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May 30, 2014

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Dear Mr. McConnell:

The New York Bankers Association ("NYBA") submits this comment letter in response to the Office of Court Administration's proposal to adopt reforms related to consumer credit collection cases. NYBA is comprised of 150 community, regional and money-center commercial banks and thrift institutions operating in New York State, with over 200,000 New York employees.

NYBA appreciates the leadership of the Office of Court Administration (the "OCA") in taking on this important issue and is grateful for the opportunity to provide comments. The proposal would require creditors to submit several new affidavits and requires an additional notice of consumer credit action for certain debtors. The OCA's stated purpose for the new rules is to "eliminate the practice of 'robo-signing' affidavits and ensure that default judgments are based on non-hearsay allegations and personal review of the debtor files." While we support the Court's clear goals of promoting strong consumer protection, we believe such protection must be balanced with a consumer's obligation to pay his or her debts for goods and/or services rendered and the financial institution or other company's resulting right to collect on those debts. As written, we believe certain aspects of the proposed rules do not further the Court's stated objective and may, in fact, serve to hamper consumers' ability to get credit in this State. We look forward to working with you to modify the proposed rules in order to achieve a balanced approach. In this respect, we strongly urge the OCA to delay implementation of any part of the proposal until all aspects of it can be analyzed and discussed with all interested parties.

As banking institutions, our members may become involved at the earliest stage of the debt process, namely that point in which a consumer applies for and is granted credit in some form, most notably, perhaps through the consumer's application for and receipt of a credit card. As such, NYBA has several concerns with the proposal as outlined. First and foremost, we believe that requiring an original account agreement (which is the strictest interpretation of the phrase "Original Agreement" as used in the proposed rules) at the outset of the case would have the unintended effect of rendering uncollectible in New York any account for which the original, obsolete account agreement has not been maintained – even if the original agreement goes back decades, has been revised on numerous occasions, and has no relevance to the debt in dispute. We believe that this requirement could ultimately and direly result in a freeze in credit markets for New York State, as financial institutions (and other companies) would be faced with a near impossible regulatory hurdle to overcome and will be forced to restrict credit in response.

For the purposes of this letter, we will focus on credit defaults and debt collections relative to credit card agreements, as we believe this would be the most relevant to the Court's proposed rule. As such and by way of background, financial institutions are governed by a wide array of rules at the federal level, which provide comprehensive protections to consumers through Regulation Z of the Board of Governors of the Federal Reserve System, interpreting the Truth-in-Lending Act (15 U.S.C. § 1601 *et seq.*) ("TILA"). The purpose of TILA, which applies to consumer credit transactions, is to make full disclosure to debtors of what they are being charged for the credit they are receiving. In interpreting TILA, Regulation Z lays out several disclosure requirements for monthly billing statements, including the balance from the last statement; payments and credits; new charges made since the last statement; finance charges on the unpaid balance; the billing period covered by the bill; finance charge information; and information regarding what to do and where to inquire about billing errors.¹ There are similar detailed requirements for financial institutions who solicit consumers for credit, and banks can face monetary penalties for TILA violations.² Many of these requirements were designed with the same consumer protection goals in mind as that envisioned for this proposal.

NYBA supports New York State's efforts to enhance these federal objectives in pursuing those who act in bad faith in debt collection cases. However, it is important to highlight the distinction between that bad actor and banks acting in good faith to collect on debt. Though banks may transfer accounts in consolidation (through a portfolio purchase, for example) or when acquiring another financial institution, the intent is to acquire and maintain long-term relationships with customers – not to collect debt, although some accounts acquired may be in arrears. Further, such acquisitions include the transfer of supporting systems and account data to properly service the account and to comply with federal consumer banking regulations. Consequently, when banks (on their own behalf, or using their affiliates or third-party collectors) seek to collect debt, they have the relevant account information to ensure that they are collecting the right amount from the right person. As a result, the OCA's use of undefined terms such as "original creditor," "debt seller" and "debt buyer" may create significant confusion because, under the strictest interpretation of those terms, the rules inaccurately presume that any entity that "purchased the debt" is a non-banking entity that primarily or only purchases charged-off accounts to engage in debt-collection activities on those accounts. Further definition of such terms is necessary to clarify the OCA's intent.

Furthermore, NYBA respectfully requests that, should the proposed rules be implemented, they should apply only to prospective debt and not retroactively. New requirements to retain and itemize account information could prove impossible in relation to older debt, as a bank or debt buyer may no longer be in business or may have already destroyed records that would not have been required to be kept before implementation.

Beyond these general comments, NYBA's comments will focus primarily on the affidavits outlined in the proposal, specifically, the Affidavit of Facts by Original Creditor ("Affidavit 1"); the Affidavit of Facts and Sale of Account by Original Creditor ("Affidavit 2"); the Affidavit of Purchase and Sale of Account by Debt Seller ("Affidavit 3"); and the Affidavit of No-Expiration of Statute of Limitations ("Affidavit 4").

Comments to Affidavit 1

¹ Regulation Z also grants consumers 60 days from receipt of a statement to challenge any charge, which triggers an obligation for the bank to investigate the consumer's claim.

² Federal regulators regularly examine banks for compliance with Regulation Z and federal consumer laws.

Affidavit 1 requires the original creditor to aver to the date of the original credit agreement (the "Agreement") entered into between the original creditor and the debtor and that the original creditor must include a copy of that Agreement with the affidavit, with "all documents modifying the interest rate or fees applicable" to the debt owed. NYBA has several reservations about this requirement, as outlined below.

First, as noted above, the term "original creditor" is undefined and could add to consumer confusion as, in an era of bank/portfolio acquisitions, it is very likely that a consumer's debt will have been transferred to another institution at some point during the life of the loan. Under the rule, consumers and courts alike might be led to believe that the debt involved is very old - and different - from the debt in the account that is actually being litigated. In reality, the disputes at issue in Court proceedings generally arise at charge off, since that is the time when a creditor declares that an amount of debt is unlikely to be collected. NYBA suggests instead that the term "original creditor" be revised to refer to the lender at the time of charge off.

Second, requiring information about the date that the parties entered into an Agreement is unnecessary, not relevant and probably not helpful to consumers, particularly when the plaintiff bank is not the same bank that was the original issuer/creditor, and provided that the plaintiff bank sent regular statements, as it is required to do.

Third, this proposed requirement does not accommodate the various methods by which account agreements are created and updated. All credit card issuers, for example, send an account agreement at the time of account opening, an event which may have occurred years or decades prior to account delinquency and the commencement of a lawsuit to collect on that account. The terms of the original Agreement are regularly updated and superseded by either a completely new agreement, or updates that alter some portion of the terms. Thus, the original Agreement no longer governs the account once a partial or complete agreement update has been made. Additionally, the original Agreement is not maintained indefinitely, nor is it required to be by any applicable banking regulation. Requiring the creditor to provide every document showing all interest rates and fees throughout the life of the agreements adds little to no evidentiary value to the case, is burdensome to the creditor, and merely acts as a bar to an otherwise valid and proper case. Indeed, under the proposed rules, the bar for prevailing on a default judgment would be greater than the bar for prevailing in a contested case.

The apparent goal of this proposed rule, providing evidence of the agreement between the customer and the lender, can be more properly and accurately achieved by calling for the production of the most recent account agreement applicable to the account in question. This would be the agreement that was in place at the time the account was closed or at the time of default, an exemplar that incorporates all revisions or updates as of the closing date. By doing so, the Court would be in receipt of the most current and fulsome information available for the account, without overly burdening the financial institutions (and, in fact, the Court and the consumer) with superfluous documentation.

Affidavit 1 also requires that, when a creditor's complaint asserts an account stated claim, the creditor must swear that "plaintiff sent one or more account statements" relating to the account at issue to the defendant debtor, and that "the debtor retained the account statement without objection." The language that the debtor "retained the account statement without objection" should be clarified. First, an "objection," without more, is insufficient basis to avoid a suit or challenge the validity of the underlying debt. Instead, to prevent suit on the debt, the defendant must substantiate "fraud, mistake or that [the account statement(s) were] never accepted by him as an account stated." See, e.g., *Bank of New York-Delaware v. Santarelli*,

128 Misc. 2d 1003, 491 N.Y.S.2d 980 (County Ct., Greene County 1985); see also 1 N.Y. Jur. 2d, Accounts and Accounting § 30 (explaining that the burden is on the party to whom the account was submitted to show that it was not accepted as an account stated). Under this new rule, the burden shifts and is therefore improperly placed on the plaintiff creditor who is not required to assert and prove a cause of action. In order to provide clarity, the term "objection to Account statements" should be defined as a pending dispute under the Fair Credit Billing Act (15 U.S.C. § 1666) section of the Truth in Lending Act (15 U.S.C. § 1601 *et seq.*). If a creditor resolves the objection to the creditor's satisfaction, provides its response to the customer and the customer does not re-object promptly to the resolution, the creditor should be able to consider the statements as "without objection."

Furthermore, requiring a creditor to attest to the consumer's receipt and retention of statements is not pragmatic, as a bank would not know whether a consumer retained statements or threw them away until the consumer appears at trial to testify. The creditor bank would not have personal knowledge of such facts, as they are solely in the purview of the defendant. Instead, we suggest language that encompasses a bank's knowledge at that stage of the proceedings, such as attestations that, to the plaintiff's information and belief, the debtor received the account statement at his or her last known address, and that the plaintiff is not aware of any unresolved objection to the statements.

Finally, Affidavit 1 also requires an itemization of the full amount of the owed debt, including principal, interest, and fees or charges. We believe these itemization requirements are overly burdensome for the original creditor as well as for the Court to review, without much benefit to the consumer. As noted above, Regulation Z requires providers of consumer credit cards to send periodic billing statements (prior to charge-off) that reflect transactions, credits, charges, and fees assessed on credit card accounts. Accordingly, the original creditor has provided this information to the consumer throughout the life of the loan. To require the additional reiteration of those amounts provides little to no benefit to either the consumer or the Court.

Instead, NYBA recommends that the Court modify the itemization requirement that plaintiff prove information for post-charge-off accounts, such as the balance at charge-off and the date thereof and the balance of the account at the time of the affidavit. In the alternative, the Court could require production of up to thirteen months of statements, which would include the charge-off statement as well as the prior year's statements, and thus should suffice to allow for capture of usage, payments, and interest charged.

Comments to Affidavit 2

Affidavit 2, which enumerates the facts and sale of an account by a debt buyer, currently envisions that the creditor and consumer entered into a single agreement at a specific point in time. In reality, as noted above, credit card agreements are amended regularly. To require the creditor to attach numerous documents that have been replaced and superseded will only add to the consumer's confusion with respect to the account and the terms of the controlling and effective agreement. The more helpful approach would be to require the creditor to attach the agreement that was in place at the time the account was closed or at the time of default. To the extent the consumer requests additional documents that pre-date that agreement, creditors should furnish those to the consumer, if available, upon the consumer's request.

Further, Affidavit 2's requirement that an original account number be provided will not achieve the desired outcome. Affidavit 2 compels the original creditor to disclose the "last four

digits of the original account number." This requirement, however, in many instances, is likely not to provide much assistance or guidance to the consumer because the original account number may not be recognizable to the consumer. Over time, an account number may change for various reasons. The more appropriate and helpful approach would be to require the creditor to identify the last 4 digits of its most recent account number when the account was still "open to buy".

As with Affidavit 1, Affidavit 2 requires a creditor to attest to the consumer's receipt and retention of statements. As outlined above, the creditor will not have personal knowledge of such facts, as they are solely in the purview of the defendant. We suggest similar language here attesting to plaintiff's transmission of statements to the consumer's last known address, and that the plaintiff is not aware of any unresolved objection to the statements. Additionally, Affidavit 2 similarly assumes that a consumer has not objected to the account statements. The affidavit does not define the circumstances that would constitute an "objection." Finally, as with Affidavit 1, this affirmation requires information on the balance of the account as an itemization of interest, fees and charges. As with the itemization of the account in the original agreement, providing this information at the time the original creditor sold the account to a debt buyer is inapposite, as such information is already provided in monthly statements.

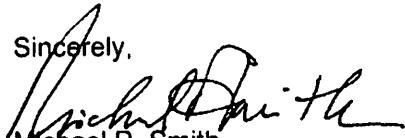
Comments to Affidavit 3

Affidavit 3 applies to the purchase and sale of an account by a debt seller and, as such, would probably not apply to many of NYBA's members, though it is unclear because, as noted above, the term "debt seller" is undefined. Nevertheless, we reiterate the comments and suggestions above regarding a plaintiff's attestation of a consumer's receipt and retention of statements and the itemization of accounts. Such information is potentially confusing to consumers with no corresponding benefit. However, we feel that the balance of the account at the time the debt seller sold the account to the debt buyer is appropriate. To the extent a debt buyer assesses post-Sale interest, fees and charges, then those items should be itemized on a debt buyer's affidavit.

Comments to Affidavit 4:

Affidavit 4 requires the creditor to submit an Affidavit of Non-Expiration of Statute of Limitations upon seeking default judgment. This requirement places an affirmative obligation on creditors that is not placed on other similarly situated litigants. Every counsel, as an officer of the Court, is obligated to ensure before filing that they know of no known bar to the case. NYBA believes that the goal of this requirement is therefore currently met and thus, this requirement is unnecessary. However, should this Affidavit remain, the proposed format should be revised to recognize that the statute of limitations will in many cases be governed by the choice of law contained in the parties' agreement.

We appreciate the opportunity to comment on this important proposal and look forward to the opportunity to discuss the proposal at a future date. Thank you.

Sincerely,

Michael P. Smith

Commercial Lawyers Conference Inc.

New York's Creditors' Bar Association

A not-for-profit corporation since 1964

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Re: Response to "Proposed Reforms Relating to
Consumer Credit Collection Cases"

Dear Mr. McConnell:

The Commercial Lawyers Conference of New York ("CLC") is an association of creditors' rights law firms. Our members represent many consumer and commercial credit grantors, including national banks, auto-finance companies, student loan issuers and guarantors, medical institutions, local businesses, as well as entities that purchase outstanding receivables from credit grantors. Please accept this letter in response to the "Proposed reforms relating to consumer credit collection cases" (the "Proposed Reforms").

The CLC recognizes and supports the court's efforts to protect the integrity of the court system. The lack of clear guidance and rules has culminated in a divergence of standards being applied at the individual court level that belies the goal of having a unified court system. The Proposed Reforms seek to correct this shortcoming and to provide the uniformity to which litigants are entitled prior to the commencement of lawsuits.

ATTAINING THE SHARED GOAL

The Honorable Judge Lippman's stated goals can best be attained by taking into consideration all stakeholders' points of view so that any reforms adopted are done so in a fair and impartial manner. The integrity of the judicial system requires a fair and impartial rulemaking system, one that is devoid of subjective influences. By listening and taking into consideration the views of all sides, the court can take steps to ensure that reforms address and resolve real issues rather than one party's perceived issues that have no real factual basis. It also assures that the rules take into consideration the various concerns of those who are directly affected by them. This inclusionary process upholds the integrity and independence of the judicial system, and it is consistent with the spirit of the Rules of the Chief Administrative Judge.¹

As part of any rulemaking process, the need for independent studies and the analysis of relevant data is integral to support the impartiality and objectivity of both the process and any resulting court rules. Without such information, the court faces the real possibility of creating reforms that fail to address the true issues and instead create new, unforeseen roadblocks to a party's right to unencumbered access to the court system.

By way of example of a concern expressed by Judge Lippman in his Law Day 2014 Remarks that has been already addressed and remedied, Judge Lippman makes reference to "the nefarious practice of sewer service...." In fact, creditors' rights attorneys have strong ethical and practical incentives to avoid the specter of sewer service and to provide consumers with notice of the pending suit.

Creditors' rights attorneys currently utilize the services of process servers who take contemporaneous pictures of the location where the pleadings are served. The pictures are time and date-stamped and contain the GPS coordinates of the place of service. This use of technology goes above and beyond the requirements of CPLR Section 308. When combined with the level of scrutiny and review by the creditors' bar of the affidavits of service, these steps are intended to eliminate the possibility of "sewer service."

The result of these efforts is supported by the data maintained by some of the largest law firms that are members of the CLC and that account for approximately 550,000 judgments entered over the past five (5) years. During this time period, the percentage of judgments vacated upon a consumer's motion is negligible. In New York City courts, less than 3% of all judgments were vacated, and outside of New York City, the number was less than 0.5%. These statistics do not take into account the reasons behind the vacatur. In many courts, judges believe that all default judgments should be vacated in the interest of justice and without regard to whether the requirements set forth in CPLR R. 5015 have been satisfied. In addition,

¹ "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." Rules of the Chief Administrative Judge, Part 100, Section 100.1.

the members of the CLC have always been amenable to vacating judgments to expedite the resolution of disputes on the merits, even when there is no issue as to the validity of service, which in turn places the consumers in a better financial position to repay the debts they owe. As such, the allegation that sewer service is a continuing issue that needs immediate judicial oversight is unsupported by the realities of the existing practice of law in this area, and it does not take into account the reasons behind the creditors' need for assistance from the court.

The perverse belief that the goal of plaintiffs in Revolving Credit Transactions is to obtain a default judgment is grounded in a lack of understanding of the debt collection business. Once a consumer exercises his/her right to have the creditor and the creditor's agents cease all communication with him/her, the only option available to the creditor is a judicial one. Creditors and debt buyers alike retain attorneys to collect outstanding debt as quickly as possible, within the bounds of all legal, ethical, and moral standards, subject to the financial abilities of the consumers from whom they are trying to collect. By properly serving the consumer with notice of the lawsuit, the hope is that he will call the plaintiff or its attorney to make arrangements to pay the debt or to advise the plaintiff or its attorney of valid reasons for not repaying it. The goal of the lawsuit is not to obtain a piece of paper called a judgment, but rather to obtain repayment of the money owed by the consumer.

There have been no studies of which we are aware to determine the root cause of what may motivate a defendant to default in Revolving Credit Transaction lawsuits. Rather, the issue has been addressed in politically-biased articles, which make the unsubstantiated claim that the high default rate is *per se* evidence of sewer service. The reason for the default may simply be a choice made by the defendant in order to avoid expending the time and resources to appear in court regarding a legal obligation for which he has no defense because the money is in fact due and owing.

The CLC respectfully requests that the Office of Court Administration ("OCA") create an advisory board that consists of those affected by the Proposed Reforms, which includes creditors, debt purchasers, members of the creditors' and consumer bar, and legal experts in the areas of evidence and civil practice. By meeting together, the board can discuss and leverage existing policies and procedures that have already been incorporated into the practice of creditor's rights law and can jointly propose changes to all relevant and applicable bodies of law and rules based on actual needs of the judiciary system, with the goal to create a better and more meaningful set of reforms. The end product will ensure that all stakeholders are given equal rights in the process and that one side does not unduly influence the outcome based on that party's social or political views.

This approach has proven successful in other states that have addressed the desire to adopt amendments to their court rules for consumer credit transactions in general and for purchased debt matters in particular. For example, in Maryland, the Rules Committee created a subcommittee that was chaired by a District Court Judge whose docket included consumer litigation matters. The subcommittee included non-rules committee members serving as

advisors, including an assistant attorney general as well as an attorney representing that state's creditors' bar.²

Barring any amendments to the Proposed Reforms that can best be accomplished through an open dialogue with all parties, we respectfully submit that the Reforms, as written, are too vague and overbroad. Clarification is needed for such terms as "debt buyer" and "original creditor," as well as the type of debt that is subject to the regulations. The mandatory requirement that the proposed form affidavits must be submitted in support of every default judgment request made in a consumer credit transaction does not allow for deviations that are commonly accepted in the consumer credit industry. The documentary requirements are unsupported by existing law, are overly burdensome, and in most instances, impossible for creditors and debt buyers alike to comply.

The Proposed Reforms need to be amended for other reasons as well. The need for an affidavit signed by an original creditor in a debt buyer action is also not supported by existing law because the original creditor's business records transfer to and become the debt buyer's business records. In light of the preceding arguments, the CLC submits that the effective date of June 15th has the effect of applying the new regulations in an *ex post facto* manner to all pending actions as well as purchased debt that pre-dates the effective date. Lastly, the proposed consumer forms are also overbroad and may lead to consumer's making unintended false statements to the court.

PROPOSED AFFIDAVITS

Vague and Overbroad Terms

The proposed court rules, §§208.14-a, 210.14-a, and 212.14-a, would require the submission of several form affidavits in all consumer credit transactions as part of every application for a default judgment. In reviewing the affidavits, numerous issues arise that require further attention by the court.

Initially, the use of the word "debtor" in the affidavits may violate the federal Fair Debt Collection Practices Act ("FDCPA") and its prohibition against misrepresenting any aspect of the debt,³ which may include calling the consumer a "debtor" prior to the entry of a judgment against the consumer. There has been at least one lawsuit filed against a CLC member firm on this point already. Consequently, we suggest substituting the word "defendant" in the place and stead of the word "debtor."

² "These amendments are designed to address a problem that has received national attention and has generated concern in Maryland by the Commissioner of Financial Regulation, the Office of the Attorney General, and the District Court....The Rules Committee held a number of subcommittee and full Committee meetings and hearings...and received from all of the stakeholders a great deal of information[.]" *Notice of Proposed Rules Changes, Standing Committee on Rules of Practice and Procedure*, Maryland Register, Vol. 38, Issue 15, pp. 884-97, 886. "With the general concurrence of the District Court, the Assistant Attorney General representing the Commissioner of Financial Regulation, the Maryland Bankers Association, and the major debt buyers, the committee proposes...." *Id.* at 886.

³ 16 USC §1692e.

Also, the Proposed Reforms refer to the terms "original creditor" and "debt buyer" without defining each term. An original creditor can refer to the entity that created and opened the account with the consumer, or it can refer to the entity that owned and serviced the account at the time of the consumer's default. Similarly, a debt buyer can be interpreted to include a bank that purchases the assets of another bank, or it can refer to an entity that is in the business of purchasing delinquent debt.

With regard to the term "original creditor," the commonly-accepted and understood definition is that of account holder at time of default.⁴ It is this entity that is in possession of the relevant financial records pertaining to the account. In light of the proliferation of bank mergers, if it were to reference the maker of the account, the Proposed Reforms would have the unintended effect of rendering worthless those accounts that were opened by entities which are no longer in existence. By way of example, several national banking associations have recently purchased the assets of other financial institutions. The purchased banks ceased to exist after the purchase date. If "original creditor" were defined to refer to the maker of the account, then the acquiring banks would be unable to seek access to the courts in New York because of their inability to obtain affidavits from the purchased banks. We therefore respectfully submit that the Proposed Reforms include a "definitions" section that defines an original creditor as the owner of a consumer credit account at the time of the consumer's default.

The term "debt buyer" similarly requires definition in order to provide clarity as to which plaintiffs are debt buyers as opposed to original creditors (using the suggested definition above). The Proposed Reforms require a plaintiff to use the debt buyer affidavit "where the plaintiff has purchased the debt." This language is overly broad and vague, and therefore it leaves the determination as to compliance with the Proposed Reforms to the discretion of individual court clerks.

Other states have defined "debt buyer" as entities engaged in the business of purchasing delinquent debt.⁵ To provide consistency with the suggested definition of "original creditor," we suggest adoption of California's definition of "debt buyer": "Debt buyer" means a person or entity that is regularly engaged in the business of purchasing charged-off consumer

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." 16 USC §1692a.

⁵ Illinois: " 'Debt buyer' means a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts or other delinquent consumer debt for collection purposes, whether it collects the debt itself or hires a third-party for collection or an attorney-at-law for litigation in order to collect such debt." 225 ILCS 425/2. North Carolina: "(4) 'As used in this subdivision, the term 'debt buyer' means a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts, or other delinquent consumer debt for collection purposes, whether it collects the debt itself or hires a third party for collection or an attorney-at-law for litigation in order to collect such debt.'" N.C. Gen. Stat. Ann. § 58-70-15. California: " 'Debt buyer' means a person or entity that is regularly engaged in the business of purchasing charged-off consumer debt for collection purposes, whether it collects the debt itself, hires a third party for collection, or hires an attorney-at-law for collection litigation. 'Debt buyer' does not mean a person or entity that acquires a charged-off consumer debt incidental to the purchase of a portfolio predominantly consisting of consumer debt that has not been charged off." Cal. Civil Code §1788.50(a).

debt for collection purposes, whether it collects the debt itself, hires a third party for collection, or hires an attorney-at-law for collection litigation. 'Debt buyer' does not mean a person or entity that acquires a charged-off consumer debt incidental to the purchase of a portfolio predominantly consisting of consumer debt that has not been charged off." Cal. Civil Code §1788.50(a).

This definition avoids the unintended consequence of defining a financial institution as a debt buyer when it purchases the assets of another financial institution. It also excludes from the definition entities such as auto-finance companies and student loan guarantors, both of which immediately are assigned ownership of the loan simultaneously with the closing of the loan by the originating lenders. These companies do not purchase loans for "pennies on the dollar," but rather provide an essential service to consumers by expanding the availability and reducing the cost of credit to middle and lower-class Americans throughout the country.⁶ It is clear, based on the remarks of Judge Lippman, that the Proposed Reforms are intended to regulate the litigation activities of entities that are in the business of purchasing delinquent debt. By adopting the language of the California statute, the Proposed Reforms will achieve the stated goal without unintentionally and negatively affecting companies whose business models are not one of the concerns expressed by Judge Lippman.

Consistent with the need to better define "original creditor" and "debt buyer," the CLC submits that the Proposed Reforms' reference to "consumer credit transaction" similarly needs to be changed. To avoid the inclusion of parties and transactions that are not contemplated by the Proposed Reforms, we submit that the term "consumer credit transaction" be replaced with the term "Revolving Credit Transaction," which should be defined as follows:

"Revolving Credit Transaction" is a consumer debt in the form of a personal loan that is not secured by real or personal property where credit is extended by a financial institution, which is in the business of extending credit, to an individual, primarily for personal, family, or household purposes, the terms of which include periodic payment provisions, late charges, and interest accrual.

This definition properly limits the types of transactions subject to the reforms to include only those envisioned by the court when it drafted the Proposed Reforms and is consistent with existing court holdings that have addressed the term "consumer credit transaction."⁷ Any

⁶ See generally, Debt Collection Agencies and the Supply of Consumer Credit, Federal Reserve Bank of Philadelphia, May 20, 2013.

⁷ Ratner v. Drucker, 79 Misc.2d 216, 359 N.Y.S.2d 859 (N.Y. City Civ. Ct. 1974) ("The key words in the definition of 'consumer credit transaction' for our purposes are 'a transaction wherein credit is extended to an individual' (NYCCCA, sec. 2101(g))... [T]his was not meant to apply to members of the medical profession and related arts, who traditionally do not extend credit as such to patients as a business or medical practice. That a physician might permit payment, or even time payments, after the rendition of his total bill for services performed, for the convenience of his patients, instead of demanding cash payment immediately, cannot serve to transform an original cash basis transaction into one denominated as a 'consumer credit transaction.'"); State v. Monteleone, 38 A.D.2d 821, 525 N.Y.S.2d 740 (3rd Dept. 1988) ("Unlike the businesses whose abuses the statutes were aimed at curbing, plaintiff (hospital) is not involved in the business of providing credit to its citizens. Nor is plaintiff a profit-seeking entity. There is no indication in the legislative history that these statutes were meant to apply to plaintiff

transaction between a consumer and a creditor that is a health care provider, physician, hospital, home improvement contractor, landscaper, mason, flooring company, food supplier, or provider of any other service where there is no "credit" extended, should not be considered a "consumer credit transaction."

Paragraph four of the Original Creditor Action Affidavit contains two additional ambiguities that require further clarification by the OCA. First, this paragraph requires original creditors to break down the balance due at the time of the signing of the affidavit into three balance components: "principal," "interest," and "fees and charges." In light of the many different types of "consumer credit transactions" that will be affected by the Proposed Reforms, the three components have different meanings, depending on the type of debt at issue.

For credit card transactions, the terms and conditions typically applicable to the account state that the amount due in the beginning of each month consists of the total prior month's balance, plus new transactions, plus the periodic interest charge, plus any fees incurred, less payments and credits. This amount is treated as the next month's principal balance, on which interest is then computed. By applying the contractual terms to the balance due, the total due at the beginning of each month constitutes the principal balance, until such time as the account is charged off.⁸ This amount is maintained by every original creditor represented by the members of the CLC, whereas a breakdown of the charge-off amount into the three components is not universally maintained in the books and records of the original creditors.

If the Proposed Reforms are interpreted to require a breakdown of the charge-off amount, it will create an inconsistent set of rules for creditors by mandating the retroactive creation of a separate set of financial records.⁹ We submit that Congress has already preempted the regulation of credit issuers with regard to the manner in which they maintain the balance due. See, Consumer Credit Protection Act, 15 U.S.C. §1601-1(A)(a). In addition, the Truth in Lending Act, Regulation Z, requires creditors to send periodic statements to holders of credit card accounts. The statements must disclose the balance at the end of the billing cycle, the previous balance due at the start of the billing cycle, and all transactions, credits and finance charges incurred throughout the billing cycle. These federal regulations allow the addition of finance charges, consisting of interest and fees, to the total balance due. Pursuant to these federal regulations, the terms and conditions applicable to consumer credit transactions specifically provide for the "rolling over" of fees and charges into the subsequent month's principal balance.

and the mere fact that the Legislature did not specifically exempt plaintiff from these statutes does not mandate the conclusion that they apply to it.").

⁸ According to Generally Accepted Accounting Procedures, as codified into federal regulations, retail loans that become past due for 180 days "should be classified a Loss and charged off." *Uniform Retail Credit Classification and Account Management Policy*, 65 Fed. Reg. 36,903 (June 12, 2000).

⁹ These records may not be admissible in evidence because they will have been created for the sole purpose of litigation in New York.

Consistent with the manner in which original creditors are required to maintain the balance due as set forth above, the amount sought in a lawsuit brought by an original creditor is the charge-off amount, less payments made subsequent to the date of charge-off. Therefore, the balance due at the time the Original Creditor Action Affidavit is signed consists solely of principal balance. In light of the foregoing, the CLC submits that the Proposed Reforms should be amended to clarify the balance that is required to be broken down.¹⁰ We submit that the required breakdown should apply to matters post-charge off and suggests the following substitution in the affidavits: ***"This amount includes the charge-off balance of \$ _____, post-charge-off interest of \$ _____, and post-charge-off fees and charges of \$ _____."*** This modification will ensure that the Proposed Rules are consistent with federal law and do not unjustly impair creditors' rights to access the courts of New York State.

The foregoing recommendation is equally applicable to the Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff (Debt Buyer Actions) (hereafter referred to as "Debt Buyer Plaintiff Affidavit"). Original creditors generally sell their accounts using the charge-off amount as the balance due.¹¹ By defining the charge-off amount as the principal due in the original creditor affidavits, the amount in paragraph 5 of the Affidavit of Facts and Sale of Account by Original Creditor (Debt Buyer Actions) (hereafter referred to as "Original Creditor Debt Buyer Action Affidavit") will match the amount due in paragraph 4 of the Debt Buyer Plaintiff Affidavit. Any other interpretation will lead to confusion as to what the true and correct balance is at the time a default judgment is sought.

Additionally, this interpretation addresses the shared concerns of all parties, which is the need to ensure that consumers are aware of and understand the balance being sought from them. As previously mentioned, original creditors are required by federal law to provide consumers with monthly billing statements that explain the balance due.¹² Consumers have sixty (60) days from receipt of the monthly billing statement to dispute any charges contained within that statement.¹³ Consumers continue to receive these statements until the account is charged off, and therefore they are presumed to have knowledge of the balance as of the time of the charge-off. Because consumers receive monthly documentation explaining the computation of the charge-off balance, the original creditor (as well as debt buyer plaintiffs) should only need to provide a breakdown of additional interest, charges, and fees that were not previously disclosed and supported by the monthly statements.¹⁴

10 If the Proposed Reforms are interpreted to require an original creditor to re-categorize the balance due into separate components, the CLC submits that the Proposed Reforms may be viewed as violating the Contract Clause of the Constitution, the very purpose of which was to ensure the inviolability of sales and financing contracts between private citizens. See, A Look Back at the Contract Clause: The Early Years - An Expansive Application, by Roger Bern, 6 J. Christian Jurisprudence (1986).

11 The United States Court of Appeals, Seventh Circuit, has recognized this amount as the principal balance due by consumers when an account is bought by a third party. See Wahl v. Midland Credit Management, Inc., 556 F.3d 643 (7th Cir. 2009).

12 12 CFR §226.7.

13 15 USC §1666.

14 Although the affidavits at issue are submitted only upon a consumer's default, the affidavits may assist a consumer who seeks to vacate the judgment in determining the accuracy of the amount sought by the plaintiff.

Mandatory Forms

Another cause for concern with the Proposed Reforms is that they make the form affidavits mandatory, despite the fact that the content of the affidavit may not be applicable to every matter being litigated. There are several factors that are common to all the proposed affidavits, while some are unique to only one of the required forms. We respectfully submit that the following concerns should be addressed by the OCA prior to the effective date of the Proposed Reforms by relaxing the requirement that the proposed affidavit be used verbatim in order to allow for variations and alternatives.¹⁵

The first proposed affidavit is the Affidavit of Facts by Original Creditor in Original Creditor Actions (hereinafter referred to as "Original Creditor Action Affidavit"), which as currently written requires the signature of an employee, officer, or member of Plaintiff. However, most of the major credit issuers utilize subsidiary servicing agents to manage their entire credit operation, from the opening of the account, issuing the credit, posting payments, mailing statements, maintaining the balance, and retaining attorneys to represent the creditors upon default of the terms by the consumers. As a result, the individuals who have personal knowledge of the relevant facts of the credit transaction are not employees of the plaintiff, but instead are employees of the servicing agent. The Original Creditor Action Affidavit does not provide for this scenario. Consequently, the Proposed Reforms, as written, create a bar to the New York courts for the majority of original creditors that enter into Revolving Credit Transactions in New York.

While this issue may be addressed and remedied in most situations by expanding the reference to "Plaintiff," in paragraph one, to "Plaintiff or its Servicing Agent or affiliate," the use of the required form does not permit each individual plaintiff to explain the relationship between the servicing agent or affiliate to the plaintiff, which is necessary to set forth the proper relationship of the affiant and the affiant's employer to the plaintiff so that the court can determine that the affiant is in fact the proper person to execute the affidavit. This situation can best be addressed by permitting original creditors to utilize an affidavit that best describes each original creditor's business practices.

A second issue of concern in the Original Creditor Action Affidavit is the reference, in paragraph 2, to the last payment date and amount. While most consumers make a payment prior to defaulting, such is not the case in every instance. In an informal poll of several original creditors represented by CLC member firms, the rate of failure of consumers to make even an initial payment varies from 1% to 4%. In light of this scenario, the reference to a last pay date and amount in the Original Creditor Action Affidavit is inapplicable. If an original creditor is required to use the form as written, court clerks will likely reject an application for a default judgment that does not contain this information, not knowing that the information is inapplicable to the case being reviewed by the clerk.

¹⁵ As an alternative to requiring a specific form, which is a practice frowned upon by Judge Lippman in his Law Day 2104 speech when he criticized the use of "affidavits that rely on boilerplate language," the Court may want to consider a requirement that sets forth the minimum facts that must be included in the plaintiff's affidavit submitted in support of its application for a default judgment.

SUPPORTING DOCUMENTARY EVIDENCE REQUIREMENT

Not Required by Existing case law

The Original Creditor Action Affidavit and the Original Creditor Debt Buyer Action Affidavit make reference to an "Agreement" and "all documents modifying the interest rate or fees applicable to the Account...." The New York Court of Appeals has already addressed the "requisite proof" needed to support an application for a default judgment, and the Proposed Reforms create a standard that is more applicable to a summary judgment request than a default judgment application. In Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 790 N.E.2d 1156, 760 N.Y.S.2d 727 (2003), the Court of Appeals recognized that a plaintiff may not be in possession of certain documents or information that may be in the control of the non-appearing party: "Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists....Indeed, defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them."

We respectfully submit that the quoted language from Woodson, combined with the language of Rule 3215(f), obviate the need to present documentary evidence to support an application for a default judgment. Not only has the Legislature made a verified complaint or affidavit adequate by itself to enter judgment by default, but also the defaulting party, as a matter of law, is deemed to have admitted the factual allegations of the complaint. Woodson notes that the affidavit or verified complaint need only provide sufficient facts to permit the trial court to determine the plaintiff has a "viable cause of action."

It is well established that use of a credit card and payments made toward the balance due establish the cardholder's liability to the creditor. The law in this issue was concisely set forth by the Hon. Fred J. Hirsh in FIA Card Services, N.A. v. DiLorenzo, 22 Misc.3d 1127(A), 881 N.Y.S.2d 363, 2009 WL 483822 (N.Y. Dist. Ct.):

The relationship between the issuer of a credit card and the holder and user of the credit card is contractual. Citibank (South Dakota) N.A. v. Sablic, 55 AD3d 651, 865 N.Y.S.2d 649 (2nd Dept 2008). The issuance of a credit card constitutes an offer of credit. The use of the card constitutes acceptance of the offer. Feder v. Fortunoff, Inc., 114 A.D.2d 399, 494 N.Y.S.2d 42 (2nd Dept. 1985); and Empire National Bank v. Monahan, 82 Misc.2d 808, 370 N.Y.S.2d 840 (Co. Ct. Rockland Co. 1975). The terms of the contract are the credit card agreement. Brower v. Gateway 2000, Inc., 246 A.D.2d 246, 676 N.Y.S.2d 569 (1st Dept. 1998).

FIA Card Services, N.A. v. DiLorenzo, 2009 WL 483822 at ***12.

Moreover, as noted by the Second Department:

In any event, even assuming that defendant did not sign the application, 'the absence of the underlying agreement, if established, would not relieve [defendant] of his obligation to pay for goods and services received on credit' (Feder v Fortunoff, 123 Misc 2d 857, 860, 474 N.Y.S.2d 937; see Empire Natl. Bank v Monahan, 82 Misc 2d 808, 809, 370 N.Y.S.2d 840; see also Minskoff v American Express Travel Related Servs. Co., 98 F.3d 703; 29 NY Jur 2d, Credit Cards and Letter of Credit, §3). Under the circumstances presented herein, summary judgment was properly granted.

Citibank (South Dakota) N.A. v. Sablic, 55 AD3d 651 (2nd Dept 2008).

There is a deep chasm between proving each and every fact by admissible evidence and pleading a viable cause of action. As such, the Proposed Reforms are creating a higher standard applicable only to requests for a default judgment in consumer retail credit transactions than currently exists to succeed on a request for summary judgment.

Furthermore, the Proposed Reforms' documentary requirement directly conflicts with original creditors' record retention obligations established by the federal government. Pursuant to federal regulations, creditors need only retain documents for 2 years after the date disclosures are required to be made or action is required to be taken.¹⁶ While some may have voluntarily expanded that time period, the CLC members are not aware of any of its clients that originate Revolving Credit Transactions that can state with certainty that it is in possession of the expansive documents required by the Proposed Reforms for all its accounts.

The explanation for creditors' inability to provide copies of every agreement and modification from the opening of the account to its closing requires an understanding of the history of the credit card business. Encyclopedia Britannica states that the first private credit card was introduced in the 1920s, followed by Diners' Club's and American Express's entry into the industry in the 1950s. While most credit card accounts that are the subject of litigation in New York courts obviously do not date back to the 1950s, it is not unusual for a credit card account to have been opened dozens of years ago. At the time these older accounts were opened, the banks could not have foreseen the need to expand their record retention policies beyond that which was required by federal law. It is also important to note that the use of electronic means to store bank documents is a relatively new advancement in the industry. Prior to the advent of this technology, documents were stored in huge warehouses at great cost to the creditors. In addition to the age of some of the delinquent accounts, and as mentioned earlier, in light of the numerous mergers that are typical in the banking industry, the records of the originating bank may not be available to the current holder of the account. As a result of this requirement, the CLC respectfully submits that the Proposed Reforms will have the unintended consequence of barring many creditors from utilizing the court system.

¹⁶ See 12 C.F.R. §226.25.

It is important to point out that federal law requires all issuers of Revolving Credit Transactions place a copy of the terms and conditions currently applicable to all open accounts on their websites.¹⁷ By visiting the creditor's website, a consumer will always have access to the terms. This ability to obtain the agreement is in addition to the creditor providing the consumer with a copy of the agreement when the account is first opened, as required by the Truth in Lending Act.

Alternative

Assuming arguendo that the Court requires documentary evidence in support of a default judgment, and in light of the practical difficulties facing Plaintiffs to obtain the original agreement and all updates to same, we submit that alternative documents can address the Court's concerns. The California Civil, which addresses the documents that a debt buyer must possess prior to writing to a debtor, provides guidance on how to balance the needs and costs of all those involved in a consumer revolving credit transaction lawsuit:

A debt buyer shall not make any written statement to a debtor in an attempt to collect a consumer debt unless the debt buyer has access to a copy of a contract or other document evidencing the debtor's agreement to the debt. If the claim is based on debt for which no signed contract or agreement exists, the debt buyer shall have access to a copy of a document provided to the debtor while the account was active, demonstrating that the debt was incurred by the debtor. For a revolving credit account, the most recent monthly statement recording a purchase transaction, last payment, or balance transfer shall be deemed sufficient to satisfy this requirement.

Cal. Civ. Code § 1788.52 (*emphasis added*).

By adopting California's standard, the Proposed Reforms can accommodate the various types of Revolving Credit Transactions subject to the reforms without creating a complete bar to certain creditors.¹⁸ The standard was adopted after careful analysis and has served the state of California well in balancing consumer's rights with the Revolving Credit Transaction industry. It is also one that creditors and debt buyers are now accustomed to following, which would assist the litigants in New York in complying with the reforms. Therefore, we respectfully submit that the OCA replace its reference in the Original Creditor Action Affidavit and the Original Creditor Debt Buyer Action Affidavit to the "Agreement" with "Retail Credit Agreement," which we submit should be defined as follows:

"Retail Credit Agreement" shall include a copy of a contract or other document evidencing the debtor's agreement to the debt. If the claim is based on a debt for which no signed contract or

¹⁷ 15 U.S.C. §1637.

¹⁸ Certain documentation that a Plaintiff may be required to produce may contain a consumer's personal and private information, such as a date of birth or social security number. The CLC requests that Plaintiff be permitted to redact this information without potentially sacrificing its right to a default judgment as a result of the redaction.

agreement exists, it shall include a copy of a document provided to the debtor while the account was active, demonstrating that the debt was incurred by the debtor. For a Revolving Credit Transaction, the most recent monthly statement recording a purchase transaction, last payment, or balance transfer shall be deemed to be sufficient evidence of an agreement.

There is a benefit to the consumers and the courts in adopting this definition and by permitting monthly card member statements in Revolving Credit Transactions. In credit card matters, these statements reflect the consumer's use of the credit card, the default, and the damages due as of charge-off. Furthermore, federal law protects consumers by providing them with a mechanism to dispute the charges,¹⁹ so that should an account move to the litigation stage, the consumer will have already had an opportunity to bring any disputes to the attention of the creditor. This process gives added credence to the accuracy of the statements so that the courts can rely on them when processing applications for default judgments. Lastly, the statements help support the elements of a breach of contract cause of action. They reflect use of the account (acceptance), the failure to make payments (breach), and the balance due at the time the account was charged off (damages). Supplemented by the affidavit of facts, which reflects the amount paid post-charge-off as well as any additional charges, if any, applied to the account post-charge-off, the court will be able to confirm the accuracy of the balance sought in Plaintiff's application for a default judgment.

ORIGINAL CREDITOR AFFIDAVITS IN DEBT BUYER ACTIONS

Impossibility of Complying

Many of the concerns surrounding the need to present the Agreement and additional documents are also applicable to the Proposed Reforms' requirement for debt buyers to submit affidavits from the original creditor and all owners of the account prior to Plaintiff. Many of these entities are no longer in existence, making it impossible for debt buyers to obtain the affidavit, thus eliminating the debt buyer's access to the courts to litigate its matters.

At the time of the sale of the accounts that were previously sold, all parties were utilizing the pool-level affidavits promulgated by the New York City Civil Court. The debt buyers and sellers relied on the court's directive when it entered into their contracts for the sale and purchase of accounts. In addition, several of the state's largest law firms previously entered into an Assurance of Discontinuance with the Attorney General's office, which requires these firms to comply with the Civil Court's directive in every action filed throughout the state. At this point in time, it is simply not possible for the current owners of the accounts to obtain affidavits from the debt sellers, rendering millions of dollars of receivables worthless.

Original Creditor's Business Records Become the Debt Buyer's Business Records

Even if the debt seller is still in existence, the need for account-level affidavits from the original creditor is not currently required under existing New York law. In New York, CPLR § 4518 (a) governs the use of business records as evidence. There are three foundation

¹⁹ 15 U.S.C. § 1601 et seq.

requirements which are outlined in People v Kennedy, 68 NY2d 569, 503 N.E.2d 501, 510 N.Y.S.2d 853 (1986):

First, the record must be made in the regular course of business - reflecting a routine, regularly conducted business activity, needed and relied on in the performance of the functions of the business. Second, it must be the regular course of business to make the record - in other words, the record was made pursuant to established procedures for the routine, habitual, systematic making of such a record. Finally, the record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made.

Id. at 578-79.

In 2002, CPLR § 4518 (a) was amended to include "tangible evidence" of an electronic record stored in the ordinary course of business as a "true and accurate" representation of the electronic record. The foundation requirements remained the same:

1. Record must be made in the regular course of business and relied upon in the performance of the functions of the business.
2. It must be the regular course of the business to make the records.
3. Record must have been made at the time of the act or within a reasonable time thereafter assuring that the recollection is fairly accurate and the entries routinely made.

CPLR 4518(a) also provides that "[a]n electronic record . . . used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record." See Lobiondo v. Leitman, Lenox Hill Hospital, 10037/04 (N.Y. Sup.Ct., Queens Cty. Sept. 20, 2007). The requirements in CPLR § 4518 ensure that the document sought to be admitted bears sufficient indicia of reliability.

The second-to-last sentence of Rule 4518(a) reads: "All other circumstances of the making of the memorandum or record, including lack of personal knowledge of the maker, may be proved to affect its weight, but shall not affect its admissibility." This section demonstrates the legislature's intent to permit an affidavit from a debt buyer who may not have personal knowledge as the creation of the evidence submitted by the debt buyer in support of its application for a default judgment.

Moreover, CPLR § 4518(a) references § 302 of the New York Technology Law which provides:

§ 302. Definitions

For the purpose of this article:

1. "Electronic" shall mean of or relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
2. "Electronic record" shall mean information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities.

The Legislative Intent behind the statute is as follows:

[It] is intended to support and encourage electronic commerce and electronic government by allowing people to use electronic signatures and electronic records in lieu of handwritten signatures and paper documents. Subsequent to the adoption of ESRA [Electronic Signatures and Records Act], the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. §§ 7001-7006), known as the ESign Law, was adopted to permit and encourage the expansion of electronic commerce in interstate and foreign commercial transactions. Like ESRA, this federal law authorizes the use and acceptance of electronic signatures and electronic records in the context of these commercial transactions. It is the intent of this bill to ensure that these laws continue to complement each other in achieving their stated purposes. Rather than seeking to modify, limit or supersede federal law, the legislature finds that it is in the best interest of the State of New York, its citizens, businesses and government entities for State and federal law to work in tandem to promote the use of electronic technology in the everyday lives and transactions of such individuals and entities[.]

Legislative History, Technology Law § 302.

Since debt buyers rely upon the transfer of highly-regulated, accurate electronic records in the regular course of their business, and they use the information provided in such records in the regular course of doing business, such evidence should be admissible. Each party in the chain of title has a duty to maintain accurate data. Each debt seller has the duty to impart accurate data to its debt buyer with the knowledge that the debt buyer is going to rely and act upon that data. An affidavit from a person who can testify to the nature of the debt buyer's business and its record keeping practices is both admissible and sufficient to support a debt buyer's application for a default judgment.

This proposition finds support in existing case law in New York. In Pine Hollow Medical, P.C. v. Progressive Cas. Ins. Co., 824 N.Y.S.2d 758 (2006), the plaintiff sought to recover first-party no-fault benefits for medical services provided to plaintiff's assignor. When the defendant objected to the admission of the evidence, the court stated:

[I]t is well-settled that where an entity 'routinely relies upon the business records of another entity in the performance of its own business,' and 'fully

incorporate[s]' said information into records made in the regular course of its business, the subsequent record is admissible notwithstanding that the preparer lacked personal knowledge of the information's accuracy. The lack of knowledge goes 'to the weight, not the admissibility' of the record.

Id. at 2 (internal citations omitted), *abrogated by Carothers v. GEICO Indem. Co.*, 882 N.Y.S.2d 802 (2009) (concluding that the law was misapplied to the facts of Pine Hollow).

So long as a business record meets these requirements, and it is "... inherent to understanding that the business of the litigants is not to provide testimony but to conduct business outside of the courtroom," [a business record] is admissible "even though the person who prepared it is unavailable to testify to the acts or transactions." Medical Expertise, P.C. v Trumbull Ins., 196 Misc.2d 389 (N.Y. Sup. Ct. Civ. Queens 2003) ("Because the report was prepared for ARC, in conformity with its procedures, the fact that Rohrs was not himself an ARC employee does not, under these facts, defeat admission.").

In addition to electronic business records, this rule applies to paper documents. While paper documents produced from electronic data are subject to hearsay exceptions to business records rules, if the source, the recorder of the information, and the participants in the chain producing the record are acting in the regular course of business, the hearsay is excused by Rule 803(b). See United States v Baker, 693 F.2d 183 (1982). This rule of law is applicable to business records that do not reflect the entire history but rather a summary. See Potemkin Cadillac Corp. v BRI Corp., 38 F3d 627 (2d Cir. 1994).

Courts must be sensitive to innovations and not seize on petty irregularities to exclude otherwise trustworthy business records from evidence. See, e.g., People v. Kennedy, 68 NY2d at 578-79. A business record which meets foundational requirements is admissible under the hearsay exception even though the person who prepared it is unavailable to testify to the acts or transactions. Business records from a separate entity used in preparation of documents and not mere filing of papers received from other entities, may be admitted under the hearsay exception; records must, however, be fully incorporated into recipient's records made in the regular course of business. Medical Expertise, P.C. v. Trumbull Ins. Co., 196 Misc.2d at 389.

The electronic data and documents on which debt buyers rely should be afforded the same hearsay exception as if they were submitted by the maker of the records. First, the documents are created and kept by entities that are accountable for maintaining reliable and accurate account information under the terms of federal law, including the FCRA and FDCA. Second, it is the nature of the business to maintain accurate records for use in daily operations by the entities utilizing the information contained therein. The penalties for inaccurate maintenance of the information further increase the trustworthiness of the assignor's data. Third, as a practice, debt buyers immediately integrate the account information they receive into their own system database without alteration, then they rely on that information in the course of their daily operations.

Other States Agree

Courts across the country have recognized the increasing number of claims on assigned debts and have allowed assignees to introduce records inherited from an assignor in establishing a prima facie case on the assigned debt. In Connecticut, the Court established that business records received from an assignor could be introduced by the assignee under the business records exception without bringing in a witness from the assignor entity. New England Savings Bank v Bedford Realty Corp, 246 Conn 594, 603, 717 A2d 713 (1998). Massachusetts' highest court held that computer records received from an assignor qualified as business records of the assignee and allowed the assignee to use the balance shown on the received record in establishing its claim against the debtor. The Court recognized that the buying and selling of loans is a common business practice and that assignees routinely rely on the data kept by the assignor. See Beal Bank, SSB v Eurich, 444 Mass. 813, 831 NE2d 909 (2005).

In Georgia, the Appellate Court mirrored this sentiment:

[W]here routine, factual documents made by one business are transmitted and delivered to a second business and there entered in the regular course of business of the receiving business," such documents are admissible. . .any lack of personal knowledge by the affiants of the specific facts in the documents "would go to the weight of the evidence, not its admissibility.

Boyd v. Calvary Portfolio Services, Inc., 285 Ga.App. 390, 391, 646 S.E.2d 496, 497 (Ga. App.2007).

The Texas judiciary is also in agreement. In Block v. Providian National Bank, 2004 WL 1551485 (Tex.App.-Dallas 2004)(unreported), the Court stated as follows:

Block claims the affidavit is defective because it was not based on personal knowledge, was conclusory, contained hearsay, did not authenticate documents attached to it, was based on speculation, and contained unsubstantiated opinions. The substance of these complaints goes to the fact that the bank had purchased the revolving account from another bank. Block, in essence, argues the custodian of appellee bank's records is incompetent to testify about the predecessor bank's records. However, once appellee bank purchased the predecessor bank's accounts, it took possession of the former's business records. It is not necessary that loan account records be verified by the custodian of the original holder's records. See Cockrell v. Republic Mortgage Ins. Co., 817 S.W.2d 106, 112-113 (Tex.App.-Dallas 1991, no writ). In all other respects, the business records affidavit substantially comports with the Rules of Evidence, Rule 902(10). Tex.R. Evid. 902(10).

Id. See also Miller v. Javitch, 397 F. Supp. 2d 991, 997-98 (N.D. Ind. 2005). In the Miller case, the Court accepted an affidavit of the debt buyer's attorney that included the electronic file from a prior assignor. Based upon the declaration of authenticity in

compliance with the Rule, the Court determined that it could consider the electronic file of the assignor.

The federal rules of evidence are also consistent with this holding. F.R.E. 803(6) (relating to hearsay exceptions for records of regularly conducted activity) has been applied to the admission of account records initially generated by one company, but later held by an assignee. In United States v. Doe, 955 F.2d 786 (2nd Cir. 1992), the Second Circuit also adopted this application of the business records exception in admitting into evidence toll receipts that had been incorporated into the business records of a construction company. The court stated:

Rule 803(6) allows business records to be admitted "if witnesses testify that the records are integrated into a company's records and relied upon in its day to day operations." Matter of Ollag Constr. Equip. Corp., 665 F.2d 43 46 (2d Cir. 1981). Even if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity.

Id.

Numerous Federal Courts have all ruled similarly. *See, e.g.,* Air Land Forwarders, Inc. v. US, 172 F. 3d 1338 (Fed. Cir. 1999); United States v. Doe, 960 F.2d 221 (1st Cir. 1992); United States v. Sokolow, 91 F.3d 396 (3d Cir. 1996); United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978); United States v. Childs, 5 F.3d 1328 (9th Cir. 1993); United States v. Hines, 564 F.2d 925 (10th Cir. 1977), *cert. denied*, 434 U.S. 1022, 98 S.Ct. 748, 54 L.Ed.2d 770 (1978); and United States v. Parker, 749 F.2d 628 (11th Cir. 1984).

Bank Records are Self Authenticating

In addition to the above, New York's rules of evidence recognize that bank statements are self authenticating, and therefore can be admitted into evidence without the need for the original creditor to lay a foundation. In People v. Ramos, the court allowed the admission of bank statements into evidence without a proper business records foundation, noting that "judicial notice may provide a basis for admitting business records that are 'so patently trustworthy as to be self-authenticating[.]'" 60 A.D.3d 1091, 876 N.Y.S.2d 127 (2nd Dept. 2009). *See also*, Thomas v. Rogers Auto Collision, Inc., 69 A.D.3d 608, 896 N.Y.S.2d 73 (2nd Dept. 2010) ("the trial court did not err in allowing the admission of [a] bank statement into evidence inasmuch as it was a self-authenticating document[.]"); Merrill Lynch Business Financial Services, Inc. v. Trataros Const., Inc., 30 A.D.3d 336 (1st Dept. 2006); Elkaim v Elkaim, 176 AD2d 117 (1st Dept. 1991). The federal court supports this approach as well. In FDIC v. Staudinger, the Federal Deposit Insurance Corp. was assigned an obligation from Penn Square Bank, as receiver and sued a consumer on a promissory note which the court took judicial notice and held as being self-authenticating. "The records admitted were the type of records maintained by banks in the ordinary course of business." Staudinger, 797 F2d 908, 910 (10th Cir. 1986).

In light of the foregoing, there is no need for a debt buyer to provide an affidavit from the original creditor as part of its application for a default judgment. The bank statements are business records of the debt buyer. In addition, the statements are self-authenticating, and the court can take judicial notice of them.

Alternative

While we believe that the law does not require an original creditor affidavit in debt buyer actions, we recognize the New York City Civil Court's recent adoption of a requirement that debt buyer applications for default judgments be supported by pool-level affidavits from the original creditor and intermediate owners of the account (the "New York City Chain of Title Affidavits"). These affidavits set forth the complete chain of title of an account in a manner that makes clear to the courts' judgment clerks that the plaintiff is the owner of the account that is the subject of the litigation.

There is an immediate benefit to utilizing the New York City Chain of Title Affidavits – all creditors and debt buyers have already altered their processes to include them as part of their purchase and sale documents, and as such, they can immediately be utilized by the debt buyers in all courts in New York. The alternative of requiring the proposed Original Creditor Debt Buyer Action Affidavit will, for all intents and purposes, put the business of selling Revolving Credit Transactions out of business for the foreseeable future. For several reasons, it is simply not possible for the debt buyers to obtain this affidavit on accounts that they have already purchased.

First, for the same reasons set forth above regarding the unavailability of the Agreements, it is not possible to obtain affidavits from original creditors that are out of business. Second, original creditors may not have the records necessary to re-create the facts needed to be included in the affidavits.²⁰ Third, when original creditors entered into the existing purchase and sale agreements, they could not have foreseen the need to spend thousands of hours and millions of dollars post-sale to retroactively execute affidavits, and this cost makes it prohibitive for them to do so. Practically speaking, it cannot be accomplished after the fact, and as a result all Revolving Credit Transactions that were previously sold will be rendered worthless. This last reason – the high cost of compliance – will also affect creditors' decisions to sell Revolving Credit Transactions in the future. This effect cannot be understated, as it will have a direct impact on the availability and cost of credit to consumers in New York state.²¹

20 In light of the federal requirement limiting the need to retain records to two years (12 CFR 202.12), as well as the cost of storing the data, not every creditor retains the information beyond this time period.

21 In a Working Paper No. 13-38 entitled *Debt Collection Agencies and the Supply of Consumer Credit*, economist/Assistant Professor Viktor Fedaseyev of Bocconi University and a Visiting Scholar, Federal Reserve Bank of Philadelphia, concluded that stricter regulations of third-party debt collectors are associated with a lower number of third-party debt collectors per capita and with fewer openings of revolving lines of credit. Because there is less pressure on consumers to pay their debts, recovery rates are reduced and lenders are less willing to provide credit in the first place.

EFFECTIVE DATE

We respectfully submit that the Proposed Reforms are neither an interpretation nor an expansion of existing law. They create an entirely new standard applicable only to the practice of civil litigation as regards Revolving Consumer Transactions. Consequently, whether or not the recommendations contained herein are adopted in whole or in part, any regulation adopted by the Court must be preceded by a reasonable time period during which the creditors and debt buyers can adjust their business practices. Any immediate enforcement of the reforms will cause irreparable harm by rendering millions of dollars of otherwise valid debts unenforceable, in addition to opening the floodgates with litigation against the creditors, debt buyers, and their attorneys for alleged violations of state law, and by extension, the federal FDCPA.²²

ADDITIONAL NOTICE REQUIREMENT

Judge Lippman references a relatively new requirement that the New York City Civil Court has adopted to provide additional notice to defendants in consumer credit transactions. The process server, upon filing the affidavit of service, provides to the court a notice to the consumer and an envelope bearing the return address of the court. The court mails the notice, and if the notice is returned by the post office, the court will not enter a default judgment on behalf of the plaintiff.

Initially, we submit that Section 3215 of the CPLR already sets forth an additional notice procedure with which a plaintiff's attorney must comply in order to obtain a default judgment. This section requires the plaintiff's attorney to provide the defendant with an additional copy of the summons at least 25 days prior to submitting an application for a default judgment to the court. If the additional notice is returned by the post office, the plaintiff's attorney cannot and does not submit the necessary supporting affirmation to the court as part of the request for the entry of judgment. CPLR §3215(g)(3)(i). In other words, there is already a procedure to do exactly what the court is proposing already, making this new requirement duplicative.

Despite the existence of this section of the CPLR, the CLC does not object to this or any other regulation reasonably designed to protect a consumer's rights while at the same time ensuring that it is not infringing on a creditor's rights to access the courts. However, as written, a defendant need only falsely write on the court mailing "does not reside" or "return to sender," and the reform, as written, will forevermore prevent the plaintiff from entering judgment. To combat this practice, which is commonplace amongst consumers who do not

²² The consumer bar and its cottage industry of suing creditors' rights attorneys have already begun to file lawsuits against debt buyers and their attorneys. In Italiano et al. v. Midland Funding, LLC et al., E.D.N.Y., Docket No. 2:14-cv-00018-LDW-ARL, several consumers against whom judgments were entered on behalf of Midland Funding, LLC commenced an action against Midland and four law firms retained by it. The lawsuit relies on the contents of Judge Lippman's Law Day 2014 speech as the alleged grounds to support violations of the FDCPA and various state laws.

want to receive mail from creditors or their attorneys, we request that this provision be re-written to provide a mechanism for a plaintiff to overcome this obstacle.

First, the requirement should only apply to pleadings served via affix and mail pursuant to CPLR Section 308(4). If service is completed by personally delivering the papers to the defendant or by delivering them to a person of suitable age and discretion at the consumer's residence, the defendant should not be able to overcome the presumption of service by simply making a mark on the envelope mailed by the court.

Second, there are certain types of returns made by the post office that should not prevent judgment entry. We submit that the reforms should only apply to mail that is returned by the post office as "Unknown." While "Undeliverable" is another potential reason for mail to be returned, there are areas in New York that are not serviced by the post office. Mail must be addressed to the consumers' post office box in order to be delivered. While this scenario can be avoided by placing the defendant's physical and mailing addresses on the summons, it is not uncommon for a consumer to live in one jurisdiction and maintain a post office box in another. The court rules must therefore be amended to permit the addition of both addresses on the summons so that the address for the additional mailing is the consumer's mailing address.

Lastly, the Proposed Reforms need a mechanism to trump this provision in those instances in which it can be shown that the defendant in fact lives at the address at which service took place (eg., Department of Motor Vehicles records, correspondence written by the defendant, personal delivery of the pleadings on the defendant at the address). This procedure must be addressed by the court prior to the effective date of the reforms, and only after conducting a meaningful review of the factors that cause mail to be returned. Barring same, the plaintiffs' due process rights will be unfairly trumped by this section of the Proposed Reforms.

UNINTENDED CONSEQUENCES

Access to credit is beneficial to consumers. However, if creditors cannot recoup their money from either the consumer or a debt purchase sale, creditors will restrict credit, and restriction of credit will have a negative impact on consumers and society. It is critical that creditors be able to recover their money. Credit improves the overall quality of our lives and allows businesses to operate more efficiently. We need credit to manage income flow, in order to purchase things like laundry machines and refrigerators that will save us money in the long run. For example, a laundry machine in the home saves money versus using a Laundromat. Consumers who cannot access credit cannot experience these benefits.²³

In Assistant Professor Viktor Fedaseyev's Paper, fn. 21, *supra*, written for the Federal Reserve Bank of Philadelphia, the conclusion was that stricter regulations of third-party debt

²³ Dr. William C. Dunkelberg, Professor of Economics, Temple University, PA, October 15, 2013, National Association of Retail Collection Attorneys Legal Symposium on Consumer Debt Collection.

collectors are associated with a lower number of third-party debt collectors per capita and with fewer openings of revolving lines of credit. Because there is less pressure on consumers to pay their debts, recovery rates are reduced and lenders are less willing to provide credit in the first place. An unintended consequence of Professor Fedaseyeu's conclusions is that credit may be less available to those who may need it most to meet their daily needs, such as the poor and the elderly. Thus, whereas Judge Lippman's Proposed Reforms may have been intended to aid that population, the adverse may be the actual result.

CONCLUSION

For the foregoing reasons, we support the Court's efforts to amend the rules applicable to default judgment applications in the state's Civil, City, and District courts. By adopting the recommendations contained herein, we believe that original creditors and debt buyers alike will be able to immediately comply with the Proposed Reforms as of the proposed effective date. Alternatively, if revisions are not made to the Reforms, Plaintiffs in Revolving Credit Transactions will suffer irreparable harm. The bar to obtain a default judgment will have been raised so high that creditors will be deprived of their rights to have equal access to the New York courts in order to litigate their disputes. If not, the availability to credit by those who need it the most will be negatively affected as the creditors tighten their underwriting process knowing that they will not have the ability to recover delinquent debts in New York.

Respectfully submitted,

Commercial Lawyers Conference

A handwritten signature in cursive script, appearing to read "Mitchell Selip".

By: Mitchell Selip, Esq., Director

Proposed Court Rules

§ 208.14-a Proof of Default Judgment in Consumer Revolving Credit Matters (Uniform Civil Rules for the New York City Civil Court)

§ 210.14-a Proof of Default Judgment in Consumer Revolving Credit Matters (Uniform Civil Rules for the City Courts Outside the City of New York)

§ 212.14-a Proof of Default Judgment in Consumer Revolving Credit Matters (Uniform Civil Rules for the District Courts)

1. Definitions

- a. "Retail Credit Agreement" shall include a copy of a contract or other document evidencing the debtor's agreement to the debt. If the claim is based on a debt for which no signed contract or agreement exists, it shall include a copy of a document provided to the debtor while the account was active, demonstrating that the debt was incurred by the debtor. For a revolving credit transaction, the most recent monthly statement recording a purchase transaction, last payment, or balance transfer shall be deemed to be sufficient evidence of an Agreement.
- b. "Revolving Credit Transaction" is a personal loan that is not secured by real or personal property where credit is extended by a financial institution, which is in the business of extending credit, to an individual primarily for personal, family, or household purposes, the terms of which include periodic payment provisions, late charges, and interest accrual.
- c. "Charged-off consumer debt" means a consumer debt that has been removed from a creditor's books as an asset and treated as a loss or expense.
- d. "Debt buyer" means a person or entity that is regularly engaged in the business of purchasing charged-off consumer debt for collection purposes, whether it collects the debt itself, hires a third party for collection, or hires an attorney-at-law for collection litigation. "Debt buyer" does not mean a person or entity that acquires a charged-off consumer debt incidental to the purchase of a portfolio predominantly consisting of consumer debt that has not been charged off.
- e. This title shall apply to all actions commenced on or after June 15, 2014.

2. Applicability. In any action arising from a ~~consumer credit transaction~~ Consumer Revolving Credit Transaction, a default judgment shall not be entered against the defendant unless the plaintiff has complied with the requirements of CPLR 3215 and submitted the affidavits required under this section.

3. Where the plaintiff is the original creditor, the plaintiff must submit ~~the an~~ affidavit of facts, pursuant to CPLR §5015, signed by a person with: a) personal knowledge and access to Plaintiff's books and records, including electronic records, relating to the Account of the Defendant; b) personal knowledge of Plaintiff's procedures for creating and maintaining its books and records and of the facts set forth in the affidavit, which knowledge must be based on affiant's review of Plaintiff's books and records.

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a. The affidavit must include the following information:

- i. A statement that Plaintiff's records were made in the regular course of business, and it was the regular course of such business to make the records; that the records were made at or near the time of the events recorded.**
- ii. The balance at time of charge-off, or, if the balance has not been charged off, an explanation of how the balance was calculated;**
- iii. An explanation of the amount, nature, and reason for all post-charge-off interest and fees, if any.**
- iv. The date and amount of the last payment, if any;**
- v. The total amount paid post-charge-off;**
- vi. The date that the account was opened;**
- vii. The original account number, which may be redacted to include at least the last four digits of the account number;**
- viii. The identity of the Original Creditor;**
- ix. If Plaintiff seeks judgment on an account stated cause of action, a statement that the affiant has personal knowledge of Plaintiff's procedures for generating and mailing account statements to its customers; that it is the regular practice of Plaintiff's business to provide periodic account statements to its customers; and that Plaintiff sent one or more account statements relating to the Account to Defendant, which statement(s) were retained by Defendant without objection.**

OR

b. The affidavit must be submitted in the form entitled AFFIDAVIT OF FACTS BY ORIGINAL CREDITOR and the AFFIDAVIT OF NON-EXPIRATION OF STATUTE OF LIMITATIONS.

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4. Where the plaintiff has purchased the debt, the plaintiff must submit the form AFFIDAVIT OF FACTS AND SALE OF ACCOUNT BY ORIGINAL CREDITOR, the AFFIDAVIT OF PURCHASE AND SALE OF ACCOUNT BY DEBT SELLER for each debt buyer who owned the debt prior to the plaintiff, AND the AFFIDAVIT OF FACTS AND PURCHASE OF ACCOUNT BY DEBT BUYER PLAINTIFF and the AFFIDAVIT OF NON-EXPIRATION OF STATUTE OF LIMITATIONS.

5. In all applications for a default judgment on Revolving Credit Transactions, the plaintiff must also submit the AFFIDAVIT OF NON-EXPIRATION OF STATUTE OF LIMITATIONS, which may be executed by the plaintiff or plaintiff's attorney.

AFFIDAVIT OF FACTS BY ORIGINAL CREDITOR

(Original Creditor Actions)

The undersigned, being duly sworn, deposes and says:

1. I am a/an _____ [employee/officer/member] of Plaintiff ~~herein~~ its servicing agent or affiliate, and I have personal knowledge and access to Plaintiff's books and records, including electronic records, relating to the account ("Account") of _____ [name of ~~debtor~~] (Debtor/Defendant) ("Defendant"). The last four digits of the account number of the Account are _____ [last four digits]. In my position, I also have personal knowledge of Plaintiff's procedures for creating and maintaining its books and records. Plaintiff's records were made in the regular course of business, and it was the regular course of such business to make the records. The records were made at or near the time of the events recorded. Based on my review of Plaintiff's books and records, I have personal knowledge of the facts set forth in this affidavit.
2. On or about _____ [date], Plaintiff and ~~Debtor~~ Defendant entered into a Revolving Credit Agreement ("Agreement"). ~~Debtor~~ Transaction ("Transaction"). Defendant agreed to pay Plaintiff for all goods, services, and cash advances provided pursuant to the Agreement terms of the Transaction. The amount of the last payment made by ~~Debtor~~ Defendant was \$ _____, made on _____ [date] OR ~~Debtor~~ Defendant has failed to make any payments as required by the Agreement. ~~Debtor~~ terms of the Transaction. Defendant is now in default and demand for payment has been made.
3. [Include this paragraph if seeking judgment on an account stated cause of action.] I have personal knowledge of Plaintiff's procedures for generating and mailing account statements to customers. It is the regular practice of Plaintiff's business to provide periodic account statements to its customers. Plaintiff sent one or more account statements relating to the Account to ~~Debtor~~ Defendant, and ~~Debtor~~ retained Plaintiff's records do not reflect that the account statement without objection(s) were returned by the post office or that the Defendant objected to them.
4. At this time, Debtor owes \$ _____ on the Account. This amount includes \$ _____ in principal, \$ _____ in the charge-off balance of \$ _____, post-charge-off interest, of \$ _____, and \$ _____ in post-charge-off fees and charges, of \$ _____." A true and correct copy of the Account, Retail Credit Agreement is attached as an exhibit to this affidavit.

WHEREFORE, deponent demands judgment against ~~Debtor~~ Defendant for \$ _____ (plus interest from _____ [date], if applicable), together with the costs and disbursements of this action.

The above statements are true and correct to the best of my personal knowledge.

Dated: _____

Name

Sworn to before me this _____

day of _____, 20__.

Notary Public