check authorizes us to create a one-time electronic funds transfer (or process it as a check or paper draft). Funds may be withdrawn from your account as soon as the same day we receive your payment. Checks are not returned to you. For more information or to stop the electronic funds transfers, call us at the number listed on the front.

If you have authorized us to pay your credit card bill automatically from your savings or checking account with us, you can stop the payment on any amount you think is wrong. To stop the payment your letter must reach us at least three business days before the automatic payment is scheduled to occur.

If your billing address or contact information has changed, or if your address is incorrect as it appears on this bill, please provide all corrections here.

Address 1 _____

Address 2 _____

City _____

State _____ Zip _____

Area Code & Home Phone _____

Area Code & Work Phone _____

Case ID:

Bank of America

Prepared for:

Account Number: [redacted] 9587

June 2009 Statement
Credit Line: $8,000.00
Cash or Credit Available:

Customer Service

For Information on Your Account Visit:
www.bankofamerica.com
Call toll-free 1-800-626-2556
TDD hearing-impaired 1-800-346-3178
Mail Payments to:
BANK OF AMERICA
P.O. BOX 15019
WILMINGTON, DE 19886-5019
Mail Billing Inquiries to:
BANK OF AMERICA
P.O. BOX 15026
WILMINGTON, DE 19850-5026

Account Information

Summary of Transactions		
Previous Balance		$8,799.22
Payments and Credits	-	$85.00
Purchases and Adjustments	+	$39.00
Periodic Rate Finance Charges	+	$211.44
Transaction Fee Finance Charges	+	$0.00
New Balance Total		$8,964.66

Billing Cycle and Payment Information		
Days in Billing Cycle		29
Closing Date		06/03/09
Payment Due Date		06/28/09
Current Payment Due		$337.00
Past Due Amount	+	$989.00
Total Minimum Payment Due		$1,326.00

Activity Since Your Last Statement

Payments and Credits	Promotional Offer ID	Posting Date	Transaction Date	Reference Number	Account Number	Amount
PAY BY PHONE PAYMENT		05/23				85.00 CR
Purchases and Adjustments						
LATE FEE FOR PAYMENT DUE 05/29		05/29	05/29	8714		39.00

Important Information About Your Account

YOUR PAYMENT WAS NOT RECEIVED BY THE DUE DATE. TO AVOID FUTURE FEES OR RATE INCREASES, PLEASE MAKE YOUR PAYMENTS ON TIME AND REMAIN UNDER YOUR CREDIT LIMIT. REMEMBER, IF TWICE IN 12 MONTHS YOUR PAYMENT IS RECEIVED AFTER THE DUE DATE AND/OR YOUR CREDIT LIMIT IS EXCEEDED, YOUR APR MAY INCREASE.

OUR RECORDS SHOW YOUR ACCOUNT IS PAST DUE

Interest Charge Calculation

Category	*Promotional Transaction Types*	*Daily Periodic Rate*	*Corresponding Annual Percentage Rate*	*APR Type*	*Balance Subject to Finance Charge*
Balance Transfers		0.082164%	29.99%	S	$0.00
Cash Advances		0.082164%	29.99%	S	$0.00
Purchases		0.082164%	29.99%	S	$8,873.94

Annual Percentage Rate for this Billing Period: 29.99%
(Includes Periodic Rate Finance Charges and Transaction Fee Finance Charges that results in an APR which exceeds the Corresponding APR above.)

APR Type Definitions: APR Type: S= Standard APR (APR normally in effect)

05 00896466001326000000850000[redacted]9587

BANK OF AMERICA
P.O. BOX 15019
WILMINGTON, DE 19886-5019

PHILADELPHIA PA 191

☐ Check here for a change of mailing address or phone number(s). Please provide all corrections on the reverse side.

Payment Information

ACCOUNT NUMBER: [redacted] 9587
NEW BALANCE TOTAL: $8,964.66
PAYMENT DUE DATE: 06/28/09
TOTAL MINIMUM PAYMENT DUE $1,326.00
Enter Payment Amount Enclosed: $

Mail this payment coupon along with a check or money order payable to: BANK OF AMERICA

Page 1 of 2

1:5240222501: 3587 Case ID:

IMPORTANT INFORMATION ABOUT THIS ACCOUNT USE211 Rev. 04/08

CUSTOMER STATEMENT OF DISPUTED ITEM – *Please call toll free 1.866.266.0212 Monday-Thursday 8am-9pm (Eastern Time), Friday 8am-7pm (Eastern Time) and Saturday 8am-6pm (Eastern Time). For prompt service please have the merchant reference number(s) available for the charge(s) in question.*

PLEASE DO NOT ALTER WORDING ON THIS FORM AND DO NOT MAIL YOUR LETTER OR FORM WITH YOUR PAYMENT. Choose only one dispute reason.

Your Name: _____
Transaction Date: _____ Posting Date: _____
Amount $: _____ Disputed Amount $: _____
Account Number: _____
Reference Number: _____
Merchant Name: _____

☐ 1. The amount of the charge was increased from $_____ to $_____ or my sales slip was added incorrectly. Enclosed is a copy of the sales slip that shows the correct amount.

☐ 2. I certify that the charge listed above ~~was not made by me or a person authorized by me to use my card~~, nor were the goods or services represented by the transaction received by me or a person authorized by me.

☐ 3. I have not received the merchandise that was to be shipped to me on ____/____/____ (MM/DD/YY). I have asked the merchant to credit my account.

☐ 4. I was issued a credit slip that was not shown on my statement. A copy of my credit slip is enclosed. The merchant has up to 30 days to credit your account.

☐ 5. Merchandise that was shipped to me has arrived damaged and/or defective. I returned it on ____/____/____ (MM/DD/YY) and asked the merchant to credit my account. Attach a letter describing how the merchandise was damaged and/or defective and a copy of the proof of return.

☐ 6. Although I did engage in the above transaction, I have contacted the merchant, returned the merchandise on ____/____/____ (MM/DD/YY) and requested a credit. I either did not receive this credit or it was unsatisfactory. Attach a letter explaining why you are disputing this charge with a copy of the proof of return. If you are unable to return the merchandise, please explain.

☐ 7. I certify that the charge in question was a single transaction, but was posted twice to my statement. I did not authorize the second transaction. Sale # 1 $ _____ Reference # _____
Sale #2 $ _____ Reference # _____

☐ 8. I notified the merchant on ____/____/____ (MM/DD/YY) I wanted the pre-authorized order (reservation) Please note cancellation # and if available, enclose a copy of your contract and a copy of your telephone bill showing date and time of cancellation. Reason for cancellation / cancellation #:

☐ 9. Although I did engage in the above transaction, I have contacted the merchant for credit. The services to be provided on ____/____/____ (MM/DD/YY) were not received or were unsatisfactory. Attach a letter describing the services expected, your attempts to resolve with the merchant and a copy of your contract.

☐ 10. I certify that I do not recognize the transaction. Merchants often provide telephone numbers next to their names on your billing statement. Please attempt to contact the merchant for information.

☐ 11. If your dispute is for a different reason, please contact us at the above telephone number.

Signature (required): _____ Date: _____
Best contact telephone #: _____ Home#: _____

Billing rights are only preserved by written inquiry. To preserve your billing rights, please return a copy of this form and any supporting information regarding the merchant charge in question to: Attn: Billing Inquiries, P.O. Box 15026, Wilmington, DE 19850-5026, USA.

PLEASE KEEP THE ORIGINAL FOR YOUR RECORDS AND SEND A COPY OF THIS STATEMENT.

GRACE PERIOD

"Grace Period" means the period of time during a billing cycle when you will not accrue Periodic Rate Finance Charges on certain transactions or balances. There is no Grace Period for Balance Transfers and Cash Advances. If you pay in full this statement's New Balance Total by its Payment Due Date and if you paid in full this statement's Previous Balance in this statement's billing cycle, then you will have a Grace Period during the billing cycle that began the day after this statement's Closing Date on the Purchase portions of this statement's New Balance Total.

During a 0% Promotional Rate Offer: 1) no Periodic Rate Finance Charges accrue on balances with the 0% Promotional Rate; and 2) you must pay the Total Minimum Payment Due by its Payment Due Date (and avoid any other "promotion turn-off event" as defined in your Credit Card Agreement) to maintain the 0% Promotional Rate.

** If a corresponding Annual Percentage Rate in the Finance Charge Schedule on the front of this statement contains a "**" symbol, then with respect to those balances: 1) the 0% Promotional Rate will expire at the end of the next billing cycle, and 2) you must pay this statement's New Balance Total by its Payment Due Date to avoid Periodic Rate Finance Charges after the end of the 0% Promotional Rate Offer on those balances existing as of the Closing Date of this statement.

CALCULATION OF BALANCES SUBJECT TO FINANCE CHARGE

Average Balance Method (including new Balance Transfers and new Cash Advances): We calculate separate Balances Subject to Finance Charge for Balance Transfers, Cash Advances, and for each Promotional Offer balance consisting of Balance Transfers or Cash Advances. We do this by: (1) calculating a daily balance for each day in this statement's billing cycle; (2) calculating a daily balance for each day prior to this statement's billing cycle that had a "Pre-Cycle balance" – a Pre-Cycle balance is a Balance Transfer or Cash Advance with a transaction date prior to this statement's billing cycle but with a posting date within this statement's billing cycle; (3) adding all the daily balances together; and (4) dividing the sum of the daily balances by the number of days in this statement's billing cycle.

To calculate the daily balance for each day in this statement's billing cycle, we take the beginning balance, add an amount equal to the applicable Daily Periodic Rate multiplied by the previous day's daily balance, add new Balance Transfers, new Cash Advances and and Transaction Fees, and subtract applicable payments and credits. If any daily balance is less than zero we treat it as zero.

To calculate a daily balance for each day prior to this statement's billing cycle that had a Pre-Cycle balance, we take the beginning balance attributable solely to Pre-Cycle balances (which will be zero on the transaction date of the first Pre-Cycle balance), add an amount equal to the applicable Daily Periodic Rate multiplied by the previous day's daily balance, and add only the applicable Pre-Cycle balances, and their related Transaction Fees. We exclude from this calculation all transactions posted in previous billing cycles.

Average Daily Balance Method (including new Purchases): We calculate separate Balances Subject to Finance Charge for Purchases and for each Promotional Offer balance consisting of Purchases. We do this by: (1) calculating a daily balance for each day in the billing cycle; (2) adding all the daily balances together; and (3) dividing the sum of the daily balances by the number of days in the billing cycle.

To calculate the daily balance for each day in this statement's billing cycle, we take the beginning balance, add an amount equal to the applicable Daily Periodic Rate multiplied by the previous day's daily balance, add new Purchases, new Account Fees, and new Transaction Fees, and subtract applicable payments and credits. If any daily balance is less than zero we treat it as zero. If the Previous Balance shown on this statement was paid in full in this statement's billing cycle, then on the day after that payment in full date, we exclude from the beginning balance new Purchases, new Account Fees, and new Transaction Fees which posted on or before that payment in full date, and we do not add new Purchases, new Account Fees, or new Transaction Fees which post after that payment in full date.

We include the costs for the credit card debt cancellation plan or credit insurance purchased through us in calculating the beginning balance for the first day of the billing cycle after the billing cycle in which such costs are billed.

TOTAL PERIODIC RATE FINANCE CHARGE COMPUTATION

Periodic Rate Finance Charges accrue and are compounded on a daily basis. To determine the Periodic Rate Finance Charges, we multiply each Balance Subject to Finance Charge by its applicable Daily Periodic Rate and that result by the number of days in the billing cycle. To determine the total Periodic Rate Finance Charge for the billing cycle, we add the Periodic Rate Finance Charges together. Each Daily Periodic Rate is calculated by dividing its corresponding Annual Percentage Rate by 365.

HOW WE ALLOCATE YOUR PAYMENTS

We will allocate your payments in the manner we determine. In most instances, we will allocate your payments to balances (including transactions made after this statement) with lower APRs before balances with higher APRs. This will result in balances with lower APRs (such as new balances with promotional APR offers) being paid before any other existing balances.

Payment Due Dates and Keeping Your Account in Good Standing

Your Payment Due Date will not fall on the same day each month. In order to help maintain any promotional rates, to avoid the imposition of Default Rates (if applicable), to avoid late fees, and to avoid overlimit fees, we must receive at least the Total Minimum Payment Due by its Payment Due Date each billing cycle and you must maintain your account balance below your Credit Limit each day.

Important Information about Payments by Phone

When using the optional Pay-by-Phone service, you authorize us to initiate an electronic payment from your account at the financial institution you designate. You must authorize the amount and timing of each payment. For your protection, we will ask for security information. A fee may apply. To cancel, call us before the scheduled payment date. Same-day payments cannot be edited or canceled.

MISCELLANEOUS

For the complete terms and conditions of your account, consult your Credit Card Agreement. FIA Card Services is a tradename of FIA Card Services, N.A. This account is issued and administered by FIA Card Services, N.A.

PAYMENTS

We credit payments as of the date received, if the payment is 1) received by 5 p.m. (Eastern Time), 2) received at the address shown in the bottom left-hand corner of the front of this statement, 3) paid with a check drawn in U.S. dollars on a U.S. financial institution or a U.S. dollar money order, and 4) sent in the enclosed return envelope with only the bottom portion of this statement accompanying it. Payments received after 5 p.m. on any day including the Payment Due Date, but that otherwise meet the above requirements, will be credited as of the next day. We will reject payments that are not drawn in U.S. dollars and those drawn on a financial institution located outside of the United States. Credit for any other payments may be delayed up to five days. No payment shall operate as an accord and satisfaction without the prior written approval of one of our Senior Officers.

We process most payment checks electronically by using the information found on your check. Each check authorizes us to create a one-time electronic funds transfer (or process it as a check or paper draft). Funds may be withdrawn from your account as soon as the same day we receive your payment. Checks are not returned to you. For more information or to stop the electronic funds transfers, call us at the number listed on the front.

If you have authorized us to pay your credit card bill automatically from your savings or checking account with us, you can stop the payment on any amount you think is wrong. To stop the payment your letter must reach us at least three business days before the automatic payment is scheduled to occur.

If your billing address or contact information has changed, or if your address is incorrect as it appears on this bill, please provide all corrections here.

Address 1 _____

Address 2 _____

City _____

State _____ Zip _____

Area Code & Home Phone _____

Area Code & Work Phone _____

Case ID:

Bank of America

Prepared for:

Account Number: [redacted] 9587

October 2009 Statement

Credit Line: $8,000.00

Cash or Credit Available:

Customer Service

For Information on Your Account Visit:
www.bankofamerica.com
Call toll-free 1-800-626-2556
TDD hearing-impaired 1-800-346-3178

Mail Payments to:
BANK OF AMERICA
P.O. BOX 15019
WILMINGTON, DE 19886-5019

Mail Billing Inquiries to:
BANK OF AMERICA
P.O. BOX 15026
WILMINGTON, DE 19850-5026

Account Information

Summary of Transactions		
Previous Balance		$9,788.88
Payments and Credits	-	$0.00
Purchases and Adjustments	+	$39.00
Periodic Rate Finance Charges	+	$260.87
Transaction Fee Finance Charges	+	$0.00
New Balance Total		$10,088.75

Billing Cycle and Payment Information		
Days in Billing Cycle		32
Closing Date		10/05/09
Payment Due Date		11/01/09
Current Payment Due		$397.00
Past Due Amount	+	$2,426.00
Total Minimum Payment Due		$2,823.00

Purchases and Adjustments

Purchases and Adjustments	Promotional Offer ID	Posting Date	Transaction Date	Reference Number	Account Number	Amount
LATE FEE FOR PAYMENT DUE 09/30		09/30	09/30	9788		39.00

Important Information About Your Account

OUR RECORDS SHOW YOUR ACCOUNT IS PAST DUE

Interest Charge Calculation

Category	Promotional Transaction Types	Daily Periodic Rate	Corresponding Annual Percentage Rate	APR Type	Balance Subject to Finance Charge
ance Transfers		0.082164%	29.99%	S	$0.00
Cash Advances		0.082164%	29.99%	S	$0.00
Purchases		0.082164%	29.99%	S	$9,921.90

Annual Percentage Rate for this Billing Period: 29.99%
(Includes Periodic Rate Finance Charges and Transaction Fee Finance Charges that results in an APR which exceeds the Corresponding APR above.)

APR Type Definitions: APR Type: S= Standard APR (APR normally in effect)

05 0100887500282300000085000000[redacted]9587

BANK OF AMERICA
P.O. BOX 15019
WILMINGTON, DE 19886-5019

PHILADELPHIA PA 191

☐ Check here for a change of mailing address or phone number(s). Please provide all corrections on the reverse side.

Payment Information

ACCOUNT NUMBER: [redacted] 9587
NEW BALANCE TOTAL: $10,088.75
PAYMENT DUE DATE: 11/01/09
TOTAL MINIMUM PAYMENT DUE $2,823.00
Enter Payment Amount Enclosed: $

Mail this payment coupon along with a check or money order payable to: BANK OF AMERICA

Page 1 of 2

1:5240222501: 371 Case ID:

IMPORTANT INFORMATION ABOUT THIS ACCOUNT USE211 Rev. 04/08

CUSTOMER STATEMENT OF DISPUTED ITEM – *Please call toll free 1.866.266.0212 Monday-Thursday 8am-9pm (Eastern Time), Friday 8am-7pm (Eastern Time) and Saturday 8am-6pm (Eastern Time). For prompt service please have the merchant reference number(s) available for the charge(s) in question.*

PLEASE DO NOT ALTER WORDING ON THIS FORM AND DO NOT MAIL YOUR LETTER OR FORM WITH YOUR PAYMENT. Choose only one dispute reason.

Your Name: _____
Transaction Date: _____ Posting Date: _____
Amount $: _____ Disputed Amount $: _____

☐ 1. The amount of the charge was increased from $_____ to $_____ or my sales slip was added incorrectly. Enclosed is a copy of the sales slip that shows the correct amount.

☐ 2. I certify that the charge listed above was not made by me or a person authorized by me to use my card, nor were the goods or services represented by the transaction received by me or a person authorized by me.

☐ 3. I have not received the merchandise that was to be shipped to me on ____/____/____ (MM/DD/YY). I have asked the merchant to credit my account.

☐ 4. I was issued a credit slip that was not shown on my statement. A copy of my credit slip is enclosed. The merchant has up to 30 days to credit your account.

☐ 5. Merchandise that was shipped to me has arrived damaged and/or defective. I returned it on ____/____/____ (MM/DD/YY) and asked the merchant to credit my account. Attach a letter describing how the merchandise was damaged and/or defective and a copy of the proof of return.

☐ 6. Although I did engage in the above transaction, I have contacted the merchant, returned the merchandise on ____/____/____ (MM/DD/YY) and requested a credit. I either did not receive this credit or it was unsatisfactory. Attach a letter explaining why you are disputing this charge with a copy of the proof of return. If you are unable to return the merchandise, please explain.

☐ 7. I certify that the charge in question was a single transaction, but was posted twice to my statement. I did not authorize the second transaction. Sale #1 $_____ Reference # _____ Sale #2 $ _____ Reference # _____.

Account Number: _____
Reference Number: _____
Merchant Name: _____

☐ 8. I notified the merchant on ____/____/____ (MM/DD/YY) to cancel the pre-authorized order (reservation). Please note cancellation # and if available, enclose a copy of your contract and a copy of your telephone bill showing date and time of cancellation. Reason for cancellation / cancellation #: _____

☐ 9. Although I did engage in the above transaction, I have contacted the merchant for credit. The services to be provided on ____/____/____ (MM/DD/YY) were not received or were unsatisfactory. Attach a letter describing the services expected, your attempts to resolve with the merchant and a copy of your contract.

☐ 10. I certify that I do not recognize the transaction. Merchants often provide telephone numbers next to their name on your billing statement. Please attempt to contact the merchant for information.

☐ 11. If your dispute is for a different reason, please contact us at the above telephone number.

Signature (required): _____ Date: _____
Best contact telephone #: _____ Home#: _____

Billing rights are only preserved by written inquiry. To preserve your billing rights, please return a copy of this form and any supporting information regarding the merchant charge in question to: Attn: Billing Inquiries, P.O. Box 15026, Wilmington, DE 19850-5026, USA.

PLEASE KEEP THE ORIGINAL FOR YOUR RECORDS AND SEND A COPY OF THIS STATEMENT.

GRACE PERIOD

"Grace Period" means the period of time during a billing cycle when you will not incur Periodic Rate Finance Charges on certain transactions or balances. There is no Grace Period for Balance Transfers and Cash Advances. If you pay in full this statement's New Balance Total by its Payment Due Date and if you paid in full this statement's Previous Balance in this statement's billing cycle, then you will have a Grace Period during the billing cycle that began the day after this statement's Closing Date on the Purchase portions of this statement's New Balance Total.

During a 0% Promotional Rate Offer: 1) no Periodic Rate Finance Charges accrue on balances with the 0% Promotional Rate; and 2) you must pay the Total Minimum Payment Due by its Payment Due Date (and avoid any other "promotion turn-off event" as defined in your Credit Card Agreement) to maintain the 0% Promotional Rate.

If a corresponding Annual Percentage Rate in the Finance Charge Schedule on the front of this statement contains a "*" symbol, then with respect to those balances: 1) the 0% Promotional Rate will expire at the end of the next billing cycle, and 2) you must pay this statement's New Balance Total by its Payment Due Date to avoid Periodic Rate Finance Charges after the end of the 0% Promotional Rate Offer on those balances existing as of the Closing Date of this statement.

CALCULATION OF BALANCES SUBJECT TO FINANCE CHARGE

Average Balance Method (including new Balance Transfers and new Cash Advances): We calculate separate Balances Subject to Finance Charge for Balance Transfers, Cash Advances, and for each Promotional Offer balance consisting of Balance Transfers or Cash Advances. We do this by: (1) calculating a daily balance for each day in this statement's billing cycle; (2) calculating a daily balance for each day prior to this statement's billing cycle that had a "Pre-Cycle balance" – a Pre-Cycle balance is a Balance Transfer or Cash Advance with a transaction date prior to this statement's billing cycle but with a posting date within this statement's billing cycle; (3) adding all the daily balances together; and (4) dividing the sum of the daily balances by the number of days in this statement's billing cycle.

To calculate the daily balance for each day in this statement's billing cycle, we take the beginning balance, add an amount equal to the applicable Daily Periodic Rate multiplied by the previous day's daily balance, add new Balance Transfers, new Cash Advances and and Transaction Fees, and subtract applicable payments and credits. If any daily balance is less than zero we treat it as zero.

To calculate a daily balance for each day prior to this statement's billing cycle that had a Pre-Cycle balance, we take the beginning balance attributable solely to Pre-Cycle balances (which will be zero on the transaction date of the first Pre-Cycle balance), add an amount equal to the applicable Daily Periodic Rate multiplied by the previous day's daily balance, and add only the applicable Pre-Cycle balances, and their related Transaction Fees. We exclude from this calculation all transactions posted in previous billing cycles.

Average Daily Balance Method (including new Purchases): We calculate separate Balances Subject to Finance Charge for Purchases and for each Promotional Offer balance consisting of Purchases. We do this by: (1) calculating a daily balance for each day in the billing cycle; (2) adding all the daily balances together; and (3) dividing the sum of the daily balances by the number of days in the billing cycle.

To calculate the daily balance for each day in this statement's billing cycle, we take the beginning balance, add an amount equal to the applicable Daily Periodic Rate multiplied by the previous day's daily balance, add new Purchases, new Account Fees, and new Transaction Fees, and subtract applicable payments and credits. If any daily balance is less than zero we treat it as zero. If the Previous Balance shown on this statement was paid in full in this statement's billing cycle, then on the day after that payment in full date, we exclude from the beginning balance new Purchases, new Account Fees, and new Transaction Fees which posted on or before that payment in full date, and we do not add new Purchases, new Account Fees, or new Transaction Fees which post after that payment in full date.

We include the costs for the credit card debt cancellation plan or credit insurance purchased through us in calculating the beginning balance for the first day of the billing cycle after the billing cycle in which such costs are billed.

TOTAL PERIODIC RATE FINANCE CHARGE COMPUTATION

Periodic Rate Finance Charges accrue and are compounded on a daily basis. To determine the Periodic Rate Finance Charges, we multiply each Balance Subject to Finance Charge by its applicable Daily Periodic Rate and that result by the number of days in the billing cycle. To determine the total Periodic Rate Finance Charge for the billing cycle, we add the Periodic Rate Finance Charges together. Each Daily Periodic Rate is calculated by dividing its corresponding Annual Percentage Rate by 365.

HOW WE ALLOCATE YOUR PAYMENTS

We will allocate your payments in the manner we determine. In most instances, we will allocate your payments to balances (including transactions made after this statement) with lower APRs before balances with higher APRs. This will result in balances with lower APRs (such as new balances with promotional APR offers) being paid before any other existing balances.

Payment Due Dates and Keeping Your Account in Good Standing

Your Payment Due Date will not fall on the same day each month. In order to help maintain any promotional rates, to avoid the imposition of Default Rates (if applicable), to avoid late fees, and to avoid overlimit fees, we must receive at least the Total Minimum Payment Due by its Payment Due Date each billing cycle and you must maintain your account balance below your Credit Limit each day.

Important Information about Payments by Phone

When using the optional Pay-by-Phone service, you authorize us to initiate an electronic payment from your account at the financial institution you designate. You must authorize the amount and timing of each payment. For your protection, we will ask for security information. A fee may apply. To cancel, call us before the scheduled payment date. Same-day payments cannot be edited or canceled.

MISCELLANEOUS

For the complete terms and conditions of your account, consult your Credit Card Agreement. FIA Card Services is a tradename of FIA Card Services, N.A. This account is issued and administered by FIA Card Services, N.A.

PAYMENTS

We credit payments as of the date received, if the payment is 1) received by 5 p.m. (Eastern Time), 2) received at the address shown in the bottom left-hand corner of the front of this statement, 3) paid with a check drawn in U.S. dollars on a U.S. financial institution or a U.S. dollar money order, and 4) sent in the enclosed return envelope with only the bottom portion of this statement accompanying it. Payments received after 5 p.m. on any day including the Payment Due Date, but that otherwise meet the above requirements, will be credited as of the next day. We will reject payments that are not drawn in U.S. dollars and those drawn on a financial institution located outside of the United States. Credit for any other payments may be delayed up to five days. No payment shall operate as an accord and satisfaction without the prior written approval of one of our Senior Officers.

We process most payment checks electronically by using the information found on your check. Each check authorizes us to create a one-time electronic funds transfer (or process it as a check or paper draft). Funds may be withdrawn from your account as soon as the same day we receive your payment. Checks are not returned to you. For more information or to stop the electronic funds transfers, call us at the number listed on the front.

If you have authorized us to pay your credit card bill automatically from your savings or checking account with us, you can stop the payment on any amount you think is wrong. To stop the payment your letter must reach us at least three business days before the automatic payment is scheduled to occur.

If your billing address or contact information has changed, or if your address is incorrect as it appears on this bill, please provide all corrections here.

Address 1 _____

Address 2 _____

City _____

State _____ Zip _____

Area Code & Home Phone _____

Area Code & Work Phone _____

Case ID:

COMMUNITY LEGAL SERVICES, INC.
By: Joanna K. Darcus, Esq.
Attorney I.D. No. 314412
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For Defendant Proceeding IFP

CAVALRY SPV I, LLC, AS ASSIGNEE OF BANK OF AMERICA/FIA CARD SERVICES, N.A. Plaintiff, v. CLIENT, Defendant.	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL DIVISION TERM, 2013 No. XXXX

To Plaintiff:
You are hereby notified to file a written response to the enclosed New Matter within twenty (20) days or a judgment may be entered against you.

Attorney for Defendant

ANSWER

1. Admitted in part; denied in part. It is admitted that Plaintiff is Calvary SPV I, LLC. However, the remaining averments in paragraph 1 are denied because, after reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments. Strict proof of Plaintiff's identity, address, and of any assignment is demanded at trial.
2. Admitted.

COUNT I
BREACH OF CONTRACT

3. Admitted in part; denied in part. Defendant admits that she had a Bank of America credit card. The remaining the remaining averments in paragraph 3 are denied because, after reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments. Strict proof is demanded at trial. By way of further denial, Defendant does not recall the date on which she obtained her Bank of America credit card nor does she remember the account number. She no longer has the credit card or any records that could remind her of the account number. Furthermore, she does not recognize and does not recall receiving the Cardmember Agreement that Plaintiff attached.

4. Denied. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments. Strict proof is demanded at trial. By way of further denial, Plaintiff is a stranger to Defendant and to any account that she had with Bank of America. Defendant had never heard of or heard from Plaintiff prior to receiving the complaint.

5. Denied. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments. Strict proof is demanded at trial. By way of further denial, Defendant does not recall the balance on her Bank of America account on the date given, but believes she owed less. She does not recognize the account statements that Plaintiff attached and no longer has copies of her own statements.

6. Denied. The averments of this paragraph are denied as conclusions of law to which no response is required.

7. Denied. The averments of this paragraph are denied as conclusions of law to which no response is required. By way of further denial, the Agreement speaks for itself, and Defendant does not recognize or recall receiving it.

8. Denied. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments. Strict proof is demanded at trial. By way of further denial, Plaintiff is a stranger to Defendant and to any account that she once had with Bank of America. Furthermore, Defendant recalls owing less to Bank of America. Finally, as discussed in New Matter below, Plaintiff unlawfully claims a usurious rate of post-charge-off interest.

WHEREFORE, Defendant CLIENT requests judgment in her favor and against Plaintiff.

COUNT II
BREACH OF CONTRACT IMPLIED IN LAW

9. No response required.

10. Denied. The averments of this paragraph are denied as conclusions of law to which no response is required. To the extent that this paragraph contains factual averments, they are denied. Defendant does not recognize or recall receiving the statements that Plaintiff attached. Neither does Defendant have copies of any statements she once received. Furthermore, only one of the statements reflects a payment and none reflect a purchase. Defendant does not recall making the payment on the June 2009 statement and denies that she ever made a payment by phone. Finally, Defendant denies that she agreed to or confirmed the account balances in the statements. As noted above, she does not recall receiving the statements and, in general, if she received a statement, she reviewed it to determine whether payment was requested. She did not study the bill to determine whether the balance claimed was correct.

11. Denied. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments. Strict proof is demanded at trial. By way of further denial, Defendant does not have copies of billing statements from her Bank of America account, and cannot confirm their contents.

12. Denied. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments. Strict proof is demanded at trial. By way of further denial, Defendant does not have copies of billing statements from her Bank of America account, and cannot confirm their contents.

13. Denied. This paragraph is denied as a conclusion of law to which no response is required. By way of further denial, Defendant does not recognize or recall receiving the Cardmember Agreement that Plaintiff attached.

14. Denied. Defendant denies that she made a payment by phone on the date given. Defendant does not pay bills by phone. She does not recall making a payment of $85 on May 23, 2009. Furthermore, Defendant denies default as a conclusion of law to which no response is required. Finally, Defendant denies that she owed any payments to Plaintiff on June 28, 2009, as Plaintiff does not even claim assignment occurred until September 28, 2011, and after reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments that Plaintiff has an interest in Defendant's Bank of America account. Strict proof is demanded at trial.

15. Denied. The averments of this paragraph are denied as conclusions of law to which no response is required. By way of further denial, the Agreement speaks for itself, and Defendant does not recognize or recall receiving it.

16. Denied. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments. Strict proof is demanded at trial. By way of further denial, Plaintiff is a stranger to Defendant and to any account that she once had with Bank of America. Furthermore, Defendant recalls owing less to Bank of America. Finally, as discussed in New Matter below, Plaintiff unlawfully claims a usurious rate of post-charge-off interest.

WHEREFORE, Defendant CLIENT requests judgment in her favor and against Plaintiff.

NEW MATTER

17. Defendant incorporates by reference all preceding paragraphs.

18. Plaintiff's action is premised on the existence and assignment of a credit card account between Defendant and Bank of America/FIA Card Services, N.A.

19. Defendant CLIENT ("Ms. CLIENT" or "Defendant") had a Bank of America credit card, but she does not recall the account number.

20. She had a payment protection plan on her Bank of America card.

21. Ms. CLIENT called Bank of America and requested that the payment protection plan be activated in 2008 when her employment status changed at her primary job.

22. Ms. CLIENT believed that the payment protection feature would cover payments or the balance on her account.

23. She does not remember receiving any billing statements after that call in 2008.

DEFENSES

First Defense to Counts I and II:
Plaintiff lacks standing to bring this action.

24. Defendant incorporates all preceding paragraphs by reference.

25. Prior to this lawsuit, Ms. CLIENT had never heard of Plaintiff Calvary SPV I, LLC.

26. Ms. CLIENT has never had a credit card account with Plaintiff.

27. Plaintiff brings this action as an alleged assignee of "Bank of America/FIA Card Services, N.A.".

28. Under criminal law, it is unlawful for a collection agency to take assignment of a debt for collection purposes unless the assignment is in writing. 18 Pa. C.S. § 7311.

29. Therefore, this action must be based on a written assignment.

30. The Pennsylvania Rules of Civil Procedure require that when a plaintiff brings a claim that is based on a writing, a copy of the writing or pertinent portions must be attached to the complaint. Pa.R.C.P. No. 1019(i).

31. To support its claim, Plaintiff has attached a generic Bill of Sale and Assignment of Loans between Plaintiff and FIA Card Services, N.A. The Bill of Sale describes a bulk debt sale and makes no mention of Ms. CLIENT or any account she had with FIA Card Services, N.A.

32. Furthermore, although the Bill of Sale appears to be on Bank of America letterhead, Bank of America is not named as an assignor.

33. In addition, the Bill of Sale refers to other documents, including a Loan Sale Agreement, without which the Bill of Sale cannot be fully understood. The Bill of Sale alone is insufficient to prove Plaintiff's ownership of Defendant's specific account.

34. Finally, Plaintiff also included a printout of unclear significance or origin that contains the name "CLIENT" and Bank of America/FIA Card Services, N.A., but makes no mention of Plaintiff.

35. This printout contains insufficient information to determine its meaning.

36. In Pennsylvania, lawsuits must be filed by the real party in interest. Pa.R.C.P. No. 2002(a).

37. Plaintiff has failed to attach sufficient documentation to demonstrate that it is the real party in interest.

38. Upon information and belief, Plaintiff is not the real party in interest and cannot maintain this action.

WHEREFORE, Defendant demands judgment in her favor and against Plaintiff.

Second Defense to Counts I and II:
Statute of Limitations Had Expired.

39. Defendant incorporates by reference all preceding paragraphs.

40. According to Plaintiff's complaint and presumably Plaintiff's records, the last payment on the account occurred on or about May 23, 2009, and no monthly payments were made after June 28, 2009.

41. This action was filed on June 26, 2013: two days shy of four years since June 28, 2009.

42. Pennsylvania has a four-year statute of limitations for contract actions. 42 Pa. Cons. Stat. Ann. § 5525.

43. However, Pennsylvania's borrowing statute, 42 Pa. Cons. Stat. Ann. § 5521(b), requires the application of the shortest applicable limitations period.

44. The Cardmember Agreement that Plaintiff alleges governs the account contains a Delaware choice of law provision. *See* Cardmember Agreement at pg. 40 ("What Law Applies").

45. Delaware has a three-year statute of limitations for contract actions. 10 Del. C. § 8106.

46. Here, any alleged injury to Plaintiff, a Delaware company, was sustained on its balance sheets in Delaware more than three years prior to the filing of this action.

47. Pennsylvania's borrowing statute requires the application of Delaware's shorter limitations period. *See Hamid v. Stock & Grimes, LLP*, 2011 U.S. Dist. LEXIS 96245, *4 (E.D.Pa. August 26, 2011).

48. Therefore, this is an attempt to collect a time-barred debt.

WHEREFORE, Defendant demands judgment in her favor and against Plaintiff.

Additional Defense to Count I:
Plaintiff May Not Seek Post-Charge-Off Interest.

49. Defendant incorporates by reference all preceding paragraphs.

50. According to Plaintiff's complaint, the value of the account at the alleged charge-off on October 31, 2009 was $10,088.75.

51. Plaintiff alleges that it was assigned Defendant's account on or about September 28, 2011.

52. In its complaint, including the documents attached to the complaint at Exhibit B, Plaintiff alleges that the "initial balance" of the account at the time of assignment was $10,088.75.

53. Upon information and belief, Plaintiff's alleged predecessor did not assess post-charge-off interest for the two years between the alleged charge-off and assignment dates.

54. During that period, Defendant did not receive billing statements from Bank of America reflecting on-going assessment of interest.

55. Plaintiff's alleged predecessor waived the right to collect post-charge-off interest.

56. Therefore, Plaintiff may not seek post-charge-off interest.

WHEREFORE, Defendant demands judgment in her favor and against Plaintiff.

First Additional Defense to Count II:
Implied Contract is an Inappropriate Theory of Recovery for a Credit Card Action.

57. Defendant incorporates by reference all preceding paragraphs.

58. Federal law requires that every credit card transaction must be based on a contract for the extension of credit. 15 U.S.C. § 1642.

59. Where a written contract exists, no unjust enrichment or implied contract theory is permitted. *See Coldwell Banker Phyllis Rubin Real Estate v. Romano*, 619 A.2d 376, 381-82 (Pa. Super. Ct. 1993). *See also Third Nat'l Bank & Trust Co. v. Lehigh Valley Coal Co.*, 44 A.2d 571 (Pa. 1945); *Birchwood Lakes Cmty. Ass'n, Inc. v. Comis*, 442 A.2d 304, 308 (Pa. Super. Ct. 1982) (stating a plaintiff cannot recover on a claim for unjust enrichment if such claim is based on a breach of a written contract); *Schlehter v. Foltz*, 115 A.2d 910 (Pa. Super. Ct. 1955) (stating that recovery hinges on the ability to show the actual promise to repay when there is an express contract—quantum meruit is unavailable).

60. Plaintiff alleged that there was a written contract.

61. Plaintiff cannot recover under an implied contract theory.

WHEREFORE, Defendant demands judgment in her favor and against Plaintiff.

Second Additional Defense to Count II:
Plaintiff May Not Recover Interest or Fees through an Implied Contract Theory.

62. Defendant incorporates by reference all preceding paragraphs.

63. Plaintiff seeks pre-judgment and post-charge-off interest.

64. Plaintiff does not differentiate between the principal balance of purchases charged to the account and the interest and fees that accrued on the account.

65. Plaintiff may not seek contractual interest or fees without proving a contract.

66. Therefore, the fees and interest that Plaintiff seeks, including the demand for post-charge-off interest at a rate of 24.99%, are uncollectible under an implied contract theory of recovery.

WHEREFORE, Defendant demands judgment in her favor and against Plaintiff.

Respectfully submitted,

_____
Date

By:_____

Joanna K. Darcus, Esq.
Attorney for Defendant
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215-981-3728

COMMUNITY LEGAL SERVICES, INC.
By: Joanna K. Darcus, Esq.
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For Defendant Proceeding IFP

MIDLAND FUNDING LLC Plaintiff v. CLIENT Defendant	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL DIVISION TERM, 2012 No. XXXX

PRELIMINARY OBJECTIONS

Pursuant to Pa.R.C.P. No. 1028, Defendant, CLIENT ("Mr. CLIENT"), through his above-named counsel, preliminarily objects to the complaint in the civil action filed by Midland Funding LLC on several grounds and in support thereof states the following:

I. Preliminary Objection on Ground of Lack of Conformity to the Pleading Requirements of Pa.R.C.P. No. 1019(h) and (i): Failure to Properly Plead Agreement and Failure to Attach Writing on Which Claim is Based.

1. Plaintiff Midland Funding LLC ("Midland Funding") avers that it is the real party in interest through an assignment of an alleged account between Mr. CLIENT and OneMain Financial, Inc ("OneMain Financial").
2. Plaintiff failed to state whether the assignment was written or oral, as required by Pa.R.C.P. No. 1019(h).
3. Under criminal law, it is unlawful for a collection agency to take assignment of a debt for collection purposes unless the assignment is in writing. 18 Pa. C.S. § 7311.
4. The action filed by Midland Funding, therefore, must be based on a written assignment.

5. Pennsylvania Rule of Civil Procedure 1019(i) provides that when a claim is based on a writing, the pleader shall attach a copy of the writing or material part thereof.
6. Plaintiff's claim is based on an agreement; specifically, it is based on an agreement for the assignment of Mr. CLIENT's alleged account.
7. Without the assignment, Plaintiff would not be the real party in interest.
8. The assignment, therefore, is a material fact upon which Plaintiff's cause of action is based and must be attached as an exhibit to the complaint.
9. Plaintiff has failed to attach the written assignment, or material part of the assignment, to the complaint, and has failed to explain any reason for its unavailability and to set forth the substance of the agreement, contrary to Pa.R.C.P. No. 1019(i). See Atlantic Credit and Finance, Inc. v. Giuliana, 829 A.2d 340 (Pa. Super. Ct. 2003).
10. Furthermore, the action is based on an additional agreement: the contract establishing the account that allegedly existed between Mr. CLIENT and OneMain Financial, Inc.
11. Plaintiff has failed to state whether that account agreement was written or oral, as required by Rule 1019(h).
12. Neither has Plaintiff attached a written account agreement, or material parts of the agreement, to the complaint, or in the alternative, explained any reason for its unavailability and set forth the substance of the agreement, contrary to the requirements of Pa.R.C.P. No. 1019(i). See Atlantic Credit and Finance, Inc. v. Giuliana, 829 A.2d 340 (Pa. Super. Ct. 2003).

WHEREFORE, Defendant requests, pursuant to Pa.R.C.P. No. 1028(a)(2), that this Honorable Court sustain Defendant's preliminary objections, and dismiss Plaintiff's

complaint without prejudice unless Plaintiff files an amended complaint, conforming in form and substance to the Pennsylvania Rules of Civil Procedure, within twenty (20) days.

II. Preliminary Objection on Ground of Lack of Conformity to the Pleading Requirements of Pa.R.C.P. No. 1019(a) and (f): Failure to Aver Material Facts and Specifically State Time, Place and Special Damages.

13. Plaintiff's complaint also fails to set forth the material facts on which the cause of action is based, contrary to Pa.R.C.P. No. 1019(a).

14. Plaintiff's complaint fails to comply with Pa.R.C.P. No. 1019(a) because it seeks recovery of a specific amount of money that is allegedly due without detailing the items forming the basis of this claim. More specifically, the complaint fails to include:

    a. the terms of the alleged credit agreement between Defendant and the original creditor;

    b. whether, how, and when Defendant allegedly breached the agreement; and

    c. the dates and amounts of credit extended; dates and amounts of interest charges; dates and amounts of other charges; and the dates and amounts of payments received.

15. Furthermore, Pa.R.C.P. No. 1019(f) provides that averments of time, place and special damages must be specifically stated in a pleading.

16. Plaintiff's complaint fails to state the dates on which the alleged credit account was offered and accepted, dates of any credit extended, dates of any payments received, the date of breach, and the date that Plaintiff took assignment of the account.

WHEREFORE, Defendant requests, pursuant to Pa.R.C.P. No. 1028(a)(2), that this Honorable Court sustain Defendant's preliminary objections, and dismiss Plaintiff's

complaint without prejudice unless Plaintiff files an amended complaint, conforming in form and substance to the Pennsylvania Rules of Civil Procedure, within twenty (20) days.

III. Preliminary Objection on Ground of Insufficient Specificity of Pleading.

17. Defendant re-alleges and incorporates by reference all preceding averments of law and fact.
18. The complaint as a whole is so grossly vague and deficient in reciting factual averments that Defendant will not be able to answer the allegations intelligently and formulate a defense.
19. Given the generality of Plaintiff's allegations and the insufficiency of its attachments, the pleading flies in the face of fact pleading necessary to satisfy the Pennsylvania Rules of Civil Procedure.

WHEREFORE, Defendant requests, pursuant to Pa.R.C.P. No. 1028(a)(3), that this Honorable Court sustain Defendant's preliminary objections, and dismiss Plaintiff's complaint without prejudice unless Plaintiff files a more specific complaint, within twenty (20) days.

IV. Preliminary Objection on Ground of Legal Insufficiency of Pleading (Demurrer).

20. Defendant re-alleges and incorporates by reference all preceding averments of law and fact.
21. Plaintiff alleges that Defendant and a third-party, OneMain Financial, entered into a credit agreement that was later assigned to Plaintiff.
22. Plaintiff further alleges that Defendant used the credit account and owed a balance of $6,211.91.

23. Plaintiff fails to allege facts that would establish a basis for the acceleration of the alleged debt or otherwise explain why the amount is being demanded at this time.

24. To the extent that Plaintiff seeks liability on a contract theory, Plaintiff has failed to attach a contract, failed to allege breach or default under the terms of the contract, and failed to attach writings that support the amount Plaintiff now claims.

25. The allegations in Plaintiff's complaint are insufficient to state a cause of action against Defendant.

WHEREFORE, Defendant requests, pursuant to Pa.R.C.P. No. 1028(a)(4), that this Honorable Court sustain Defendant's preliminary objections, and dismiss Plaintiff's complaint without prejudice unless Plaintiff files a legally sufficient complaint, within twenty (20) days.

Respectfully submitted,

COMMUNITY LEGAL SERVICES, INC.

Date: _____

_____

Joanna K. Darcus, Esq.
Attorney for Defendant
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215-981-3728

COMMUNITY LEGAL SERVICES, INC.
By: Joanna K. Darcus, Esq.
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For Defendant Proceeding IFP

MIDLAND FUNDING LLC	:	
	:	COURT OF COMMON PLEAS
Plaintiff	:	
	:	PHILADELPHIA COUNTY
v.	:	
	:	CIVIL DIVISION
CLIENT	:	
Defendant	:	TERM, 2012
	:	No. XXXX

MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT

I. Matter before the Court

These preliminary objections are brought by Defendant CLIENT hereinafter referred to as "Defendant" or "Mr. CLIENT," to a boilerplate complaint filed by a debt collector seeking judgment based on an alleged credit agreement between Defendant and a third-party. As set forth in the preliminary objections and discussed below, Plaintiff's complaint is defective in that it (a) fails to include any writing or the material part thereof upon which its claim is based; (b) fails to set forth with particularity the basis of the alleged amount owed, including the terms and date of any alleged credit agreement, and the dates and amounts of any extensions of credit that are part of the claim, any credits of payment, and any interest charges applied; and (c) fails to allege facts sufficient to state a cause of action against Defendant. The preliminary objections, therefore, should be sustained on the grounds of insufficient specificity, failure to conform to law or rule of court, and legal insufficiency.

II. Statement of Questions Involved

1. In an action on an alleged credit account debt, should Defendant's preliminary objections, pursuant to Pa.R.C.P. No. 1028(a)(2), be sustained where (a) Plaintiff has failed to attach to the complaint material writings upon which the claim is based, including but not limited to the writing setting forth the terms of the alleged credit agreement and the written assignment of the alleged debt, and (b) Plaintiff further fails to state that such writings are inaccessible, together with the reason, and to set forth the substance of the writings?

   Proposed Answer: Yes.

2. In an action on an alleged credit account debt, should the Defendant's preliminary objections, pursuant to Pa.R.C.P. No. 1028(a)(2) and 1028(a)(3), be sustained where the Plaintiff's complaint lacks the requisite specificity and fails to comply with Pa.R.C.P. No. 1019(a) and (f) where the complaint and the documentation attached thereto fail to set forth: the date of the alleged credit agreement; the terms of the alleged agreement; and the dates and amounts of any extensions of credit, any applied interest charges that are part of the claim, credits for payments received, if any, or any other component of the total amount alleged to be due?

   Proposed Answer: Yes.

3. In an action on an alleged credit account debt, should the Defendant's preliminary objection, pursuant to Pa.R.C.P. No. 1028(a)(4) for failure to state a claim, be sustained where the Plaintiff's complaint discusses an account, but fails to allege facts setting forth a contract or the terms of the account agreement and fails to allege breach or default under those terms?

Proposed Answer: Yes.

III. Facts

Since Defendant's preliminary objections challenge the sufficiency of the Plaintiff's complaint, the material "facts" for the purpose of this Motion are largely the contents of the complaint, including the documents attached thereto:

1. This action was initiated by Plaintiff Midland Funding LLC, ("Midland Funding") to collect on an alleged credit agreement between Defendant CLIENT and OneMain Financial, Inc. See Exhibit A, Pl.'s Complaint.

2. Plaintiff is a stranger to the contract, and claims that it is the real party in interest through an assignment of the credit account, but it fails to attach the relevant, material portions of this assignment. See Exhibit A, Pl.'s Complaint.

3. Plaintiff also fails to set forth the material terms of this alleged assignment. See Exhibit A, Pl.'s Complaint.

4. Plaintiff seeks to collect $6,211.91, plus additional interest and costs of the suit through this alleged assignment of an alleged credit account. See Exhibit A, Pl.'s Complaint.

5. Plaintiff does not attach a copy of the alleged credit agreement between Mr. CLIENT and the original creditor. See Exhibit A, Pl.'s Complaint.

6. The complaint does not allege the date of any such credit agreement, does not describe any of the terms of the credit agreement, fails to include the amount of any extensions of credit that are part of this claim; the dates and amounts of credits for payments, if any; dates and amounts of interest charges; dates and amounts of other charges; and the date and nature of any default that now renders the balance of the account due. See Exhibit A, Pl.'s Complaint.

7. Plaintiff does not aver that Defendant breached or defaulted on the terms of the credit account. See Exhibit A, Pl.'s Complaint.

IV. Argument

Defendant's preliminary objections should be sustained due to Plaintiff's failure to comply with applicable pleading requirements and for insufficient specificity in a pleading.

A. Defendant's preliminary objections should be sustained, pursuant to Pa.R.C.P. No. 1028(a)(2), because Plaintiff has failed to attach to the complaint material writings upon which the claim is based.

Pennsylvania Rule of Civil Procedure 1019(i) provides as follows:

> When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient to so state, together with the reason, and to set forth the substance in writing.

Here, Plaintiff's claim is presumably based on two writings: (1) the alleged credit agreement and (2) the assignment of rights under the alleged credit account to Plaintiff. Despite the requirement of Pa.R.C.P. No. 1019(i), however, Plaintiff has attached neither writing, nor has Plaintiff complied with the alternative provisions of the Rule governing pleading requirements where a writing is not accessible.

Ordinarily agreements for extensions of credit are based on a writing that sets forth the terms upon which credit is extended to the applicant. The terms generally include the rate of

interest and other applicable fees, the amount of credit extended, and other conditions. Credit agreements are ordinarily in writing and this court may take judicial notice that the terms of a credit card agreement are ordinarily set forth in a writing.[1] Furthermore, as the Honorable Judge Idee C. Fox noted in Unifund v. Vo, No. 080403966, slip op. at 6-7 (C.P. Phila. Cnty. Feb. 17, 2009) (copy attached as Exhibit B), the federal Truth and Lending Act ("TILA"), 15 U.S.C. §1601 et seq., requires creditors to provide borrowers with written disclosures of the interest rates, fees and finance charges applicable to their credit accounts. These disclosures are a material part of the writing upon which collection actions are based, and failure to attach a copy or to explain their unavailability and to set forth the substance of the agreement in the complaint constitutes a failure to comply with Rule 1019(i). See Vo, No. 080403966 at 7.

Similarly, the agreement assigning the credit account to Plaintiff also must be attached to the complaint. Under criminal law, it is unlawful for a collection agency to take assignment of a debt for collection purposes unless the assignment is in writing. 18 Pa. C.S. § 7311. The action filed by Midland Funding, therefore, must be based on a written assignment. Without the assignment, Plaintiff would not be the real party in interest. The assignment, therefore, is a material fact upon which Plaintiff's cause of action is based and must be attached as an exhibit to the complaint. Plaintiff has failed to attach the assignment or any material portion of it.

The Superior Court has held that preliminary objections must be sustained under these circumstances. In Atlantic Credit and Finance, Inc. v. Giuliana, 829 A.2d 340 (Pa. Super. Ct. 2003), a case squarely on point, the court ruled that preliminary objections to a complaint should

[1] See Judge Wettick's discussion in Worldwide Asset Purchasing, LLC v. Stern, Civ. Nos. AR04-4429, and Commonwealth Financial Systems, Inc. v. Miller, AR04-4572, 153-MAY Pittsburgh Legal J. 111, 112 (C.P. Allegheny 2004): "It is my understanding that in a typical credit card transaction, the relationship between the cardholder and the issuer begins with a written application signed and submitted by the cardholder. In this application, the cardholder agrees to be bound by the provisions set forth in the application and possibly other terms and conditions that are furnished to the cardholder at the time the card is issued."

be sustained where a plaintiff alleged the defendants' indebtedness on a credit card account it had purchased but did not attach documentation of the agreement or the assignment, or sufficient documentation of the debt to the complaint. In Atlantic Credit, the plaintiff:

> Failed to attach either any contract or agreement between GM and [defendants], or any contract or agreement between GM and itself, other than a single sheet which appears to be monthly statement from GM Card addressed to [defendants] dated March 3, 2000, setting forth a new balance as of March 28, 2000, of $9,644.66 based on an interest rate of 24.15% and monthly "over limit charge assessments" of $29.00 and "late charge assessments" of $29.00.

Id. at 341.

The Superior Court held that defendants' preliminary objections should have been sustained on the grounds that: "the failure to attach the writings which assertedly establish the appellee's right to judgment against appellants in the amount of $17,496.27, based on an alleged debt it allegedly purchased for substantially less than $9,644.66, is fatal to claims set forth in appellee's complaint. Thus, the preliminary objection of appellant based on failure to produce a cardholder agreement and statement of account, as well as evidence of the assignment, establishes a meritorious defense." Id. at 345.

Trial courts throughout the Commonwealth have reached this same conclusion in other debt collection cases. In Claims Recovery Systems v. Donley, 24 Pa. D. & C.5th 64, 72 (C.P. Lawrence Cnty. 2011), the court sustained the defendant's preliminary objections upon finding that "Plaintiff's failure to attach documentation that Defendant's account was included in the assignment from Huntington Bank to Hudson and Keyes, LLC, and the alleged assignment from Hudson and Keyes, LLC to Plaintiff is a violation of Pa.R.C.P. 1019(i)." Preliminary objections have also been sustained where the plaintiff failed to attach "defendant's original credit application, any of the periodic mailings detailing changes to the terms of the contract or a statement that it lacks access to any or all of the relevant writings" and instead attached a

generic, unsigned credit cardholder agreement that was inapplicable to the defendant, as it was dated a year after the defendant was alleged to have breached the agreement. See Remit Corp. v. Miller, 5 Pa. D. & C.5th 43, 44-45 (C.P. Centre Cnty. 2008). Similarly, an unsigned generic cardholder agreement was insufficient to overrule preliminary objections where the plaintiff did not attach the credit application signed by the defendant. See Capital One Bank v. Clevenstine, 7 Pa. D. & C.5th 153, 154-155 (C.P. Centre Cnty. 2009) (preliminary objections sustained where unsigned cardholder agreement, dated four years prior to defendant applying for a credit card, was only writing attached to complaint).

Relying on Atlantic Credit, the Honorable Stanton R. Wettick has ruled that in a credit card collection action, "the writings that must be attached to the complaint include the application signed by the cardholder and any other relevant terms and conditions which govern the issuer's claims." Worldwide Asset Purchasing, LLC v. Stern, Civ. Nos. AR04-4429, and Commonwealth Financial Systems, Inc. v. Miller, AR04-4572, 153-MAY Pittsburgh Legal J. 111, 112 (C.P. Allegheny Cnty. 2004) [hereafter, "Stern"]. His Honor further explains that "if the claim involves a period of time in which the initial terms and conditions applied and a later period of time in which amended terms and conditions apply, the complaint must attach both original and the amended terms and conditions with the dates for which they were applicable." Id.

As noted above, Pa.R.C.P. No. 1019(i) provides an alternative procedure if the writing or copy is not accessible to the pleader. In such cases, "it is sufficient so to state, together with the reason, and to set forth the substance in writing." Here, Plaintiff has not, however, invoked or satisfied either requirement under Rule 1019(i). Plaintiff did not attach the writing nor did

Plaintiff state that the agreement was inaccessible, the reason for its inaccessibility and the substance of the writing.

In the instant case, Plaintiff has failed to attach an assignment of the account, the terms of the account, or any billing statements from the original creditor to Defendant. As in the above cases, the present Plaintiff has failed to comply with Pa.R.C.P. No. 1019(i), and the present Defendant's preliminary objections should be sustained. This Honorable Court should dismiss Plaintiff's complaint without prejudice unless Plaintiff files an amended complaint, conforming in form and substance to the Pennsylvania Rules of Civil Procedure, within twenty (20) days.

B. Defendant's preliminary objections should be sustained, pursuant to Pa.R.C.P. No. 1028(a)(2) and 1028(a)(3), because it gives no specific details about the alleged debt underlying the claim.

In its complaint, Plaintiff asserts that Defendant is liable to it for an alleged credit account. Plaintiff, who is a stranger to the credit agreement, claims it is owed $6211.91, plus interest and costs, but does not support its claim with any specificity as to the alleged agreement underlying the claim. Plaintiff's complaint is plainly a boilerplate document in which the total amount alleged to be due on the account has been inserted into stock paragraphs containing no detail whatsoever concerning the account. The complaint contains no allegations as to the date or terms of the alleged credit agreement, or any other details concerning the account.

Such a complaint is completely inadequate under our Rules of Civil Procedure, as it fails to set forth the material facts upon which the cause of action is based, as required by Pa.R.C.P. No. 1019(a), and fails to specifically state averments of time, place, and items of special damages, as required by Pa.R.C.P. No. 1019(f).

Other trial courts in Pennsylvania have sustained preliminary objections on the same bases as those asserted here. One such decision by Judge Wettick in Stern, *supra*, 153-MAY

Pittsburgh Legal J. 111. Judge Wettick issued a single written opinion consolidating two separate cases "because issues concerning the adequacy of complaints to recover credit card balances have been arising with considerable frequency." Id., fn. 1. In each of the two cases, Judge Wettick sustained the defendant's preliminary objections, holding that a bare bones complaint like the one presently at issue is totally inadequate.

The Stern decision is squarely on point. As with the present complaint, the complaint in Stern gave virtually no specific details about the alleged debt underlying the claim:

> The complaint simply avers that monthly statements were sent to defendant which detailed the charges made to the account, including finance charges, late and over limit charges, and that the balance due is $7,240.44. None of the monthly statements is attached and there is no description of the items forming the basis of the claim. Id. at 112.

Judge Wettick held that given such a lack of detail, the defendant's preliminary objections were proper:

> Under Rule 1019, a complaint must include the amounts of the charges that are part of the claim, the dates of the charges, credits for payments, if any, dates and amounts of interest charges, and date and amounts of other charges. The complaint should contain sufficient documentation and allegations to permit a defendant to calculate the total amount of damages that are allegedly due by reading the documents attached to the complaint and the allegations within the complaint.

Id. As Judge Wettick pointed out, a pleading must contain an appropriate level of detail:

> According to 4 Pennsylvania Standard Practice 2d §22.84 at 210-11, the complaint should include an informative statement of the account, with debits and credits properly identified, itemized and segregated; there must be clear and definite charges, not lumped but itemized, showing the nature of the transactions [; an] exhibit must set forth the items on which plaintiff claims, delivery dates, unit charges, and total amounts.

Id. at 8, fn. 2. This level of detail is necessary, among other reasons, so that the defendant can determine whether the allegations are to be admitted or denied, and to give

the defendant sufficient information to determine whether to plead the statute of limitations in defense.

In his opinion, Judge Wettick relied on St. Hill & Assocs. v. Capital Asset Research Corp., 2000 WL 33711023 (C.P. Phila. Cnty. 2000), and Marine Bank v. Orlando, 25 D. & C.3d 264 (C.P. Erie Cnty. 1982). In Marine Bank, Judge Nygaard sustained preliminary objections in a debt collection case for failure to make sufficiently specific allegations where the plaintiff failed to set forth the exact terms and conditions of the agreement and failed to state in the complaint the time, place, and specific averments of damage, including dates and amounts of individual transactions on the account. Judge Nygaard found that these allegations were required, even if the defendant might have other ways to find the missing information:

> Counsel for plaintiff argues that defendants have this information from knowledge obtained outside of the pleadings and the information sought may be obtained through discovery proceedings. This argument loses its force when it is born in mind that the primary function of pleadings is to form the issue and to restrict the proof of trial to those issues. Personal knowledge or the potential for discovery do supply the information to an adverse party but such information is not a part of the pleadings and does not satisfy the primary function of this rule. The Rules of Civil Procedure are drawn on the theory that the issues are to be formed by the pleadings and the discovery process is merely an auxiliary aid to counsel.

Marine Bank, 25 D. & C.3d at 267.

Judge Nygaard held that the complaint must be more specific as to the charges that were a basis of the cause of action: "The court believes that defendant is entitled to know the dates on which individual transactions were made, the amounts therefore [sic] and the items purchased to be able to answer intelligently and determine what items he can admit and what he must contest." Id. at 268.

Similarly, in St. Hill, Judge Herron sustained preliminary objections that asserted that the plaintiff failed to set forth sufficient facts as to time, place, and items of special damages for

among other reasons, failing to explain what comprised the alleged total amount due, when invoices were sent, or what they covered. 2000 WL 33711023. Judge Herron held that to be proper, the complaint must specify the dates and times of performance and demands for payment.

Following the path led by Judge Wettick in Stern, supra, numerous Common Pleas courts around the Commonwealth have examined boilerplate debt collection complaints much like the one here and have sustained preliminary objections on the same grounds as asserted here, in many cases with written opinions explaining their reasoning. See, e.g., Unifund v. Vo, No. 080403966, (C.P. Phila. Cnty. 2009, per Fox, J.) (copy attached in Exhibit B); Remit Corp. v. Miller, 5 Pa. D. & C.5th 43 (C.P. Centre Cnty. 2008, per Ruest, J.); Capital One Bank v. Clevenstine, 7 Pa. D. & C.5th 153, 154-155 (C.P. Centre Cnty. 2009).

In Stern and in Vo, Judge Wettick and Judge Fox also cited for its persuasive authority an Ohio case, Asset Acceptance Corp. v. Proctor, 804 N.E. 2d 975 (Ohio Ct. App. 2004), in which the assignee of a credit card account made cursory allegations similar to those in Stern, Vo, and here. In Proctor, as described by Judge Wettick in Stern at 112 "[n]either the complaint nor the affidavit explained how the plaintiff arrived at [the total] numbers" alleged to be due. The court in Proctor explained why this failure rendered the complaint inadequate:

> In order to adequately plead and prove an account, '[a]n account must show the name of the party charged. It begins with a balance, preferably zero, or with a sum recited that can qualify as an account stated, but at least the balance should be a provable sum. Following the balance, the item or items, dated and identifiable by number or otherwise, representing charges, or debits and credits should appear. Summarization is necessary showing a running or developing balance or an arrangement which permits the calculation of the balance claimed to be due.

804 N.E. 2d at 977 (internal citations omitted) (as quoted in Stern, supra, at 112).

As in the above cases, the present Plaintiff has not pleaded or attached sufficient documentation establishing the basis for the total amount alleged to be due. Defendant's preliminary objections, therefore, should be sustained, pursuant to Pa.R.C.P. No. 1028(a)(2), for failure to set forth the material facts on which the cause of action is based and to set forth specific averments of time, place, and items of special damages, and pursuant to Pa.R.C.P. No. 1028(a)(3), for insufficient specificity of a pleading.

C. Defendant's preliminary objections should be sustained, pursuant to Pa.R.C.P. No. 1028(a)(4) because Plaintiff has failed to state a claim against Defendant.

Since "[t]he right to recover for breach of contract accrues when the contract is broken," 12 P.L.E. Contracts § 493, breach is an element of a contract action that must be pled in the complaint. Moreover, "[f]acts establishing the breach of th[e] contract must be alleged to set out a cause of action..." Gen. State Auth. v. Sutter Corp., 403 A.2d 1022, 1025 (Pa. Commw. Ct. 1979). Although Plaintiff seeks to claim an allegedly unpaid balance on a credit account—without documenting its basis for demanding that specific sum—Plaintiff does not allege that there was a breach or default under the terms of the agreement. See 12 P.L.E. Contracts § 495 (stating that all elements of a contract action must be alleged in the complaint). As discussed above, Plaintiff makes no allegations about the terms of the account agreement that would define breach and fails to attach the agreement. Here, the allegations do not amount to a cause of action against the Defendant, as Plaintiff has failed to allege breach and has failed to set forth any facts about breach.

For these reasons, Plaintiff has failed to allege facts setting forth the element of breach which would be required to establish liability under a contract theory. To the extent that the

complaint is based on such a theory or any other theory that requires an allegation of breach, it should be dismissed pursuant to Pa.R.C.P. No. 1028(a)(4), for legal insufficiency.

V. Conclusion

As is described above, Plaintiff's boilerplate pleading fails to comply with the pleading requirements set forth in the Rules of Civil Procedure. For the reasons set forth above, Defendant requests that his preliminary objections be sustained and that the complaint in this matter be dismissed without prejudice unless Plaintiff files an amended complaint conforming in form and substance to the Pennsylvania Rules of Civil Procedure, within twenty (20) days.

Respectfully submitted,

COMMUNITY LEGAL SERVICES, INC.

Date: _____

By: _____

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Attorney for Defendant Proceeding IFP

Portfolio Recovery Associates, LLC, Plaintiff, v. CLIENT, Defendant.	MUNICIPAL COURT PHILADELPHIA COUNTY CIVIL DIVISION SC-13-XX-XX-XXXX

TRIAL MEMORANDUM

Plaintiff is a debt buyer, which means it specializes in buying portfolios of allegedly defaulted consumer debts for pennies on the dollar and then attempts to collect the full amount of the debts. Here, Plaintiff seeks to collect an alleged balance on a credit account between Defendant and HSBC BANK NEVADA, N.A./HHB/US WEST. Plaintiff has failed to prove that it has standing to sue on the alleged debt and has failed to produce a contract. In addition, Plaintiff presents inadequate proof to support its claim under any theory of recovery.

1. **Plaintiff must establish that it is the real party in interest.**

Until a plaintiff debt buyer can show injury, it has no standing to sue: "Judgment cannot be entered in favor of a stranger to the contract, and, before a party is entitled to recover on a lease or contract, the burden is on him to show that he has an interest therein." Commw. Dept. of Commerce v. Carlow, 687 A.2d 22, 25 (Pa. Commw. Ct. 1996). Furthermore, "[w]hen suit is brought against the defendant by a stranger to his contract, he is entitled to proof that plaintiff is

the owner of the claim against him. This protection must be afforded to the defendant. Otherwise, the defendant might find himself subjected to the same liability to the original owner of the cause of action, in the event there was no actual assignment." Hillbrook Apartments v. Nyce Crete Co., 352 A.2d 148, 155 (Pa. Super. Ct. 1975).

Proper proof of Plaintiff's claim would be written proof of assignment. Under criminal law, it is unlawful for a collection agency to take assignment of a debt for collection purposes unless the assignment is in writing. 18 Pa. C.S. § 7311. Where a plaintiff avers that it is the real party in interest through an assignment of an account between the defendant and an original creditor, the collection action is necessarily premised on that written agreement. The Pennsylvania Rules of Civil Procedure, No. 1019(i), require that when a claim is based on a writing, the pleader shall attach a copy of the writing or material part thereof. Municipal Court Rule 109(4) also provides that when a claim is based on a writing, the pleader shall attach a copy of the writing or material part thereof.

Where a plaintiff has failed to attach the written assignment, or material part of the assignment, to the complaint, and has failed to explain any reason for its unavailability and to set forth the substance of the agreement, the plaintiff fails to comply with the pleading standards of Municipal Court Rule 109(4) and fails to show that it is the real party in interest. See Atl. Credit & Fin., Inc. v. Giuliana, 829 A.2d 340, 345 (Pa. Super. Ct. 2003) (stating the absence of the writing establishing the assignment of the debt is "fatal to the claims set forth in appellee's complaint").

Here, Plaintiff's contends that it is the current holder of the account by presenting a verification and an affidavit from Plaintiff's alleged assignor. Neither document is the written assignment to which our statutes and case law refer. The Purchase and Sale Agreement and Bill

of Sale with exhibits, to which the affidavit refers, are the documents required under the rules. Furthermore, both documents Plaintiff provided were created in anticipation of or for use in litigation, therefore, neither is admissible under Municipal Court Rule 121. Finally, as the Superior Court recently stated, "Pennsylvania courts long have disapproved of trial by affidavit." JP Morgan Chase Bank, N.A. v. Murray, 63 A.3d 1258, 1267 (Pa. Super. Ct. 2013).

Putting debt buyers to their proofs in collection actions such as this is not a mere technical exercise, but a necessary counterweight to their business model's tendency to two types of widespread problems involving fraud and consumer abuse in the debt buying industry: 1) debts being purchased without title, and 2) the same debts being purchased by multiple parties exposing consumers to multiple collection demands on the same debt by different collectors. See Wood v. M&J Recovery LLC, CV 05-5564, 2007 U.S. Dist. LEXIS 24157 (E.D.N.Y., April 2, 2007) (explaining that 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). Finally, Pennsylvania courts have established that debt buyers are not entitled to rely upon the business records of their predecessors in interest without proving the circumstantial trustworthiness of the documents, including the chain of custody of the documents. Commw. Fin. Sys., Inc. v. Smith, 15 A.3d 492 (Pa. Super. Ct. 2011).

2. An "account stated" theory of recovery is inappropriate for credit card actions.

The Pennsylvania Supreme Court has defined an "account stated" to be "an account in writing, *examined and accepted by both parties*, which acceptance need not be expressly so, but may be implied from the circumstances." Robbins v. Weinstein, 17 A.2d 629, 634 (Pa. 1941) (citing Leinbach v. Wolle, 61 A. 248 (Pa. 1905) (emphasis added). An "account stated" is "a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an

amount due the creditor." Restatement (Second) of Contracts § 282(1). Failure to respond to a credit card statement received in the mail is insufficient to establish a prima facie case of account stated. See, e.g., Target Nat'l Bank v. Kilbride, 10 Pa. D. & C.5th 489, 493, 2010 WL 1435304 (C.P. Centre Cnty. 2010) (stating that something more than mere acquiescence by failure to take exception to a series of statements received in the mail is required to show assent).

Further, an "account stated" cause of action is not applicable in the consumer credit card collection context. Judge R. Stanton Wettick, Jr. soundly rejected the validity of an "account stated" cause of action in Target Nat'l Bank/Target Visa v. Samanez, No. AR07-09777, 2007 Pa. D. & C. Dec. LEXIS 433 (C.P. Allegheny Cnty. 2007), in Pittsburgh Legal Journal, Vol. 156, No. 7 (March 28, 2008) at *76-80, available at http://www.acba.org/ACBA/Publications/PLJ-Opinions/2008/7-PLJOpinionsVol156_032808.pdf. Judge Wettick analyzed case law and secondary legal authority, then offered an explanation, supported by findings from a report by the U.S. Government Accountability Office,[1] that credit card statements are too complicated for the average consumer to be able to determine whether the amount being claimed to be due is accurate. See id. at *79-80. Other courts have agreed that, given their complexity, a consumer cannot be held to agree, by silence, that credit card statements are correct:

> An account stated theory may have been appropriate when credit card issuers gave cardholders fixed interest rates and charged very few fees. With the proliferation of credit cards over the past two decades, however, interest rates have varied and fees have increased in number and severity. It is unreasonable to expect the average debtor to understand the changing terms of a Customer

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[1] See Credit Cards--Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers, U.S. Government Accountability Office, Document GAO-06-929 (9/2006) ("Report"), available at http://www.gao.gov/new.items/d06929.pdf (last visited November 19, 2012).

The Report concludes that disclosures are written at too high a literacy level and are too complicated for many consumers to understand. Id. at 4-6. In addition, the disclosures are often poorly organized, burying important information in the text, and scattering information about a single topic in numerous places. Id. at 6. The design of the disclosures often makes them hard to read with large amounts of the text in small, condensed typefaces and poor, ineffective headings. Id.

> Agreement such that he or she can object to any invoice received in a timely manner.

Capital One Bank (USA), N.A. v. Clevenstine, 7 Pa. D. & C.5th 153, 157-58, 2009 WL 1245043 (C.P. Centre Cnty. 2009). But see Citibank v. King, 2 Pa. D. & C.5th 60, 2007 WL 4967502 (C.P. Centre Cnty. 2007) (overruling preliminary objections to account stated claim for credit card account). Defendant submits that Judge Wettick's decision in Samanez and cases like it are thoughtfully reasoned and more persuasive than any contrary case law. In addition, supporting an account stated claim based simply on the failure of a defendant to object to a series of credit card statements mailed to him would run contrary to federal consumer law statutes.[2]

3. **If this Court finds that "account stated" is an applicable theory, Plaintiff has not proven the elements of the claim.**

Even if an "account stated" cause of action is appropriate in this credit card action, Plaintiff has not proven the essential elements. Without testimony or other admissible evidence that Defendant received and examined all billing statements or that Defendant otherwise assented to their correctness, Plaintiff has failed to prove the account was rendered and accepted, which are essential elements of a cause of action under the "account stated" theory.

4. **Plaintiff cannot establish a claim based on an open book account theory without producing all of the billing statements on the account.**

Proper pleading in an action on a book account requires that the "account" be attached and include "clear, definite charges, not lumped but itemized, showing the nature of the transactions." C-E Glass v. Ryan, 70 Pa. D. & C.2d 251, 1975 WL 16632 (C.P. Beaver Cnty. 1975). Therefore, adequate pleading requires,

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[2] The Truth in Lending Act provides that in an action to collect a credit card debt, the creditor has the burden of proof to show that the charges are authorized. 15 U.S.C. §1643(b). In addition, the Fair Debt Collection Practices Act provides that a court may not treat a consumer's failure to request verification of a debt as an admission of liability. 15 U.S.C. § 1692g(c).

> [A]n account must show the name of the party charged. It begins with a balance, preferably at zero, or with a sum recited that can qualify as an account stated, but at least the balance should be a provable sum. Following the balance, the item or items, dated and identifiable by number or otherwise, representing charges, or debits, and credits, should appear. Summarization is necessary showing a running or developing balance or an arrangement which permits the calculation of the balance claimed to be due.

Worldwide Asset Purchasing, LLC v. Stern, 153-MAY Pittsburgh Legal J. 111 (C.P. Allegheny 2004), quoting Asset Acceptance Corp. v. Proctor, 804 N.E.2d 975 (Ohio Ct. App. 2004).

Here, Plaintiff attached a single facsimile billing statement to its Statement of Claim and provided no other statements. There are no payments or purchases on this statement, but only charges for interest and fees. This billing statement fails to present the "clear, definite" itemized accounting that is necessary to establish an open book account. In addition, the fees and interest that appear in this statement are not collectible without proof of a contract that authorizes them.

5. Plaintiff has not proven that there was a contract.

Plaintiff has failed to prove that there was a valid contract between Defendant and Plaintiff's alleged successor in interest, HSBC BANK NEVADA, N.A./HHB/US WEST. Federal law requires that an affirmative application be made to a credit card issuer, 15 U.S.C. § 1642, so that if the application was made in writing, a copy of the application should be annexed to the complaint pursuant to Pa.R.C.P. No. 1019(i) and the corresponding Municipal Court Rule 109(4). Here, Plaintiff has not provided a credit card application or a credit card contract. Even the billing statement provided bears a different name than that mentioned in Plaintiff's other documents. Therefore, Plaintiff has not proven the existence of a contract.

6. Unjust enrichment is not an appropriate theory of recovery where an express contract exists.

"Unjust enrichment" is an equitable doctrine. Styer v. Hugo, 619 A.2d 347 (Pa. Super. Ct. 1993), aff'd, 637 A.2d 276 (Pa. 1994). Where unjust enrichment is found, the law implies a

contract, which requires the defendant to pay the plaintiff the value of the benefit conferred. Schenck v. K.E. David, Ltd., 666 A.2d 327 (Pa. Super. Ct. 1995). Yet, as discussed above, every credit card transaction must be based on a contract for the extension of credit. 15 U.S.C. § 1642.

Where a written contract exists, no unjust enrichment theory is permitted. See Coldwell Banker Phyllis Rubin Real Estate v. Romano, 619 A.2d 376, 381-82 (Pa. Super. Ct. 1993). See also Third Nat'l Bank & Trust Co. v. Lehigh Valley Coal Co., 44 A.2d 571 (Pa. 1945); Birchwood Lakes Cmty. Ass'n, Inc. v. Comis, 442 A.2d 304, 308 (Pa. Super. Ct. 1982) (stating a plaintiff cannot recover on a claim for unjust enrichment if such claim is based on a breach of a written contract); Schlehter v. Foltz, 115 A.2d 910 (Pa. Super. Ct. 1955) (stating that recovery hinges on the ability to show the actual promise to repay when there is an express contract—quantum meruit is unavailable). A credit card action is a contract action, therefore, Plaintiff cannot recover under an unjust enrichment theory.

Conclusion

For the above reasons, Defendant requests that an award be entered in his favor and against Plaintiff.

Respectfully submitted,

Date: _2014__ _____

Attorney for Defendant

MIDLAND FUNDING LLC	:	
	:	COURT OF COMMON PLEAS
Plaintiff	:	
	:	PHILADELPHIA COUNTY
v.	:	
	:	CIVIL DIVISION
CLIENT	:	
Defendant	:	TERM, 2012
	:	No. XXXX

ORDER

AND NOW, this _____day of _____, 2013, upon consideration of the foregoing preliminary objections, it is hereby ORDERED that the preliminary objections to Plaintiff's complaint are sustained. Plaintiff's complaint shall be dismissed without prejudice unless Plaintiff files an amended within twenty (20) days of the docketing of this order. If Plaintiff does not file an amended pleading within twenty (20) days of the docketing of this order, the complaint may be dismissed without prejudice upon praecipe to the Prothonotary.

BY THE COURT:

_____

J.

PHILADELPHIA MUNICIPAL COURT
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

1339 Chestnut Street, 10th Floor, Philadelphia, PA 19107

Patrick F. Dugan, President Judge John J. Joyce, Deputy Court Administrator

SC-19-[redacted]

Midland Funding, LLC 2365 NORTHSIDE DRIVE Suite 300 San Diego, CA 92108	[redacted] [redacted] PHILADELPHIA, PA 1[redacted]

LAURA SMITH

_____

Attorney

Attorney # 322470

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215.981.3700

PETITION

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:
Your Petitioner respectfully requests that:

1. Petitioner is the named ____ Plaintiff __X__ Defendant in the above-captioned case.

2. That the __X__ Plaintiff ____ Defendant is/and resides at:
   Midland Funding, LLC
   2365 NORTHSIDE DRIVE Suite 300
   San Diego, CA 92108

3. That a hearing was held in Municipal Court on 11-20-2019 and a Judgment was entered for __X__ Plaintiff ___ Defendant by Default on 11-20-2019.

4. Your Petitioner failed to appear at the hearing for reason that:
   Defendant, [redacted], did not have notice of this action, the hearing that was scheduled for November 20, 2019, or the default judgment entered at that hearing in his absence. Mr. [redacted] first learned of this case in early March 2020, when he visited Community Legal Services for (continued...)

5. Your Petitioner has a good reason to proceed in that:
   Defendant, Mr. [redacted], took prompt action to file this Petition after learning about the judgment against him on March 2, 2020. As indicated above, he promptly sought free legal help after discovering his frozen bank account, and communicated with his CLS attorney as best he could (continued...)

WHEREFORE, your Petitioner respectfully requests the Court to open this judgment to allow your Petitioner to proceed.

I am an attorney for the defendant(s), the defendant's authorized representative or have a power of attorney for the defendant(s) in this petition action. I hereby verify that I am authorized to make this verification; that I have sufficient knowledge, information and belief to take this verification or have gained sufficient knowledge, information and belief from communications with the defendant or the persons listed below and that the facts set forth are true and correct to the best of my knowledge, information and belief. I understand that this verification is made subject to the penalties set forth in 18 Pa. C.S. § 4904, which concerns the making of unsworn falsifications to authorities. If I am an authorized representative or have a power of attorney, I have attached a completed Philadelphia Municipal Court authorized representative form or a completed power of attorney form.

LAURA SMITH

_____ _____

Signature Plaintiff/Attorney/Petitioner **Intv. Code**

172-06/11/01

PHILADELPHIA MUNICIPAL COURT
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

1339 Chestnut Street, 10th Floor, Philadelphia, PA 19107

Patrick F. Dugan, President Judge John J. Joyce, Deputy Court Administrator

SC-19-[redacted]

Midland Funding, LLC 2365 NORTHSIDE DRIVE Suite 300 San Diego, CA 92108	[redacted]
Plaintiff(s)	*Defendant(s)*

Overflow of Reason To Proceed Notes

over the following weeks, despite the difficulties posed by the COVID-19 pandemic, no access to any money at all to pay his bills, and the statewide stay-at-home order. In addition, Defendant has meritorious defenses to this action, as detailed below.

Mr. [redacted] does not owe the Plaintiff the debt as claimed in its Statement of Claim. See Exhibit 2. He believes the amount of the debt alleged is incorrect. Plaintiff Midland Funding, which admits that it is not the original creditor, failed to attach any credit card agreement or billing statement from the original creditor as required by state and local rules, and failed to explain their absence. Mr. [redacted], who does not dispute that he once had a credit account with Care Credit, recalls that the original balance was $2,000 and that he made several payments on that account, each for approximately $140. Plaintiff?s claim does not account for those payments or explain the contractual or statutory basis for any fees or interest added.

Mr. [redacted] also believes that Midland lacks standing to bring this action. Mr. Coppersmith has never borrowed money or entered any agreement with Midland. He does not recognize the Plaintiff and has not seen any written assignment of the alleged Care Credit debt from the original creditor to Plaintiff. If any such documentation exists, he has not seen it and it is not part of the court record. Mr. [redacted] therefore denies that Plaintiff is the real party in interest, as there is no written assignment of the alleged debt from the original creditor to Plaintiff attached to Plaintiff?s Statement of Claim, and no explanation for its absence.

Defendant respectfully requests that this Court open the judgment, vacate the writ of execution and order that any funds taken be returned to him, and allow this case to proceed to a hearing on the merits so that he has an opportunity to defend himself.

PHILADELPHIA MUNICIPAL COURT
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

1339 Chestnut Street, 10th Floor, Philadelphia, PA 19107

Patrick F. Dugan, President Judge John J. Joyce, Deputy Court Administrator

SC-19-[redacted]

Midland Funding, LLC 2365 NORTHSIDE DRIVE Suite 300 San Diego, CA 92108	
Plaintiff(s)	*Defendant(s)*

Overflow of Petition Failed To Appear Notes

advice about his frozen bank account. About a week earlier, on or about February 25, 2020, he was attempting to check his bank account balance online when he noticed something wrong with his account; he could see a recent deposit, but there was no available balance. Mr. Coppersmith had just started a new job and was anticipating the direct deposit of his first paycheck. Confused, Mr. [redacted] went to an ATM the next day to attempt to withdraw cash from his account. When he could not, he called his bank to ask what was happening with his account and why. A bank representative told him they could not discuss the account freeze. They did not tell him the account was frozen because of a judgment against him, provide contact information for plaintiff?s counsel, or give him any other information. Mr. [redacted], who frequently has problems with mail at his small apartment building with an unlocked mailbox, had not received any information about the bank account freeze (including a copy of the writ of execution). He did not know why his account was frozen or where to turn for help. Mr. Coppersmith is indigent and could not afford to hire an attorney?in fact he had no access to any funds at all because of the account freeze.

A few days later, he remembered that free legal help might be available through Community Legal Services (CLS). On March 2, 2020, he came to CLS to apply for legal help. It was there that Mr. [redacted] learned for the first time that his account was frozen based on a default judgment against him by a company called Midland Funding. Since he had never heard of Midland Funding, he thought at first that the judgment must be the result of identify theft. CLS intake staff referred Mr. [redacted] to a CLS consumer attorney, who contacted him two days later, on March 4, 2020. Over the next week, Mr. [redacted] and his CLS attorney corresponded by email and worked to arrange a time to talk in person or by phone. But because Mr. Coppersmith was working long hours and was not permitted to use his phone during work time, this proved a challenge. Meanwhile, he had no money at all?including for transportation costs?and was walking several miles to and from work each day. (He could not access even the $300 to which he is entitled under state law.) On March 11, with the COVID-19 shutdown looming, Mr. [redacted] was laid off from his job in the service/hospitality industry. And in the following days the City of Philadelphia, and then the Governor, ordered all non-essential businesses to close and eventually directed all residents to stay at home to protect the public?s health. Mr. [redacted] was completely isolated from information and resources. He did not have internet in his home. With no income or access to his account, he could not afford to keep his cell phone service on. Making matters worse, Mr. [redacted] is immunocompromised, so could not safely leave the house during the ongoing coronavirus pandemic. Because of this physical and technological isolation, he and his CLS attorney could not communicate for several weeks.

(continued...)

PHILADELPHIA MUNICIPAL COURT
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

1339 Chestnut Street, 10th Floor, Philadelphia, PA 19107

Patrick F. Dugan, President Judge John J. Joyce, Deputy Court Administrator

SC-19-[redacted]

Midland Funding, LLC 2365 NORTHSIDE DRIVE Suite 300 San Diego, CA 92108	[redacted]
Plaintiff(s)	*Defendant(s)*

Overflow of Petition Failed To Appear Notes

In late April, Mr. [redacted] was able to restore his cell phone service through a contribution from a friend. Standing outside of a fast-food restaurant to use their free wi-fi, Mr. [redacted] was able to access his email and reconnect with his CLS attorney. On April 29, 2020, he informed CLS that he was still in need of legal help. Over the next two weeks, with continued interruptions in phone service, he continued to communicate with his CLS attorney about his situation. On May 18, 2020, his attorney did an initial interview with Mr. [redacted] by phone and, after analyzing the underlying collections case, agreed to file a Petition to Open the judgment on his behalf. This Petition is being filed two days later, on May 20, 2020.

[redacted] first learned of Plaintiff Midland Funding?s judgment against him when he sought legal help at CLS on March 2, 2020, and first learned about the nature of the claim against him on May 18, 2020, when his CLS attorney reviewed the docket with him in detail. The Affidavit of Service in this case, Exhibit 1, indicates that service was made on November 4, 2019, upon an ?Adult family member with whom said Defendant resides,? and included a physical description: a 29 year-old white woman weighing 140 pounds, height 5? 6?. Mr. [redacted] lives alone and does not have any family. There is no one in his 3-unit apartment building that resembled that physical description?the only white female in the building at that time (who was no relation to Mr. [redacted]), weighed significantly more. Living alone and without any family, Mr. [redacted] could not have received proper service through this attempt. He did not receive notice of this action.

Likewise, [redacted] did not receive notice of the judgment entered against him two weeks later. If the Court mailed a notice of judgment, it did not reach Mr. [redacted]. As indicated above, he frequently encountered problems with his mail because of the open mailbox fixed to the outside of his building?s door.

EXHIBIT G

Notice of Appeal

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CIVIL

Velocity Investments, LLC

Plaintiff(s)

vs.

[redacted]

Defendant(s)

_____ Term, 2020
(month) *(year)*

No. _____

Municipal Court Case Number:
SC[redacted]

☑ S.C. No. ☐ L.T. No. ☐ C.E. No.
(Check One)

NOTICE OF APPEAL
From a Philadelphia Municipal Court Order

[redacted], who was/were the ☐ Plaintiff(s) ☑ Defendant(s) in the Municipal Court action referenced above, files this Notice of Appeal of the Municipal Court's Order which was entered on the dockets of the Municipal Court on _____. I have attached a copy of the Order from which I/we are appealing.

☐ Landlord – Tenant: possession only or possession and money judgment;

☐ Residential Lease (10 days) ☐ Non-Residential Lease (30 days)

☐ **Supersedeas is requested** ☐ **Supersedeas is not requested**

*** A supersedeas is a stay that will prevent you from being evicted as long as you pay escrow due to the court on time.**

☐ Landlord – Tenant: money judgment only *(30 days)*

☐ Small Claims or Code Enforcement: money judgment only *(30 days)*

☑ Supplementary Orders *(30 days)*

Laura Smith 322470
Signature Attorney I.D. #

1424 Chestnut Street
Address

Philadelphia PA 19102
City State Zip Code

1/21/2020
Date

215.981.3741
Phone Number

PHILADELPHIA MUNICIPAL COURT
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

1339 Chestnut Street, 10th Floor, Philadelphia, PA 19107

Patrick F. Dugan, President Judge

SC-[redacted]

VELOCITY INVESTMENTS, LLC P.O. Box 788 Wall, NJ 07719	[redacted] Street Philadelphia, PA [redacted]
Plaintiff(s)	*Defendant(s)*

LAURA SMITH

Petitioner/Attorney
Attorney # 322470

Address & Phone 1424 CHESTNUT STREET
PHILADELPHIA, PA 19102
215.981.3700

RULE

AND NOW, this 22nd day of December, 2019, the Court upon consideration of the foregoing Petition,

Denied a Rule on the Defendant to show cause why relief requested in the Petition be granted.

10-Petition Not Timely Filed

Service of original process was properly made in accordance with Pa. R. Civ. P. 402(a)(2)(i). Additionally, the court mailed a notice of the default judgment to the petitioner. It was not returned and, therefore, it is presumed that the notice was delivered and received by the petitioner.

BY THE COURT:

Bradley Moss

J.

VELOCITY INVESTMENTS, LLC, Plaintiff-Appellee, v. DEFENDANT, Defendant-Appellant.	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL DIVISION January Term 2020 No. 0#### Appeal of SC-##-##-##-####

O R D E R

AND NOW, this _____ day of _____, 2020, upon consideration of the Defendant-Appellant's Motion to Reverse and Vacate Municipal Court's Denial of Petition to Open it is hereby **ORDERED** that:

1. The Defendant-Appellant's Motion to Reverse and Vacate the Denial of the Petition to Open is **GRANTED**;
2. The Order Denying the Petition to Open is **VACATED**;
3. The Default Judgment is **VACATED**;
4. Any Writs of Execution are **VACATED** and any Execution is **STAYED**; and
5. This case is **REMANDED** to the Municipal Court for a trial on the merits.

_____

J.

COMMUNITY LEGAL SERVICES, INC.
By: Laura R. Smith, Esquire
Attorney I.D. No. 322470
1424 Chestnut Street
Philadelphia, PA 19102
215-981-3741
lsmith@clsphila.org Attorney for Defendant-Appellant Proceeding IFP

VELOCITY INVESTMENTS, LLC, Plaintiff-Appellee, v. DEFENDANT, Defendant-Appellant.	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL DIVISION January Term 2020 No. 02471 Appeal of SC-##-##-##-####

MOTION TO REVERSE AND VACATE MUNICIPAL COURT'S DENIAL OF PETITION TO OPEN

Defendant-Appellant Defendant ("Ms. Defendant" or "Defendant") through her counsel, hereby requests that this Court reverse and vacate the Municipal Court's denial of her December 19, 2019, Petition to Open the default judgment ("Petition"),[1] entered on August 1, 2007, of which she had had no knowledge until December 3, 2019, when her bank account was garnished. She requests that this Court remand the case for a trial on the merits, for the following reasons:

The Parties

1. Velocity Investments, LLC ("Velocity Investments" or "Plaintiff"), is a debt buyer, which means it purchases—for pennies on the dollar—large portfolios of consumer debt that have been deemed uncollectible by the original creditor, then seeks to collect the full amount of the alleged debt. *See* Ex. A, Def.'s Pet. to Open Default J. ["Pet. to Open"].

[1] Ms. Defendant originally filed the Petition on December 17, 2019, but re-filed it two days later at the Municipal Court's request.

2. Debt buyers often seek to collect on debts without admissible, documentary proof to support the validity or ownership of the debts they purchase. *See* Peter Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 Maryland J. Bus. &Tech. L. 259 (2011).

3. Ms. Defendant is a low-income Philadelphia resident who did not know about the 2007 case against her until December of 2019, when she discovered that her bank account had been seized, and her bank identified Plaintiff as the judgment-holder. *See* Ex. A, Pet. to Open.

4. Ms. Defendant immediately sought legal assistance to open the judgment, and now asks only to have her day in court so her defenses to the Action can be heard. *See* Ex. B, Philadelphia Municipal Ct. Docket, SC-##-##-##-#### ["MC Docket"].

The Default Judgment and Ms. Defendant's Reasonable Explanation for the Default

5. On May 16, 2007, Velocity Investments filed a small claims action against Ms. Defendant in Philadelphia Municipal Court: docket number SC-07-05-16-5550 (the "Action" or the "lawsuit"). Ex. B, MC Docket.

6. Plaintiff's Statement of Claim, which appears to have been filed with a single exhibit entitled, "Statement," is not available for viewing on the Municipal Court docket. *See* Ex. B. None of the original filings documents—including the Statement of Claim and the five docket entries following it—were available when Ms. Defendant filed her Petition to Open on December 17, 2019, and they remain unavailable as of the date of this Motion. *See* Ex. A, Pet. to Open. A user trying to access these documents receives the message, "This document is not currently available." *See* Ex. C, Affidavit of Laura Smith, Esq. ["Smith Aff."].

7. A hearing on Plaintiff's claim was scheduled for August 1, 2007. Ex. B, MC Docket.

8. Ms. Defendant never received notice of the Action or the hearing. Ex. A, Pet. to Open.

9. Ms. Defendant was not personally served with the Statement of Claim or notice of hearing.

10. The Municipal Court docket includes an Affidavit of Service, dated May 29, 2007 and docketed July 24, 2007, which indicates that the Statement of Claim was left with "John," a 25-year-old male identified as Defendant's husband. Ex. D, Aff. Service.

11. Ms. Defendant was married to John in 2007, but he never informed her of the Action. They separated in 2010 and are now divorced. Ex. A, Pet. to Open.

12. A default judgment was entered in favor of Plaintiff on August 1, 2007, in the amount of $5,946.45, plus $83.00 in costs, for a total amount of $6,029.45. *See* Ex. B, MC Docket.

13. Ms. Defendant was not aware of the August 1, 2007, hearing or the default judgment that was entered in her absence. Ex. A, Pet. to Open.

14. Ms. Defendant first learned of the lawsuit and the default judgment on December 3, 2019, when she could not access her bank account and found out that it had been frozen through Plaintiff's execution on this 2007 judgment. *See* Ex. E, Writ of Exec.; Ex. A, Pet. to Open.

Ms. Defendant's Prompt Action to Open the Judgment

15. Ms. Defendant first learned of this Action on Tuesday, December 3, 2019, when she tried to access her the Social Security Disability funds in her bank account and could not. Her usual practice was to transfer her social security funds from the account where they were deposited each month into a second account, from which she paid her family's bills. Ex. A, Pet. to Open.

16. When she could not access her funds, she immediately called her bank to ask why. A bank employee informed her that her account had been frozen because of a garnishment, and suggested that she contact Plaintiff's lawyer for more information. Ex. A, Pet. to Open.

17. Ms. Defendant called Plaintiff's lawyer the same day, and learned for the first time that a judgment had been entered against her in 2007. Ex. A, Pet. to Open.

18. Unfamiliar with Velocity Investments, the Action, and the judgment against her, Ms. Defendant sought legal advice. She could not afford an attorney so the very next day, on December 4, 2019, she called Community Legal Services (CLS) to apply for legal assistance.

19. CLS suggested that she visit the office for an intake interview, which she did on the next intake day—Friday, December 6th. Intake staff searched court records to identify the action against her and referred her to a CLS consumer attorney, the undersigned. Ex. A, Pet. to Open.

20. The CLS consumer attorney conducted an initial interview with Ms. Defendant by phone the following Tuesday, December 10th, and agreed to Ms. Defendant in her urgent efforts to remove the hold on her bank account. Ex. A, Pet. to Open.

21. Ms. Defendant and her attorney scheduled an in-person meeting for Tuesday, December 17, 2019, to review the underlying case together. Ex. A, Pet. to Open.

22. Searching the Municipal Court docket, they discovered that the Statement of Claim and most of the case filings from 2007 were not accessible. Ex. A, Pet. to Open; Ex. C, Smith Aff. Users attempting to access the case documents received an automated message: "This document is not currently available."

23. Ms. Defendant and her attorney reviewed what little information was available from the caption and docket text. Based on that incomplete information, and because Mc. Defendant was unfamiliar with Velocity Investments and had not received notice of the action or the judgment, CLS agreed to file a Petition to Open on her behalf. Ex. A, Pet. to Open.

24. The Petition to Open the default judgment was filed the same day, Tuesday, December 17, 2019, ten business days after Ms. Defendant first learned that the action and the judgment existed. *See* Ex. A, Pet. to Open; Ex. B, MC Docket.

The Petition to Open Asserted Meritorious Defenses

25. Ms. Defendant's Petition asserted multiple meritorious defenses: that she did not owe the debt as claimed, that Velocity Investments lacked standing to bring the Action, and that, even if Plaintiff alleged a valid debt, which she denies on information and belief, its claim was likely filed beyond the statute of limitations. *See* Ex. A, Pet. to Open.

26. As Ms. Defendant explained in her Petition, she was limited in her ability to assert detailed defenses because she had no access to (and to date has never seen) the Statement of Claim and its exhibit. Ex. A, Pet. to Open.

27. In her first defense, Ms. Defendant asserted that she does not owe the debt as claimed by Plaintiff because she never had an account with Velocity Investments. Ex. A, Pet. to Open.

28. In the alternative, Ms. Defendant averred that if she is mistaken and if she did have an account with Velocity Investments, then the amount of the alleged debt is incorrect.

29. Pennsylvania's Superior Court has held that in a petition to open, the presence of a single defense that would justify relief if proven at trial is sufficient to fulfill the meritorious defense requirement; the petitioner need not prove the merits of the defense. *Provident Credit Corp. v. Young*, 446 A.2d 257, 263 (1982) (*en banc*); *Miller Block Co. v. U.S. Nat'l Bank*, 567 A.2d 695, 700 (Pa. Super. 1989).

30. Even a partial meritorious defense fulfills this requirement. *See Hutchison v. Hutchison*, 418 A.2d 352, 354–55 (Pa. Super. 1980), *rev'd on other grounds*, 422 A.2d 501 (Pa. 1980).

31. If proven at trial, Ms. Defendant's assertion that she does not owe the alleged debt as claimed would justify relief. As such, Ms. Defendant's first defense set forth a meritorious defense to Plaintiff's claim.

32. In her second defense, Ms. Defendant asserted that Velocity Investments did not have standing to bring its claim because it failed to prove ownership of the alleged debt, and did not

attach documentation of an assignment of the debt. Ex. A, Pet. to Open; *see* Ex. B, MC Docket.

33. In Pennsylvania, a lawsuit must be filed by the real party in interest. Pa. R. Civ. P. 2002(a).

34. In her Petition, Ms. Defendant averred that Velocity Investments is not the real party in interest, as she has had no relationship with Plaintiff and is unaware of any written assignment of the alleged debt from an original creditor to Plaintiff. *See* Ex. A, Pet. to Open.

35. The docket identifies a single exhibit filed with Plaintiff's Statement of Claim, entitled "Statement." This suggests that Plaintiff failed to attach any assignment documents. *See* Ex. A, Pet. to Open; Ex. B, MC Docket.

36. The Superior Court has held that a debt buyer's failure to attach written evidence of the assignment of a consumer debt establishes a meritorious defense to the action, and it is reversible error for a trial court to find otherwise. *Atl. Credit & Fin., Inc. v. Giuliana*, 829 A.2d 340, 345 (Pa. Super. 2003).

37. As such, Ms. Defendant's second defense set forth a meritorious defense to Plaintiff's claim.

38. In her third defense, Ms. Defendant set forth that, even if she were mistaken and she had an account with Velocity Investments, the Action, on information and belief, was filed beyond the statute of limitations. *See* Ex. A, Pet. to Open.

39. If proven at trial, her assertion that the Action was time-barred would justify relief. As such, Ms. Defendant's third defense set forth a meritorious defense to Plaintiff's claim.

40. Each of these defenses, if proven at trial, would prevent a judgment in favor of Plaintiff as claimed in its Statement of Claim.

41. As such, Ms. Defendant set forth a meritorious defense to support opening the judgment to have a trial on the merits.

Municipal Court's Denial of Petition to Open

42. Despite the circumstances set forth above, the Honorable Bradley Moss denied Ms. Defendant's Petition without a hearing on Sunday, December 22, 2019, as not timely filed. *See* Ex. F, Order Denying Def.'s Petition to Open ["Order Den. Pet."].

43. Ms. Defendant appealed that denial on January 21, 2020. *See* Ex. G, Notice of Appeal.

44. The Municipal Court's decision to deny Ms. Defendant's Petition was based solely on her Petition; there was no hearing on the matter.

45. As such, there is no stenographic record of the proceeding available, and it cannot be attached to this Motion as required by Local Rule 1001. *See* Phila. Civ. R. 1001(f)(2)(i)(b).

46. Likewise, the Plaintiff's Statement of Claim is "not available" through the Municipal Court's electronic docket, as explained in the Affidavit of Laura Smith, Ex. C, so it cannot be attached to this Motion as required by Local Rule 1001. *See* Phila. Civ. R. 1001(f)(2)(i)(a).

47. Instead, the Petition and the Municipal Court's Order denying it are attached as Exhibits A and F, respectively.

48. The Municipal Court's decision to deny Ms. Defendant's Petition constituted legal error and/or an abuse of discretion.

49. It was an error of law and/or abuse of discretion to deny Ms. Defendant's Petition where she (1) put forth a reasonable explanation for the default, as she never received notice of the hearing that resulted in a default judgment; (2) acted promptly by seeking legal counsel the very next day after learning of the default judgment, and filing her Petition ten business days after learning of the judgment; and (3) asserted meritorious defenses that Plaintiff does not have standing to bring the claim, that she does not owe the debt as claimed, and, in the alternative, that the claim is time-barred.

50. It was an error of law and/or abuse of discretion to rule that Ms. Defendant's Petition was not timely filed when she received no notice of the Action, the hearing, or the judgment, and took immediate action to gather facts and seek legal counsel to file the Petition after learning of the existence of the default judgment.

51. The lower court's denial of Ms. Defendant's Petition states: "Service of original process was properly made in accordance with Pa. R. Civ. P. 402(a)(2)(1). Additionally, the court mailed a notice of the default judgment to the petitioner. It was not returned and, therefore, it is presumed that the notice was delivered and received by the petitioner." Ex. F.

52. This denial constituted an error of law and/or abuse of discretion for three reasons.

53. First, the lower court abused its discretion when it ignored the fact that Ms. Defendant was not personally served and ignored her averment that the person who was served never notified her of the action. *See Provident Credit*, 446 A.2d at 261.

54. Second, the lower court erred in presuming—without testimonial evidence or any documentary evidence to corroborate it—that the court mailed Ms. Defendant a notice of the judgment. *See Szymanski v. Dotey*, 52 A.3d 289, 293 (Pa. Super. 2012).

55. Finally, the lower court erred in presuming—based on an already erroneous presumption that the notice was sent—that Ms. Defendant received the notice. *See id*. ("A presumption that a letter was received cannot be based on a presumption that the letter was mailed. A presumption cannot be based on a presumption.").

56. The equities in this case justify opening the default judgment, particularly in light of the national context of debt buyers filing suit and seeking default judgment against defendants like Ms. Defendant with inadequate proof the underlying debt, thereby exposing consumers to the threat of multiple collection actions by competing entities.

57. Ms. Defendant seeks only to have a trial on the merits to determine once and for all her liability, if any, to Velocity Investments for the alleged debt.

WHEREFORE, for the foregoing reasons, Defendant-Appellant Defendant respectfully requests that this Court reverse and vacate the order of the Municipal Court denying her Petition, open the default judgment, vacate any writs of execution, remand this matter to Municipal Court for a trial on the merits, and grant any further relief as is just and proper.

Respectfully submitted,

COMMUNITY LEGAL SERVICES, INC.

Feb. 10, 2020

By: __/s/ Laura Smith _____
Laura R. Smith, Esq.
Attorney for Defendant-Appellant

COMMUNITY LEGAL SERVICES, INC.
By: Laura R. Smith, Esquire
Attorney I.D. No. 322470
1424 Chestnut Street
Philadelphia, PA 19102
215-981-3741
lsmith@clsphila.org Attorney for Defendant-Appellant Proceeding IFP

VELOCITY INVESTMENTS, LLC, Plaintiff Appellee, v. DEFENDANT, Defendant Appellant.	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL DIVISION January Term 2020 No. 0#### Appeal of SC-##-##-##-####

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REVERSE AND VACATE MUNICIPAL COURT'S DENIAL OF PETITION TO OPEN

I. Matter Before the Court

This is an appeal from the Municipal Court's denial of a Petition to Open Default Judgment in a small claims case. Defendant-Appellant ("Ms. Defendant" or "Defendant") recently learned that a default judgment had been entered against her more than twelve years ago. As best as she can discern from incomplete court records, the claim was for the collection of an alleged debt between Ms. Defendant and an unknown third party. Plaintiff Velocity Investments, LLC ("Velocity Investments" or "Plaintiff"), does not lend money; it would have been a stranger to any contract with Ms. Defendant. Rather, Velocity Investments is a member of the debt buying industry—an industry plagued with problems regarding documentation and title to putative debt.

Ms. Defendant received no notice of the default judgment or the August 1, 2007, hearing at which it was entered. She first learned that a judgment had been entered against her on

December 3, 2019, when she tried to access her bank account and could not. She immediately called her bank to find out why. A bank representative informed her that her account was frozen because of a garnishment and suggested she contact Plaintiff's lawyer. Ms. Defendant did so the same day, and learned that the garnishment was based on a 2007 judgment against her.

After learning that the judgment existed, Ms. Defendant sought legal help right away. Unable to afford to hire an attorney, she called Community Legal Services ("CLS") the very next day, December 4, 2019. CLS instructed her to come to the office for intake, which she did on CLS's next intake day—Friday, December 6th. Over the next week and a half, she met with intake staff, spoke by phone with a CLS attorney (the undersigned), and then met with that attorney in person on December 17, 2019. When Ms. Defendant and her CLS attorney reviewed the Municipal Court's electronic docket, they discovered that nearly all case filings from 2007, including the Statement of Claim were "not currently available."

Based on the limited record available, and the fact that Ms. Defendant never received notice of the claim, the hearing, or the judgment against her, CLS agreed to file a Petition to Open the Default Judgment ("the Petition"). The Petition was filed the same day, December 17th—the tenth business day after Ms. Defendant first discovered that the default judgment existed. Ms. Defendant's Petition was denied without a hearing on Sunday, December 22, 2019, as untimely.

In the Petition, Ms. Defendant asserted meritorious defenses that she did not owe the debt as claimed, that Velocity Investments lacked standing to bring the action, and that any claim by Velocity Investments is time-barred. Ms. Defendant filed a timely appeal of the denial of her Petition, and seeks only to have her day in court to dispute the debt as claimed.

II. Statement of Questions Involved

QUESTION 1: Should an August 1, 2007, default judgment be opened where the Petitioner seeks only to have a trial on the merits and has (1) put forth a reasonable explanation for the default, as she never received notice of the claim or hearing that resulted in a default judgment; (2) acted promptly by seeking legal counsel the very next day after learning of the default judgment, and filing the Petition ten business days after learning of the default judgment; and (3) asserted meritorious defenses that she does not owe the debt as claimed, that Plaintiff does not have standing to bring the claim, and, in the alternative, that Plaintiff's claim is time-barred?

Proposed Answer: Yes.

QUESTION 2: Did the lower court commit an error of law and/or abuse its discretion when it denied Ms. Defendant's Petition to Open Default Judgment on the grounds that the Petition was not timely filed when Ms. Defendant received no notice of the hearing or judgment, and took immediate action to gather facts and seek legal counsel to file the Petition after learning of the existence of the default judgment against her?

Proposed Answer: Yes

III. Statement of Facts

Ms. Defendant learned just recently that a default judgment had been entered against her many years ago, on August 1, 2007. As far as she can tell from the incomplete Municipal Court record, the claim was for the collection of an alleged debt between Ms. Defendant and an unknown third party. Plaintiff Velocity Investments, LLC, does not lend money. Rather, upon information and belief, Velocity Investments is a debt buyer—a member of an industry plagued with problems regarding documentation and title to putative debt.

Ms. Defendant received no notice of the default judgment or the August 1, 2007, hearing at which it was entered. She first learned that the judgment existed on Tuesday, December 3,

2019, when she tried to access her Social Security Disability funds and could not. She had recently received her monthly Social Security payment by electronic deposit, and transferred most of those funds to a second account from which she planned to pay her bills—her usual practice. When she could not access that account, she immediately called her bank to find out why. A bank representative informed her that her account had been frozen because of a garnishment and suggested she contact Plaintiff's lawyer. Ms. Defendant did so the same day, and learned that the garnishment was based on a 2007 judgment against her in this action.

Ms. Defendant immediately sought legal help. She is indigent and could not afford to hire an attorney, so she called CLS the very next day, December 4, 2019, to apply for legal assistance. CLS suggested that she come in for an intake interview, which she did on CLS's next intake day—Friday, December 6th. There she met with CLS intake staff, who searched court records to identify the action against her and referred her case internally to the undersigned consumer attorney. The CLS attorney did an initial interview with Ms. Defendant by phone the following Tuesday, December 10th, agreeing to assist in her urgent efforts to remove the account hold on her Social Security funds. Next, Ms. Defendant and her CLS attorney scheduled a meeting for December 17, 2019, to review the underlying case together. They attempted to unravel what had transpired in the case but found little information available on the Municipal Court's electronic docket. They discovered that most of the original filings from 2007—including the Statement of Claim and its lone exhibit, entitled "Statement"—were inaccessible. *See* Ex. B, MC Docket. Instead, a user trying to access these files received the message: "This document is not currently available." *See* Ex. C, Smith Aff. One of the few documents available

from 2007 was the Affidavit of Service,[2] which asserted that the Statement of Claim had been provided to "John," Ms. Defendant's husband at the time. *See* Ex. D, Aff. Service. (The couple separated a decade ago and are now divorced.) But as Ms. Defendant stated in her Petition to Open, she never received this or any other notice of the suit's filing or the August 1, 2007, hearing. If John was indeed served, he never notified Ms. Defendant.

Based on the incomplete record available—the information in the caption, docket entries, and recent (2019) execution filings—CLS agreed to file a Petition to Open the Default Judgment. The Petition was originally filed on the same day, December 17th. (Because of confusion on the part of the Municipal Court's filing office, the Petition was initially rejected and, at the Court's request, re-filed on Friday, December 19th.) Ms. Defendant's Petition was denied without a hearing three days later, on Sunday, December 22, 2019, as untimely.

Ms. Defendant filed a timely appeal of that denial on January 21, 2020. *See* Ex. G, Notice of Appeal. She requests the opportunity to defend herself, as she would have done if she received notice of the original suit. She seeks only to have a trial on the merits to determine once and for all her liability, if any, to Plaintiff for whatever debt it might allege she owed to a third party.

IV. Argument

The default judgment entered in this case must be opened because the equitable considerations present, analyzed in the Supreme Court's three-factor framework, clearly justified opening the judgment to grant Ms. Defendant her day in court. Thus the lower court's refusal to open the judgment was a legal error and/or abuse of discretion.

Judgment by default is not intended as a device to allow a plaintiff to avoid a legal contest by winning a race to the courthouse. *Kraynick v. Hertz*, 227 A.2d 144, 147 (Pa. 1971).

[2] The Affidavit of Service, attached here as Exhibit D, is no longer available on the Municipal Court docket. As of February 2020, every document from 2007—the year this case was filed and judgment entered—is "not available," leaving only the 2019 execution filings visible to a docket user. *See* Ex. C, Smith Aff.

Rather, the purpose of the default judgment procedure is to expedite court business, particularly where there is no genuine dispute, or where a defendant seeks only to delay proceedings. *See id.*; *Duckson v. Wee Wheelers, Inc.*, 620 A.2d 1206 (Pa. Super. 1993). Whether to open a default judgment is a question of equity:

> In determining whether a judgment by default should be opened, we must ascertain whether there are present any equitable considerations in the factual posture of the case which require that we grant to a defendant against whom the judgment has been entered an opportunity to have his 'day in court' and to have the cause decided upon the merits. In so doing, we act as a court of conscience.

Provident Credit Corp. v. Young, 446 A.2d 257, 260–61 (1982) (*en banc*) (quoting *Kraynick*, 277 A.2d at 147). A petition to open a default judgment "is an appeal to the court's equitable powers and is a matter for judicial discretion." *McCoy v. Public Acceptance Corp.*, 305 A.2d 698, 700 (Pa. 1973).

As a framework for this equitable analysis, Pennsylvania courts employ a three-factor test. *Allegheny Hydro No. 1 v. Am. Line Builders, Inc.*, 722 A.2d 189, 192 (Pa. Super. 1998). To determine whether to open a default judgment, courts must ascertain whether: (1) the failure to appear can be excused; (2) the petition to open has been promptly filed; and (3) the party seeking to open the judgment has shown a meritorious defense. *See Balk v. Ford Motor Co.*, 285 A.2d 128, 130–31 (Pa. 1971).

On appeal, a lower court's ruling on a petition to open a default judgment should be reversed only where its decision was an error of law or abuse of discretion. *Id.* "However, the exercise of equitable powers implies the obligation for the [lower] court to consider equities which militate in favor of opening a default judgment and to act with the conscience of a court of equity." *Ashton v. Ashton*, 390 A.2d 282, 285 (Pa. Super. 1978). And the Superior Court has emphasized that it "will not hesitate to find an abuse of discretion in a lower court's denial of a

petition to open when, upon [the Superior Court's] review of the case, [it finds] that the equities clearly favored opening the default judgment." *Allegheny Hydro*, 722 A.2d at 192. Moreover, in overturning a lower court's refusal to open a default judgment, the Superior Court in *Ashton* emphasized that the purpose of the default judgment mechanism is to prevent "dilatory" defendants from delaying plaintiffs' claims—it is "not intended to provide the plaintiff with means of gaining judgment without difficulties arising from litigation." *See* 390 A.2d at 285. This purpose should be "foremost in the court's mind" when ruling on a petition to open default judgment, the *Ashton* Court cautioned. *Id.*

Ms. Defendant's circumstances, as presented here and to the Municipal Court, demonstrate that the equities clearly justified opening the judgment to grant Ms. Defendant her day in court.

1. The lower court correctly found that Ms. Defendant had a reasonable explanation for her failure to attend the August 1, 2007, hearing.

Opening a default judgment is appropriate when, along with a meritorious defense and a prompt petition to open, the defendant "offers a legitimate excuse for the delay that caused the default." *See Duckson*, 620 A.2d at 1209. A default judgment may be considered reasonably explained or excused where defendant-appellant's "failure to answer was due to an oversight, an unintentional omission to act, or a mistake of the rights and duties of the appellant," rather than a conscious decision not to defend. *Campbell v. Heilman Homes*, 335 A.2d 371, 373 (Pa. Super. 1975) (holding that the lower court erred in refusing to open a default judgment where the defendant corporation's failure to respond was caused by the "inattentiveness" of its employee, despite the Superior Court's observation that the corporation's method of "insuring that important papers reach[ed] their corporate appointed destination" was inadequate). Moreover, "a valid return of service does not always show actual knowledge of the suit." *See Provident Credit*,

446 A.2d at 261. In *Provident Credit*, the Superior Court held that the lower court had abused its discretion in denying the defendant's petition to open where a valid return of service showed that the complaint was served on someone other than the defendant herself, and where the defendant testified that person never informed her of the lawsuit. *Id.* The Superior Court explained:

> The lower court appears to have ignored both the fact that the sheriff's return did not indicate that the complaint was left with appellant personally and appellant's testimony that service was made on a baby-sitter and that the first notice she had that anything was happening was a card received from appellee shortly after the judgment was entered.

Id.

Here, Ms. Defendant did not attend the August 1, 2007, because she never received any notice that a lawsuit had been filed against her or that a hearing had been scheduled. In short, she could not have attended a hearing she did not know about. Although the Affidavit of Service reflects that her then-husband had been served with the Statement of Claim, he never notified Ms. Defendant. Thus here, as in *Campbell*, the default was not the result of a deliberate decision not to defend. *See* 335 A.2d

at 373. To the contrary, if Ms. Defendant had known about the hearing, she would have attended to defend against the claim. *See id*. Her reason for missing the hearing, therefore, was reasonably explained and excused. *See Provident Credit*, 446 A.2d at 261. As such, the lower court properly found that Ms. Defendant had a reasonable excuse for her failure to appear on the day of the hearing.

2. <u>The lower court correctly found that Ms. Defendant's Petition to Open set forth a meritorious defense to the action.</u>

It is well-established that in a petition to open, the "requirement of a meritorious defense is only that a defense must be pleaded that if proved at trial would justify relief." *Provident Credit*, 446 A.2d at 263. The petitioner has no "obligation to prove the merits of the defenses

they raise[].” *Miller Block Co. v. U.S. Nat’l Bank*, 567 A.2d 695, 700 (Pa. Super. 1989). Moreover, even a partial meritorious defense fulfills this requirement. *See Hutchison*, 418 A.2d at 354–55. Ms. Defendant’s Petition asserted multiple meritorious defenses that would justify relief if proven at trial: that she did not owe the debt as claimed, that Velocity Investments lacked standing to bring this action, and that any claim by Velocity Investments is time-barred. Of course without access to the Statement of Claim, Ms. Defendant could not assert detailed defenses; she was forced to rely on information gleaned from the caption and docket entries alone. The lower court correctly found that her Petition set forth meritorious defenses to the action.

a. Ms. Defendant’s defense that she does not owe the debt as claimed by Plaintiff establishes a meritorious defense.

Ms. Defendant set forth in her Petition that she does not owe the debt as claimed by Plaintiff. She had never heard of Velocity Investments until its execution attempt in December 2019. She has never had an account with Velocity Investments but, if she did, she believes that the amount of the alleged debt is incorrect. If proven at trial, Ms. Defendant’s assertion that she does not owe the alleged debt would undoubtedly justify relief. Similarly, if proven at trial, Ms. Defendant’s assertion disputing the amount of the alleged debt would justify relief as a partial defense.

b. Ms. Defendant’s defense that Plaintiff did not have standing establishes another meritorious defense.

In her Petition, Ms. Defendant asserted that Velocity Investments did not have standing to bring its claim because it failed to prove ownership of the alleged debt. In Pennsylvania, a lawsuit must be filed by the real party in interest. Pa. R. Civ. P. 2002(a). The Superior Court has explained how this rule applies in cases like this, where Velocity Investments, a debt buyer

plaintiff, is a third party to any alleged contract with Ms. Defendant:

> When suit is brought against the defendant by a stranger to his contract, he is entitled to proof that plaintiff is the owner of the claim against him. Otherwise, the defendant might find himself subjected to the same liability to the original owner of the cause of action, in the event there was no actual assignment.

See Hillbrook Apts v. Nyce Crete Co., 352 A.2d 148, 155 (Pa. Super. 1975) (citing *Brown v. Esposito*, 42 A.2d 93, 94 (Pa. Super. 1945). Thus Pennsylvania law is clear that until a plaintiff debt buyer can show injury, it has no standing to sue: "Judgment cannot be entered in favor of a stranger to the contract, and, before a party is entitled to recover on a lease or contract, the burden is on him to show that he has an interest therein." *Commw. Dept. of Commerce v. Carlow*, 687 A.2d 22, 25 (Pa. Commw. 1996).

In a case like this, where the plaintiff's interest in the alleged contract is necessarily based on a written assignment, the Municipal Court's Local Rules (like Pennsylvania's Rules of Civil Procedure) require the plaintiff to attach a copy of that written assignment to the complaint. *See* Phila. M.C.R. Civ.P.No. 109(a)(4);[3] Pa. R. Civ. P. 1019(i).[4] The Superior Court has held that a debt buyer's failure to attach written evidence of the assignment of a consumer debt establishes a meritorious defense to the action, and it is reversible error for a trial court to find otherwise. *Atl. Credit & Fin., Inc. v. Giuliana*, 829 A.2d 340, 345 (Pa. Super. 2003) (holding that a debt buyer's failure to attach written evidence of the assignment and other account documents was "fatal" to its claim, and therefore established a meritorious defense in defendant's petition to open default judgment).

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[3] The rule states: "Where the claim is based upon a writing, a copy of the writing or pertinent portions thereof shall be attached. If the writing is not available, it is sufficient to so state, together with the reasons, and to set forth the substance of the writing."

[4] Likewise requiring that: "If the agreement is in writing, it must be attached to the pleading. . . . When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance of the writing."

Here, without access to the Statement of Claim or its exhibit, Ms. Defendant is left to guess at Plaintiff's claim and its basis for standing. Presumably, Velocity Investments purports to be the owner of the alleged debt as the assignee of an original creditor or another debt buyer. As such, it was required to attach a written assignment (or assignments) documenting the chain of title from the original creditor to Velocity Investments. In her Petition, Ms. Defendant asserted that Velocity Investments did not have standing to bring its claim because she had never contracted with it and had not seen any written assignment of the alleged debt to Velocity from an original creditor.[5] Without evidence of ownership of Ms. Defendant's alleged debt, Velocity Investments cannot show that it has standing as the real party in interest.[6]

c. Ms. Defendant's defense that Plaintiff's claim is time-barred establishes a meritorious defense.

Ms. Defendant stated in her Petition that, even if she were mistaken and *did* have an account with Velocity Investments (or a valid predecessor in interest), the lawsuit, on information and belief, was filed beyond the statute of limitations. Contract actions must be commenced within four years in Pennsylvania. 42 Pa. C.S. § 5525. That a claim is filed beyond

[5] The docket identifies a single exhibit filed with Plaintiff's Statement of Claim—it is titled "Statement." If in fact Velocity Investments filed only an account statement with its Statement of Claim, then it failed to attach any assignment documents to substantiate its claim.

[6] Proof of ownership of a debt is critical to a collection action. The threat that defendants will be subjected to liability to multiple parties for the same debt is particularly acute in today's debt buying marketplace, which is plagued by companies that sell debts to which they did not have proper title or sell the same debt to multiple debt buyers. *See* Peter Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 Maryland J. Bus. & Tech. L. 259, 270–71 (2011) (highlighting abuses in the debt buyer industry that subject consumers to duplicative collection actions or judgments on a single debt). Against this backdrop, the Federal Trade Commission (FTC) concluded in 2010 that the debt collection litigation system was "broken," and called on states to enact a number of reforms, including reducing the prevalence of default judgments and requiring more account documentation substantiating the debt alleged in complaints. FTC, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*, at i, iii, and 20, *available at* http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf. In this debt collection litigation system rife with abuse, it is essential that courts require bulk debt buyers to comply with established court rules and attach written evidence of the assignment of consumer debts that buyers claim. Otherwise, defendants like Ms. Defendant may find themselves—if there is no actual assignment—subjected to identical liability to the original credit or another debt buyer.

the statute of limitation period is a complete defense to the action. As such, Ms. Defendant set forth a meritorious defense that Plaintiff's claim is time-barred.

Each of these defenses, if proven at trial, would have prevented a judgment for Plaintiff as claimed in its Statement of Claims. As such, Ms. Defendant set forth a meritorious defense to support opening the default judgment and allowing a trial on the merits. The Municipal Court correctly determined that she had met this prong of the standard for opening the judgment.

3. The lower court committed an error of law or abused its discretion in ruling that Ms. Defendant's Petition to Open was not timely filed.

When Ms. Defendant learned on December 3, 2019, of the default judgment against her, she acted promptly to gather information from her bank and Plaintiff's attorney, seek legal assistance, and file her Petition. Despite this, the lower court found her Petition untimely.

There is no bright-line rule or "magic formula" regarding what amount of time renders a petition to open a judgment untimely. *Provident Credit*, 446 A.2d at 262. The Pennsylvania Supreme Court has explained that whether a petition was promptly filed "is always an equitable determination which must be made in light of what is reasonable under the circumstances" and "where equitable circumstances exist, a default judgment may be opened regardless of the time that may have elapsed between entry of the judgment and filing of the petition to open." *Queen City Elec. Supply Co. v. Soltis Elec. Co.*, 421 A.2d 174, 177 (Pa. 1980). The relevant question, then, is the reason for delay and length of time between the defendant's first notice of the judgment and the filing of the petition. *See Provident Credit*, 446 A.2d at 262–63. In fact, the Superior Court has held that where a case is aged and an extended time has passed between entry of judgment and the defendant's first notice of the judgment, both facts weigh in favor of a timeliness finding. *See Sprouse v. Kline-Styer-McCann*, 352 A.2d 134, 136 (Pa. Super. 1975).

Applying this standard, the Superior Court has excused significant delays where the

petitioner was unsophisticated about the law yet took all steps she "reasonably believed were necessary" to protect her interests, including seeking legal counsel. *See Provident Credit*, 446 A.2d at 262. In *Provident Credit*, the Superior Court reversed the trial court's denial of a petition to open despite a nearly three-year period between entry of the default judgment and filing of the petition. *Id.* (noting that the petitioner had sought legal counsel but was turned away because she could not afford to pay); *see also Queen City*, 421 A.2d at 177 (finding a twenty-month delay by financial institution excusable where it relied on advice that opening the default judgment was not necessary to protect its interests); *Hutchison v. Hutchison*, 418 A.2d 352, 355 (Pa. Super. 1980), *rev'd on other grounds*, 422 A.2d 501 (Pa. 1980) (finding a ten-month delay reasonable where petitioner immediately obtained counsel, who chose to pursue a different avenue for relief before filing petition to open).

Similarly, the Superior Court in *Sprouse* opened a default judgment after a two-month delay in filing the petition, during which the defendant attempted to find counsel and gather facts about the four-year-old case:

> We feel that appellant's petition was promptly filed, considering the entire length of time that has elapsed in this case. The event in question occurred over six-and-one-half years prior to the date when appellant received notice of the judgment. Appellant did not receive notice of the judgment until almost four years and nine months after service of process. Appellant's brief alleges that he was greatly confused upon finding that a judgment had been taken against him without his knowledge. In addition, appellant had to retain counsel and facts had to be mustered. Under these circumstances, we do not feel that a delay of approximately two months indicates a lack of diligence on appellant's part.

See 352 A.2d at 136.

Here, Ms. Defendant's first notice of the judgment came more than twelve years after it was entered, and the events underlying the claim—presumably, an alleged account with an unknown creditor—were even older. She, like the defendant in *Sprouse*, had no idea that the

judgment against her existed. *See id.* Yet, upon learning of the judgment, Ms. Defendant began to muster facts immediately, sought legal counsel the very next day, and filed the Petition within ten business days. *See id.* Thus compelling equitable circumstances exist here to render her Petition timely.

a. Ms. Defendant's first notice of this action came many years after default judgment was entered, and the lower court abused its discretion when it ignored the fact that she was not personally served and ignored her averment that the person who was served never notified her of the action.

Ms. Defendant was not personally served and received no notice that an action had been filed against her until more than twelve years later, when Plaintiff made its first execution attempt. An Affidavit of Service asserts that the Statement of Claim was served May 29, 2007, on Ms. Defendant's then-husband, John. Ex. D, Aff. Service. In her Petition, Ms. Defendant explained that she knew nothing of this action until December 2019, and specifically addressed the Affidavit of Service: "If her ex-husband was served, he never informed Ms. Defendant of the action." Ex. A, Pet. to Open. Despite this, the Municipal Court denied her Petition as untimely, stating: "Service of original process was properly made in accordance with Pa. R. Civ. P. 402(a)(2)(1)." *See* Ex. F, Order Den. Pet. In so holding, without a hearing or any facts to the contrary, the lower court made an error of law and/or abused its discretion. *See Provident Credit*, 446 A.2d at 261.[7]

As stated above, "a valid return of service does not always show actual knowledge of the suit." *See id.* at 261. The Superior Court has held that, even where service was properly made and a valid return of service docketed, it is reversible error for a lower court to ignore the fact that the defendant was not personally served and the defendant's testimony that the person who

[7] The lower court's emphasis on its finding that service "was properly made" in deeming the Petition untimely is also difficult to reconcile with its holding that Ms. Defendant had a reasonable explanation for her failure to appear at the August 1, 2007, hearing.

received the complaint never informed the defendant of the lawsuit. *Id.* After all, the timeliness analysis requires prompt action once the defendant has notice of the lawsuit or judgment. *See id*. (holding that the lower court was wrong to ignore defendant's testimony that "the first notice she had that anything was happening was a card received from [plaintiff] shortly after the judgment was entered" because "[i]t was only then that [defendant] consulted—and had any reason to consult—a lawyer").

Here it is clear that, if service was made, it was on someone other than Ms. Defendant. According to the Affidavit of Service, the Statement of Claim was left with her then-husband. And she specifically averred in the Petition that, if he was served, he never informed her of the action; she never received any notice whatsoever of the action or the hearing. Yet the lower court ignored both of these facts, with no evidence to the contrary. Here, as in *Provident Credit*, the lower court's failure constituted an abuse of discretion or error law. *See* 446 A.2d at 261.

b. Ms. Defendant did not receive notice of the August 1, 2007, default judgment, and the lower court committed errors of law when it presumed that the court mailed and that she received a notice of judgment from the court.

Ms. Defendant was not notified that a default judgment had been entered against her until more than twelve years later when, on December 3, 2019, she discovered that her bank account had been frozen and spoke with Plaintiff's lawyer. Ms. Defendant explained in her Petition that she did not receive any notice of the August 1, 2007, default judgment when it was entered. However, the lower court's denial of Ms. Defendant's Petition states that, "the court mailed a notice of the default judgment to the petitioner. It was not returned and, therefore, it is presumed that the notice was delivered and received by the petitioner." *See* Ex. F, Order Den. In so holding, the lower court erred in presuming—without documentary evidence—that the court mailed Ms. Defendant notice of the judgment. *See Szymanski v. Dotey*, 52 A.3d 289, 293 (Pa.

Super. 2012). It further erred in presuming—based on an already erroneous presumption that the notice was sent—that Ms. Defendant received the notice. *See id.*

"A presumption that a letter was received cannot be based on a presumption that the letter was mailed. A presumption cannot be based on a presumption." *Id.* To trigger a presumption of receipt (*i.e.*, the mailbox rule), there must be "evidentiary proof that the letter was signed in the usual course of business and placed in the regular place of mailing." *Id.* (quoting *Geise v. Nationwide Life & Annuity Co. of Am.*, 939 A.2d 409, 423 (Pa. Super. 2007)). And the party "seeking the benefit of the presumption"—here, the Municipal Court—must produce that proof. *See id.* The Superior Court held in *Szymanski* that a court notice could not be presumed received—even when the record included the notice and a Court Administrator testified that she wrote the notice—due to a lack of documentary evidence corroborating that the notice had been mailed. *Id.* The court explained that, because the Court Administrator "offered no testimony or evidence that she had placed the notice in the office's regular place of mailing" or that "any other employee mailed it via any method of mailing," the evidence did not establish that the notice was mailed. *Id.*

Here, the lower court committed an error of law or abused its discretion when it ruled that Ms. Defendant's Petition was untimely based on its findings that "the court mailed a notice" and the "notice was not returned to the court and, therefore, is presumed to have been delivered." *See* Ex. F, Order Den. The record in this case includes no documentary evidence corroborating that the notice was mailed—the same evidence that was lacking in *Szymanski*. *See* 52 A.3d at 293. In fact, this case lacks even uncorroborated testimony by court administrators—evidence that was present in *Szymanski*, and which the Superior Court nevertheless found inadequate to trigger the

presumption. The docket appears to include an automatically generated "notice of judgment,"[8] but there is no evidence whatsoever—documentary or testimonial—that the notice was actually mailed. *See* Ex. B, MC Docket. These stacked, unsupported presumptions are precisely what the *Szymanski* Court rejected. *See* 52 A.3d at 293. Thus the lower court committed an error of law or abused its discretion in ruling that the Petition was not timely filed based on the presumption that the notice was mailed.

c. Once Ms. Defendant learned of the judgment, she promptly sought legal assistance and filed her Petition.

Ms. Defendant had no notice of the default judgment until many years after it was entered. She was not personally served with original process, did not receive notice that the action had been filed, was not aware that a hearing was scheduled, and did not receive notice from the court (or anyone else) that a default judgment had been entered against her. On December 3, 2019, when she finally learned that judgment had been entered against her through the garnishment of her bank account, she acted quickly and reasonably. She immediately contacted her bank, and followed their instructions to contact Plaintiff's lawyer, even though she had never heard of Velocity Investments. The very next day, she called CLS seeking legal help. She met with CLS intake staff, spoke by phone with a consumer attorney, and then met with that attorney on December 17, 2019. Unable to access most documents from the year the case was filed, and having never seen the Statement of Claim against her, CLS agreed to file a Petition to Open on based on the limited information available. The Petition was filed the same day.

From the moment she learned of the judgment against her, Ms. Defendant acted reasonably and without delay. Under these circumstances, the Petition to Open was timely filed.

[8] A docket entry titled "Notice of Judgment" appears in the Municipal Court record, but it, like all documents from before 2019, is "not currently available," so Ms. Defendant has not seen the PDF and cannot attach it here.

It was an abuse of discretion for the lower court to deny Ms. Defendant's Petition as untimely.

4. Denying Ms. Defendant the opportunity to defend herself would be grossly inequitable in light of the nationwide context of debt buyers routinely obtaining default judgments without adequate proof of their underlying debt.

Pennsylvania courts have broad equitable power to open judgments that would otherwise be unfair. *Kwasnik v. Hahn*, 615 A.2d 84, 88 (Pa. Super. 1992). Here, the equities lie in Ms. Defendant's favor. She never received notice of the August 1, 2007, hearing or the judgment entered against her. When she finally learned of the judgment through the Plaintiff's first execution attempt, Ms. Defendant immediately conducted her own fact-finding, sought legal assistance the next day, and filed her Petition on the tenth business day. This is an old judgment that Ms. Defendant learned of just recently; she seeks only to have her day in court to assert her defenses.

Given these circumstances and the nationwide context of debt buyers that routinely obtain default judgments without documentation of or title to putative debt, it would be grossly inequitable to deny Ms. Defendant the opportunity to defend herself against Velocity Investments' claim. Thus it is well within this Court's equitable powers to reverse and vacate the lower court's denial of Ms. Defendant's Petition, which describes her prompt action to open the judgment, establishes that she had no notice of the judgment, and asserts meritorious defenses. *See Schultz v. Erie Ins. Exch.*, 505 Pa. 90, 93 (1984).

V. Relief

For the foregoing reasons, the default judgment entered against Ms. Defendant should be vacated, and she should be allowed to present her defense. Ms. Defendant respectfully requests that this Court reverse and vacate the lower court's decision to deny her Petition to Open, vacate the default judgment and any writs of execution, and remand the matter to Municipal Court for a

trial on the merits.

Respectfully submitted,

COMMUNITY LEGAL SERVICES, INC.

2/10/2020

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