COMMENT TO THE STATE OF NEW YORK
UNIFIED COURT SYSTEM

RE: PROPOSED REFORMS RELATING TO
CONSUMER CREDIT COLLECTION CASES

RESURGENT
Capital Services

May 30, 2014

Via email to:
rulecomments@nycourts.gov
and overnight mail to:

John W. McConnell, Esq.,
Counsel, Office of Court Administration
25 Beaver Street, 11th Fl.
New York, New York 10004

Dear Mr. McConnell:

Resurgent Capital Services, L.P. ("Resurgent") appreciates the opportunity to file this comment (the "Comment") on the Proposed Reforms Relating to Consumer Credit Collection Cases (the "Proposed Reforms") which, among other things, would seek to prevent unwarranted default judgments and ensure a fair legal process by requiring certain plaintiffs to include certain attestations and provide certain defendants with additional notifications, resources and assistance. We appreciate the opportunity to assist the Office of Court Administration (the "OCA") in crafting a framework that appropriately balances the protection of New York consumers with applicable legal and evidentiary requirements.

The Proposed Reforms reflect objectives similar to Resurgent's with respect to the clear provision of targeted and pertinent information to defendants whose consumer credit accounts are in the legal processes.

The following is our rationale behind our concerns regarding certain aspects of the Proposed Reforms and, where applicable, we have suggested amendments[1] and clarifications designed to reflect that reasoning:

[1] Please see attached exhibit for suggested drafting changes to the Proposed Reforms.

COMMENT TO THE STATE OF NEW YORK UNIFIED COURT SYSTEM

RE: PROPOSED REFORMS RELATING TO CONSUMER CREDIT COLLECTION CASES

RESURGENT Capital Services

I. Prospective Application

Requiring that accounts purchased prior to the effective date of the Proposed Reforms be subject to their requirements could lead to loss and liability for companies operating in New York or otherwise utilizing the New York Court System to prosecute consumer collection lawsuits. The Proposed Reforms represent a fundamental shift in the legal and evidentiary requirements associated with bringing collection lawsuits. As drafted, the Proposed Reforms will alter the manner in which debt sale transactions are conducted and will require several burdensome and costly changes for both original creditors and debt assignees. The decision to purchase a debt portfolio involves significant pre-purchase investment analysis and contractual negotiation, a major component of which is the pre-purchase negotiation and pricing, regarding access to account documentation or media. Because the existence, availability, and purchase price of the account documentation required to bring collection actions has a dramatic impact on the calculus involved in the decision to purchase a debt portfolio, changing the evidentiary requirements applicable to accounts that have already been assigned and requiring the assignees to provide documentation which was not necessarily contemplated at the time of purchase would result in significant hardship and economic loss to the assignees.

Accounts that were purchased under drastically different assumptions might have a significant reduction on value if there were a retroactive application of these Proposed Reforms, as in some cases assignees would be left with no avenue for collection. Not that the Court Rules are proposed legislation, but their practical effect is the same. In New York, statutes are applied prospectively, unless there is a clear legislative indication to the contrary. *Rudin Management Co. Inc. v. Commissioner, Dept. Of Consumer Affairs*, 213 A.D.2d 185, 623 N.Y.S.2d 569 (1st Dep't 1995); see also Brown, 145 Misc. 2d 1085, 548 N.Y.S.2d 841, 846 (Richmond County 1989) ("Ordinarily, statutes are presumed to operate prospectively unless a contrary intention unequivocally appears."), aff'd 150 Misc. 2d 375, 575 N.Y.S.2d 622 (1990). The practical impact of this law would be to void contracts negotiated in light of existing laws and rules[2]. Given the serious implications of the ex post facto effect, the Court should strongly consider making these

[2] The Contract Clause appears in the United States Constitution, Article I, section 10, clause 1. It states: No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. The Contract Clause prohibits states from enacting any law that retroactively impairs contract rights.

rules applicable to debts sold after some future date. This is an approach taken by many regulators and legislatures when proposing or passing reforms of this nature. Both California's recent Fair Debt Buying Practices Act and New York City's DRP-182 included this type of language with much success.[3]

Similarly, the failure to abide by the requirements of the proposed rule (such as including an account specific date or other anchor point for an account) has already precipitated consumer suits in New York, and the rule is not yet effective. The Proposed Reforms might expose creditors and debt collectors to Fair Debt Collection Practices Act (FDCPA) claims as noncompliance with applicable requirements of state collection laws can be considered a FDCPA violation.[4] Accordingly, Resurgent recommends an approach to the Proposed Reforms similar to that utilized in New York and other jurisdictions. Namely, that the OCA consider making the Proposed Reforms applicable only to debts that have sold after a certain future date and the Proposed Reforms are implemented in order to allow institutions to make the necessary changes in business operation standards as well as permit institutions to amend applicable record retention policies to accommodate the new requirements.

II. Affidavit and Admission of Business Record; Relevant Standards

It is common practice for banks and financial institutions to buy and sell assets and accounts. Financial institutions merge with, acquire, or otherwise take ownership of the assets or accounts of other financial institutions on a daily basis. In these circumstances, related business records are transferred to and absorbed by the acquiring institution and referenced, used and relied upon in the institution's day-to-day business operations. Just as in a bank acquisition, debt buyers absorb the business records received from debt sellers at the time of a sale and rely on them as the foundation for the customer relationships they seek to establish. The debt buyer does more than merely accept and file away the records it receives from the seller—it necessarily relies upon their accuracy for the ongoing functioning of the business. This reliance meets the criteria set by several New York courts for the establishment of a foundation on which business records may be admitted as a hearsay exception. Accordingly, as outlined further below, it is proper for an assignor-creditor's business records describing a consumer's account, once acquired,

[3] See Fair Debt Buying Practices Act, § 1788.50 (Passed by the California Assembly July, 2013, but applicable to debt collection activities in connection with consumer debt sold or resold after January, 2014); DRP-182 (Effective May, 2009, but applicable to debt purchased after September, 2009).

[4] see *Leblanc v Unifund*, 601 F.3d 1185, (11th Cir 2010)(violation of state licensing law allowed for Federal Fair Debt Collection Practices Act class action)

incorporated, and relied upon by a subsequent owner, to be admissible into evidence by that subsequent owner without the need for extensive testimony from a custodian of the original creditor.

New York State's evidentiary rule regarding the business records hearsay exception, NY CPLR §4518 provides that in order to be admitted under a hearsay exception a record must be made in regular course of business, it must be in the regular course of business to make the record, and the record must have been made at or about the time of the event recorded.[5] Certain New York courts state that, for the business records exception to apply, the proponent should lay a proper foundation for the record through testimony of someone with personal knowledge of the maker's business practices and procedures.[6] However, the plain language of the statute contains no such requirement. It says that personal knowledge "goes to weight, not admissibility."[7]

Application of the business records exception in cases involving debt buyer plaintiffs raises the issue of whether documents transferred by the seller in a debt sale may be admitted under NY CPLR §4518. In the usual scenario, a debt buyer attempting to collect on a debt it purchased from an issuer or other debt seller produces a records custodian from its own company to testify and lay the foundation for the records it seeks to admit. Importantly, the court in New York Court of Appeals' decision in *Johnson v. Lutz* offers insight into the issue, noting that "in the business world, credit is given to records made in the course of business by persons who are engaged in the business upon information given by others engaged in the same business as a part of their duty."[8] It necessarily follows that credit should be given to documents and records transferred from a debt seller to a debt buyer pursuant to a legal and contractual duty on the seller's part to assure the accuracy of such records. Those records should qualify as business records under NY CPLR §4518.[9]

As mentioned above, certain New York courts have held that a person simply receiving and filing a business record, with no knowledge of the record maker's policies and procedures, is

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[5] CPLR 4518 (a).
[6] *West Valley Fire Dist. No.1 v. Village of Springville*, 294 A.D.2d 949, 743 N.Y.S.2d 215 (2002).
[7] CPLR 4518 (a).
[8] *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930).
[9] See generally Frumer and Biskind, 6 Bender's New York Evidence CPLR § 19.04[4], at 19-106 [noting "if the supplier of information was not acting under a business duty to communicate accurately the assurance of the accuracy that underlies the business records exception does not guarantee the truth of the information supplied even though it may have been scrupulously recorded.].

incapable of establishing a proper foundation.[10] However, that is not the end of the analysis, consistent with case law, "the business record exception permits the recipient to lay the foundation given 'the relationship between the two entities and the nature of the records in question, including the circumstances of their preparation.'"[11]

As stated in *Med. Expertise, P.C., v Trumbull Ins. Co.*:

> "Clearly, records made in the regular course of business are hearsay when offered for the truth of their contents. N.Y. C.P.L.R. art. 4518(a) creates in New York a business records exception to the hearsay rule to alleviate a harsh result in many valid claims. This exception to the hearsay rules continues to evolve, both by legislative initiative and by judicial construction, to marry the requirements of modern day businesses to the foundational requirements of this exception. For example, this rule was amended by the state legislature in 2002 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."[12]

This principle has been adopted in assignee/debt buyer cases as well.[13]

Further, other methods have been established that allow an entity to produce its own witness to lay a foundation for business records received from another. Some courts have provided that the relationship between two entities exchanging records may be such that the party using the information has sufficient circumstantial familiarity with the recordkeeping practices of the other as to impart a competence to provide foundational testimony.[14] The most widely-adopted alternative method permitted by New York courts is the laying of a foundation by a showing that the entity receiving the records routinely relies upon them in the course of its own business.[15] As

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[10] *West Valley Fire Dist. No.1 v. Village of Springville*, 294 A.D.2d 949, 743 N.Y.S.2d 215 (2002).
[11] *Medical Expertise, P.C. ex rel. Moukha v. Trumbull Ins. Co.* 765 N.Y.S.2d 171, 173. (2003).
[12] *Id.*
[13] See *Robinson v. H&R Block Bank,* 12-Civ-4196, NYLJ 1202602645242(EDNY, Decided May 29, 2013) and *Portfolio Recovery Assoc. v Lall,* 2013 NY Slip Op. (Supreme Court, Appellate Term, and First Department).
[14] *People v. Cratsley* 86 N.Y.2d 81, 6329 N.Y.S.2d 992 (1995).
[15] See *West Valley Fire Dist. No.1 v. Village of Springville*, 294 A.D.2d 949, 743 N.Y.S.2d 215 (2002); *People v. Markowitz* 721 N.Y.S.2d 758, 2001 N.Y. Slip Op. 21094 (2001); *People v. Cratsley* 86 N.Y.2d

mentioned above, in instances where an entity purchases debt for collection, the records it receives are incorporated into its own business records and supplemented through additional collection activities and consumer communications. Courts have repeatedly held that in this context, so long as an entity utilizes the records in its day-to-day business and relies upon their accuracy, the records have essentially been adopted by the entity as its own and the entity's own witness may establish a foundation for their admission.

Opposition to the admission of business records received in a debt sale relies, in part, on *Palisades Collection, LLC v. Kedik,* a case decided by the Supreme Court, Appellate Division, Fourth Department of New York.[16] In *Palisades*, the proponent attempted to admit certain spreadsheets as proof that it had been assigned the defendant's credit card debt. The court reasoned that affidavits from the proponent's agents did not lay a proper foundation for the business records exception. In concluding that no foundation had been established for the admission of records due to the absence of testimony by someone with personal knowledge of the record maker's business practices and procedures, the *Palisades* Court relied upon the New York Court of Appeals' holding in *West Valley Fire District No. 1 v. Village of Springville.* The analysis in *Palisades*, however, does not address other circumstances, as recognized in *West Valley* as well as similar cases[17], that there are other methods by which a sufficient foundation for the admission of business records may be laid including whether the plaintiff had routinely relied upon the documents[18] or whether the relationship between the plaintiff and debt seller was such that a plaintiff's witness would be competent to testify about procedures of the seller.[19]

In addition, Federal courts interpreting the analogous Federal Rule of Evidence have answered the question similarly. They have held that the federal rule does not require the record to be actually prepared by the entity seeking to admit it, and only two factors should be considered when attempting to lay a foundation: 1) whether the receiving business relies upon the accuracy

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81, 6329 N.Y.S.2d 992 (1995); *People v. DiSalvo* 284 A.D.2d 547, 727 N.Y.S.2d 146 (2001); *Medical Expertise, P.C. ex rel. Moukha v. Trumbull Ins. Co.* 765 N.Y.S.2d 171 (2003).

[16] *Palisades Collection, LLC v. Kedik*, 67 A.D.3d 1329, 890 N.Y.S.2d 230 (2009).

[17] *People v. Cratsley* 86 N.Y.2d 81, 6329 N.Y.S.2d 992 (1995); *People v. Etienne*, 745 N.Y.S.2d 867, 192 Misc.2d 90 (2002); *In the Matter of Leon RR*, 48 N.Y.2d 117, 421 N.Y.S.2d 863 (1979); *People v. Clinkscales*, 774 N.Y.S.2d 308, 3 Misc.3d 333 (2004).

[18] *Plymouth Rock Fuel Corp. v. Leucadia, Inc.*, 117 A.D.2d 727, 498 N.Y.S.2d 453 (1986); *People v. DiSalvo* 284 A.D.2d 547, 727 N.Y.S.2d 146 (2001); *Air Land Forwarders, Inc. v. United* States, 172 F.3d 1338 (1999); *United States v. Jakobetz*, 955 F2d 786, 801-802 (2d Cir.1992).

[19] *Medical Expertise, P.C. ex rel. Moukha v. Trumbull Ins. Co.* 765 N.Y.S.2d 171, 173. (2003); *In the Matter of Leon RR*, 48 N.Y.2d 117, 421 N.Y.S.2d 863 (1979).

of the document, and 2) whether there are other circumstances suggesting the trustworthiness of the document.[20] Federal Courts in the First, Second, Third, Fifth, Ninth, and Eleventh Circuits follow this two part analysis.

It is fundamental to the debt buying industry that they place great reliance on the accuracy of documents received in debt sales, as they are required by applicable law to communicate accurate information to consumers. Further, the fact that these records contain identifying consumer information as well as credit agreements, balance information and account statements validates their inherent reliability and trustworthiness (especially in New York, where records like bank statements are considered to be self-authenticating). Also, credit issuers are regulated by countless consumer protection laws, indicating that records received from creditors should be trustworthy as they must comply with federal law.[21] Additionally, federal courts have acknowledged that under the alternative - if the law required testimony by a witness to every step of a debt purchase transaction, no debtor would ever be found to be under obligation. Blind devotion to technicalities may defeat the purpose of NY CPLR §4518.[22]

Considering the issues associated with the business records hearsay exception discussed above, Resurgent suggests that an affidavit from the Original Creditor prepared at a pool or portfolio level would be sufficient. Typically, debt accounts are purchased in large portfolios, requiring a debt buyer to make a certification relating specifically to an individual debt account could potentially impose an undue burden. A pool-level affidavit would adequately certify that the debt seller owned the entire debt portfolio instead of a single debt account. It would also certify that the seller complied with the required recordkeeping procedures, and had the power to assign it to the debt buyer.

III. Proposed Reforms Require Clarification of "Original Agreement"

In order to avoid ambiguity, the Proposed Reforms should include a definition of the phrase "Original Agreement." As drafted, the Proposed Reforms are unclear regarding what would qualify as "A True and Correct Copy of Original Agreement." The extension of credit, particularly a revolving line of credit accessible by credit card, is comprised of several

[20] *Air Land Forwarders, Inc. v. United* States, 172 F.3d 1338 (1999); *United States v. Jakobetz*, 955 F2d 786, 801-802 (2d Cir.1992).

[21] See Fair Credit Reporting Act; Fair Debt Collection Practices Act; Gramm-Leach-Bliley Act; Truth in Lending Act; Electronic Funds Transfer Act.

[22] See *Massachusetts Bonding and Insurance Co. v. Norwich Pharmcal Co.*, 18 F2d 934 (2d Cir. 1927).

components which, taken together, create the binding agreement. Credit cards usually have card member agreements outlining the terms and conditions relevant to the credit. These "agreements" are generally mailed to the consumers once the application for credit has been approved. Subsequent use of the associated account is deemed to indicate acceptance of the terms of the agreement, which are frequently amended.

New York Courts have recognized the principle that use of the credit card will effectuate a binding agreement because the relationship between the issuer of a credit card and the holder and user of the credit card is contractual.[23] One court held that [t]he issuance of a credit card constitutes an offer of credit...[and the] use of the card constitutes acceptance of the offer."[24]

The California legislature addressed the same "Original Agreement" issue in the California Fair Debt Buying Practices Act, which permits the charge-off statement to serve as evidence of the agreement (and evidence of the circumstances which constitute default) is appropriate it is the final statement of account sent by the creditor to the consumer after default. The charge-off statement reliably recites pertinent account information and serves as the best evidence of the agreement.

An amendment to the Proposed Reforms that better defines "Original Agreement" by incorporating the substance of the California law would help debt buyers better understand what evidence they are going to be expected to produce when collecting on a debt.

IV. Pre charge off itemization

Including interest amounts for revolving credit obligations is unmanageable due to the nature of the credit extended. It is critical to note that in the consumer debt context, interest on credit cards is generally compounded and becomes principal in subsequent credit cycles. Under the Federal Financial Institutions Examination Counsel's (FFIEC) Uniform Retail Credit Classification and Account Management Policy, credit card issuers are required to charge off credit card debt by the end of the month in which the credit became 180 days past due. The charge-off balance is a static and reliable amount that is highly regulated by numerous federal agencies (the Federal Reserve Board, FDIC, Office of the Comptroller of Currency (OCC) and others) as well as by federal laws. Due to this reliance on federal law, regulated creditors are unable to itemize pre charge-off balances electronically. Accounting for pre-charge-off interest

[23] *Citibank (South Dakota) N.A. v. Sablic*, 55 AD3d 651 (2nd Dept 2008).
[24] *Feder v. Fortunoff, Inc.*, 114 A.D.2d 399 (2nd Dept.1985)(emphasis supplied).

after it has been compounded cannot be conducted by a systemic and automated process and instead requires a time consuming manual review on an account by account basis, which makes the process prone to error and impracticality.

Courts have held that this principal applies to assignees. In *Wahl v. Midland Credit Management, Inc*[25], the Court stated that there would be no falsity even if the "amount due" had been described as "principal due." Judge Posner observes that when interest is compounded, today's interest becomes tomorrow's principal, so all past-due amounts accurately may be described as "principal due".[26]

For the reasons set forth above, it is unnecessary as a matter of law for the Original Creditor Affidavit to include account level information. By requiring that the original charge-off balance and date (and any additional post-charge-off amounts) be recited in the plaintiff's affidavit, as it is demonstrably reliable.

* * * *

We appreciate the opportunity to provide the foregoing comments and are available to answer any questions related to this Comment at the email below.

Regards,

Luke Umstetter
Resurgent Capital Services, LP
E-mail: lumstetter@resurgent.com

[25] No. 08-1517, 556 F.3d 643, 2009 U.S. App. LEXIS 3530 (7th Cir. Feb. 23, 2009)
[26] See *Hahn v. Triumph P'Ships LLC*, 557 F.3d 755, 756-57 (7th Cir. 2009)

EXHIBIT A.

SUMMARY OF PROPOSED AFFIDAVITS

Together with any other affidavits required under New York law, the following affidavits would be required on debt that was charged-off after September 1, 2014 as part of an application for a default judgment in a consumer credit case.

A. Original Creditor Actions

In an action by an original creditor to collect on a consumer credit debt, the plaintiff must submit the following affidavits in conformance with NY CLS- CPLR-4518(a) containing the following information as part of an application for a default judgment:

1. Affidavit of Facts by Original Creditor

a. Facts constituting the asserted cause of action: name of debtor, last four digits of account, date and terms of original agreement, date and amount of last payment;

b. If the complaint asserts an account stated cause of action, a statement indicating that an accounting was sent to the debtor and the debtor retained the accounting without objection;

c. Summary of amount debtor allegedly owes, including an itemization of how the amount was calculated based on principal, interest and fees and charges; and

2. Either 1) A True and Correct Copy of Original Agreement governing the account upon which the action is based, and any amendments thereto, or 2) the charge-off or other post default statement shall be attached to the Original Creditor's Affidavit of Facts.

3. Affidavit of Non-Expiration of Statute of Limitations (All Actions). An affidavit from plaintiff or plaintiff's counsel setting forth where and when the cause of action accrued, the statute of limitations for New York and any other jurisdiction where the cause of action accrued, and stating that after reasonable inquiry the plaintiff has reason to believe that the statute of limitations has not expired.

B. Debt Buyer Actions

In an action by a debt buyer plaintiff to collect on a consumer credit debt, the plaintiff must submit the following affidavits in conformance with NY CLS-CPLR- 4518(a) containing the following information as part of an application for a default judgment.

I. Affidavit of Facts and Sale of Account by Original Creditor (Debt Buyer Actions). An affidavit based on personal knowledge from the original creditor setting forth:

a. Facts constituting the asserted cause of action;

b. If the complaint asserts an account stated cause of action, a statement indicating that an accounting was sent to the debtor and the debtor retained the accounting without objection;

c. Statement that the debt was assigned to the debt buyer (or intermediary debt buyer) and date of assignment;

d. Statement that records specific to the debt at issue were created and maintained in the ordinary course of the original creditor's business and subsequently transferred to the debt buyer (or intermediary debt buyer); and

e. Statement of the amount owed to the original creditor at the time of assignment.

2. Affidavit of Purchase and Sale of Account by Debt Seller (Debt Buyer Actions). An affidavit in conformance with NY CLS-CPLR- 4518(a) from any debt seller who owned the debt prior to the plaintiff, setting forth:

a. Date that debt seller purchased the account and from whom it was purchased;

b. Date that debt seller sold the account and to whom it was sold;

c. Amount owed by the debtor at the time of sale, itemized by the amount owed at time of purchase, plus post-purchase interest, fees and charges, less post-purchase payments by the debtor; and

d. Statement that records pertaining to the debt were maintained in the ordinary course of the debt seller's business and such records were subsequently transferred along with the debt to the debt buyer.

3. Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff (Debt Buyer Actions). An affidavit in conformance with NY CLS-CPLR- 4518(a) from plaintiff's representative setting forth:

a. Facts constituting the asserted cause of action;

b. Date that debt buyer purchased the account and from whom it was purchased;

c. Summary of the complete chain of title of the debt;

d. Summary of the amount allegedly owed to the debt buyer, itemized by the amount owed at the time of purchase, plus post-purchase interest, fees and charges, less post-purchase payments by the debtor; and

4. Either 1) A True and Correct Copy of Original Agreement governing the account upon which the action is based, and any amendments thereto, shall be attached to the Affidavit of Facts and Sale of Account by Original Creditor or 2) the charge-off or other post default statement.

5. True and Correct Copies of All Written Assignments of the Account shall be attached to the Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff.

6. Affidavit of Non-Expiration of Statute of Limitations (All Actions). An affidavit from plaintiff or plaintiffs s counsel setting forth where and when the cause of action accrued, the statute of limitations for New York and any other jurisdiction where the cause of action accrued, and stating that after reasonable inquiry the plaintiff has reason to believe that the statute of limitations has not expired.

encore
CAPITAL GROUP

May 30, 2014

Submitted via E-Mail to: *rulecomments@nycourts.gov*

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

RE: Proposed Reforms Related to Consumer Credit Collection Cases

Dear Mr. McConnell:

Encore Capital Group, on behalf of itself and its wholly-owned subsidiaries (collectively, "Encore"), hereby submits its comments to the Office of Court Administration regarding the proposed reforms related to consumer credit collection cases. Encore supports the OCA's efforts to create reform, bolster transparency and instill additional protections for consumers facing litigation related to unpaid debts. However, certain portions of the proposed rules cannot be met and would have the immediate effect of ending consumer credit litigation in New York State – making it the only state to eliminate the ability of creditors and debt purchasers to use the court system to collect on validly-owed consumer credit obligations. The number of annual credit collection lawsuits in New York State would be reduced from over 100,000 to zero, having a devastating impact to creditors and debt purchasers doing business in New York. Moreover, the proposed rules, as currently drafted, would likely have severe unintended consequences on the ability of low and moderate income New Yorkers to access affordable credit.

Introduction

Encore is a publicly traded company and is the largest debt purchaser in the nation. Purchasing primarily charged-off credit card receivables, we currently own accounts relating to over two million New York residents with outstanding credit obligations. Our goal is to develop long-term partnerships with our consumers, in which they are able to regain their financial footing and ultimately resolve their outstanding debt. To that end, we offer reasonable repayment plans, collect no fees or interest on new accounts, and often discount a significant amount of the total debt owed. In 2013, we forgave over $28 million in debt to New York residents, and have forgiven over $180 million in debt owed by New York consumers since we began collecting in the state.

Litigation is a last resort for us and many other creditors and debt purchasers. We undertake significant measures to negotiate a resolution with our consumers before we ever reach the point of litigation. Before reaching the point of litigation, we typically

have tried multiple times to communicate with our consumers about their account, and we offer the majority of our consumers a meaningful discount off of the face value of their debt. Litigation is expensive for us, and less than desirable for our consumers.

For the accounts on which we pursue litigation, we have exhausted all such efforts to negotiate a resolution, including extensive processes used to communicate with the consumer through letters and phone calls. For consumers who do not want to be contacted about their obligation and refuse to engage in a dialogue with us, litigation is our only recourse under the law. Unfortunately, if enacted in their current form, the OCA's proposed rules would completely eliminate the ability of Encore, other debt buyers, and original creditors to find redress through the legal system to recover validly-owed delinquent debt. The expected impact to New York consumers, in terms of reduced access to affordable credit, would likewise be severe.

Encore Supports Meaningful Change

We support raising standards for the entire credit and collections industry, and we appreciate the OCA's substantial efforts to increase transparency in collections litigation and, ultimately, to protect consumers. An integral part of Encore's culture is to collaborate with our consumers to help them resolve their outstanding financial obligations in a productive and empowering way. To that end, Encore has consistently championed multiple consumer-focused initiatives, including:

- We do not charge any fees or interest on new accounts.
- We do not resell the debt we purchase.
- In 2011, we launched our industry-leading Consumer Bill of Rights.
    - Our Consumer Bill of Rights includes hardship guidelines for the elderly, those with serious medical concerns and victims of natural disasters. In addition, we do not collect from identified active duty servicemembers.
- We provide our consumers with robust disclosures regarding the statute of limitations on their account, the tax consequences of making a payment on their account, and consumers' legal rights under the FDCPA.
- We do not reinstate the statute of limitations when consumers make payments on time-barred accounts.
- In our communications with consumers, we focus on transparency, honesty and clarity. Our letters aim to bolster consumer comprehension of the account, and their associated rights and responsibilities, and include:
    - Full account details, including the original creditor account number, private label brand name (Sears, Lowes, etc.), and robust disclosures on time-barred debt and credit reporting
    - What to expect in the collections process

- How to access our Consumer Bill of Rights
- How to contact us

- In 2012, Encore founded the Consumer Credit Research Institute (CCRI), a scientific organization dedicated to better understanding financial distressed consumers' decisions, choices and activities. Through its research and collaboration with leading academics from Dartmouth College and the University of California, Los Angeles, the CCRI seeks to discover new ways to break the chronic debt cycles that can lead to ongoing financial distress and advance thinking in the area of financial education.
- Our industry association, DBA International, has its own stringent debt buyer certification standards. Encore was on the DBA board charged with creating the certification standards, and Encore is in full compliance with those high standards.

As evidenced by the above, we support effective consumer protection and believe there can be benefits for both consumers and industry if regulatory gaps are closed, and all market participants are subject to uniform and consistent requirements. Unfortunately, the OCA's reforms will effectively foreclose our access to the courts rather than preventing abuses.

These Rules Would Have Devastating Consequences to NY Consumers and Local Businesses

We believe that, as drafted, the OCA's well-intended rules meant to protect consumers would have severe unintended consequences to the most vulnerable consumers. The proposed rules would in no uncertain terms eliminate the ability of owners of charged-off consumer credit to bring litigation in New York courts to recover on those accounts. Without any ability to litigate such claims, New York consumers would have no legally-enforceable obligation to repay their consumer credit obligations. As a result, creditors would restrict the amount of credit they extend to New York consumers, and would increase the interest rates and fees charged to recoup the additional risk that would necessarily accompany no longer having any legal redress against delinquent account holders. The reduced access and affordability of credit would harm millions of New York consumers who rely on using credit cards as a way to pay for various expenditures, ranging from every day grocery purchases to more substantial one-time purchases like new furniture or clothing. Furthermore, a decline of accessible and affordable traditional credit would disproportionately impact the most vulnerable New Yorkers, who may look to high-interest and other types of predatory lending as alternative sources of credit.

To support this point, we would also like to direct the OCA to a recent study from the Federal Reserve Bank of Philadelphia's Working Paper Series, which examined the role of third-party debt collectors and how regulations impact the availability of credit for

consumers.[1] Examining the impact of state debt collection laws across 22 states, the author concluded that more regulation results in less credit available to consumers, such that every additional restriction on debt collection activities lowers the number of new revolving lines of credit by 2.2%. The study also finds that debt collection regulation has resulted in a significantly lower credit card recovery rate and that debt collection (when done in a responsible, legally compliant and ethical manner) complements credit scoring as a protection to creditors, resulting in increased credit access. The author's conclusion mirrors Encore's position that responsible regulations should balance consumer protection with creditor rights: "In terms of policy implications, my results indicate that financial regulation that institutes strong consumer protection must be balanced with creditor rights in order for the latter to extend consumer credit in the first place."[2]

Other research comes to similar conclusions. For example, a 2009 study examined whether differences in legal protection affect the size, maturity, and interest rate spread on loans to borrowers in 48 counties. The research found that "banks respond to poor enforceability of contracts by reducing loan amounts, shortening loan maturities, and increasing loan spreads. These effects are both statistically significant and economically large."[3] This research demonstrates the expected result of the proposed rules (which are far more burdensome than those studied since they would foreclose the right to collect through the courts) would be an unintended, devastating impact to New York consumers. The most vulnerable New Yorkers – the ones these rules aim to protect most – would be forced to look to other avenues for credit, including predatory and other high-interest lending arrangements.

The reduced access to and affordability of credit for New York consumers would also impact the state's businesses, which rely on consumers' ability to purchase items on credit. Not only would consumers' purchasing power decline, resulting in decreased sales for small and large New York businesses alike, but those businesses that do extend consumer credit would also have no legal recourse to seek payment from consumers who failed to repay their obligations.

This impact to New York business and their employees would not be insignificant. Collection agencies directly employ 14,155 New York residents, and indirectly employee another 12,748 employees such as process servers, contract employees and other outside vendors.[4] These numbers don't even account for the thousands of employees of original issuers that extend credit in the first place, which would no longer have the ability to collect on delinquent accounts through the court system.

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[1] Fedaseyeu, Viktor, "Debt Collection Agencies and the Supply of Consumer Credit," Federal Reserve Bank of Philadelphia, 2013.
[2] *Id.* at 24.
[3] Bae, K., Goyal, V.K., "Creditor Rights, Enforcement and Bank Loans," The Journal of Finance 64(2): 828-860, 2009.
[4] Ernst & Young, "The Impact of Third-Party Debt Collection on the National and State Economies," February 2012.

The Proposed Rules Would Make New York the Only State to Eliminate the Ability of Creditors and Debt Purchasers to Sue on Validly-Owed Debt

No other states' requirements to litigate collections cases go so far as to shut the courts to creditors and debt purchasers, as the OCA's proposed rules would do. In 2012 Maryland adopted progressive reforms to its court rules that require, to bring suit and obtain a judgment, portfolio-level affidavits of sale to demonstrate chain of title, as well as a certificate of conformity and a billing statement to reflect the usage, payment or transaction that occurred within 3 years of filing the lawsuit.[5] Just last year, California passed comprehensive legislation requiring debt buyers to include with complaints a portfolio-level seller affidavit, along with a statement showing a payment or charge made.[6]

Importantly, no state requires a plaintiff to obtain a pre-charge-off itemization and account-level affidavits from the original creditor attesting to the account statements and account-level Terms & Conditions along with all amendments thereto. Due to federal regulations for document retention that govern the issuers of credit card debt, it would simply be impossible for original creditors or debt purchasers to have this information and documentation.[7] As a result, such requirements would make New York the first and only state to eliminate an entire industry's ability to sue consumers for validly-due charged-off credit card receivables. Such a result is unconscionable and inconsistent with the longstanding recognition by the New York Court of Appeals has taken of the constitutional constraints on its rulemaking authority. "[A] court may not significantly affect the legal relationship between litigating parties through the exercise of its rule-making authority. Furthermore, no court rule can enlarge or abridge rights conferred by statute, and this bars the imposition of additional procedural hurdles that impair statutory remedies." (citations omitted).[8]

We urge the OCA to also consider that the Consumer Financial Protection Bureau is currently engaged in a debt collection rulemaking. As a result, within the next year, we expect the CFPB to issue raised collections standards that encompass new requirements on documents and data needed to collect, disclosures and notices for consumers, and consumer confidentiality and privacy safeguards. As Encore has expressed to the CFPB, we support robust disclosures to consumers to increase their comprehension of their account obligations as well as their rights and remedies. The CFPB itself, however, has recognized publicly that certain requirements contained in the proposed OCA rules –

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[5] Maryland District Court rules; Maryland Rules of Civil Procedure 3-306, 3-308, 3-509.
[6] Cal. Stats.2013, c. 64 (S.B. 233).
[7] *See* 12 C.F.R. § 226.25 (federal law requires original creditors to maintain records for 24 months).
[8] *People v. Ramos*, 85 N.Y.2d 687, 687-688 (1995). *See also Gair v. Peck*, 6 N.Y.2d 97, 104 (1959); *Broome County Farmers' Fire Relief Assn. v. New York State Elec. & Gas Corp.*, 239 A.D. 304, 306 (3rd Dept. 1933), *affd.* 264 N.Y. 614; *Chase Watch Corp. v. Heins*, 284 N.Y. 129 (1940); and *Matter of Brusco v. Braun*, 84 N.Y.2d 674, 682 (1994).

including a pre-charge off itemization of the debt – are simply impossible because of federal record-keeping requirements imposed on the issuers of debt.[9]

The Reforms Should Be Narrowed to Achieve Robust Change without Eliminating an Entire Industry and Restricting Access to Affordable Credit for New Yorkers

We support the OCA's proposal to expand state-wide additional notice and providing unrepresented defendants with additional resources and assistance. As stated above, Encore strongly supports raised industry standards to bolster consumer comprehension of their account obligations and associated rights and remedies. However, the proposed affidavit requirements are completely unworkable in several important ways. We have four main areas of concern with respect to the proposed affidavit requirements.

Account-Level Seller Affidavits. In every state, affidavit requirements to obtain judgment on credit collection cases are at the portfolio-level for proving chain of title, or else allow the purchaser to submit its own affidavit. Many states have recently adopted their own standards to deal with the same concerns addressed by the OCA, but in formats that do not close the doors of the courts to an entire industry.[10] When the portfolio-level affidavit requirements for proving the chain of title were implemented in New York City, there was a decline in litigation coupled with increased reliability and accuracy of account information. Portfolio-level affidavits provide reliable evidence of the validity and accuracy of an account, when linked to the account through a bill of sale and an account-level affidavit by the current account owner. From a practical level, to require original issuers to create an account-level affidavit, whether for chain of title or for records authentication, for each account would be extremely cost prohibitive and in no uncertain terms lead to the cessation of debt buyers (and likely original creditors) from bringing any litigation in the New York State court system. No provision of New York law requires account-level affidavits and such a requirement would be inconsistent with CPLR § 4518(a). Requiring portfolio-level seller affidavits, combined with a bill of sale, account-level debt buyer affidavits, and a statement showing payment, charge-off or use would provide ample evidence that the account is valid and the outstanding balance is accurate. Such requirements would go well beyond the most stringent requirements in other states, including those in Maryland and California.

Pre-Charge Off Itemization. We support a requirement to provide the charge off balance and a post-charge off itemization of principal, interest and fees in order to obtain default judgment. Indeed, Encore does not charge any fees or interest on new accounts, and we believe that consumers should have transparency into interest and fees that new owners of the accounts may add onto the charge-off balance. However, as currently drafted the OCA's proposed rules would require a pre-charge off itemization to be

[9] *See* Consumer Financial Protection Bureau, Fair Debt Collection Practices Act CFPB Annual Report 2013 (March 20, 2013) at 52.

[10] *See e.g.*, Tenn. Code Ann. 47-22-302 (subsequent creditor may testify to previous creditor records if incorporated and relied upon, unless circumstances indicate lack of trustworthiness); Tex.R.Civ.P. 508 (requires disclosure of information to defendant in petition and specifically allows plaintiff to swear to third party records if subsequently incorporated into and relied upon).

contained in an original creditor or debt seller affidavit. Such a requirement would *eliminate the ability of the entire debt collection industry to litigate in the state of New York, and ignores the underlying concept of the revolving line-of-credit.*

Credit card issuers generally do not maintain pre-charge-off account information. As such, any requirement to itemize the account balance between the date of default and date of charge-off is an *impossibility* (and this has been recognized by both the CFPB and FTC in reports published last year).[11] Banks that issue credit card debt and ultimately charge off delinquent debt according to federal accounting requirements treat the "charge-off balance" as the "principal." The charge-off balance is highly regulated at the Federal level by the Office of the Comptroller of the Current (OCC), and is inherently reliable evidence of the amount the consumer owed as of the date of charge-off. Regulations issued by the Federal Financial Institutions Examination Council on behalf of the Federal Reserve, FDIC, OCC and Office of Thrift Supervision, as well as the OCC's handbook for inspecting financial institutions, clearly provide how and when a credit card debt must be charged-off as a loss.[12] These policies provide specific standards for calculating the charge-off balance.

The charge-off balance is contained in the charge-off statement, which sets forth the past-due balance on the card as of the charge-off date, and is therefore evidence of the consumer's use of the credit card and agreement with the terms and conditions for the credit card. Under the Fair Credit Billing Act, consumers have 60 days to challenge any credit card transactions, and transactions that go unchallenged are presumed under the law to be correct. Further, the charge-off statement is mailed to consumers at the time of charge-off, giving them the opportunity to review. The strict federal regulations on calculating charge-off balance, along with the consumer's ability to review and contest both the original charges and the charge-off statement, makes the charge-off statement the best evidence of the debt owed to the original creditor. Accordingly, any itemization requirement should use the charge-off balance contained in the charge-off statement – a highly-regulated, reliable balance.[13]

Account-level Terms & Conditions and Original Signed Contract. The OCA's proposed rules would also require extensive documentation that is often unavailable or nonexistent, and which does not provide additional assurances that the debt is valid. For example, credit cards are typically not entered into by a signed contract. Rather, credit card accounts are typically opened by phone or online. The Terms and Conditions that are mailed to consumers are considered to be the "contract," but are often unavailable, because original creditors are not required to keep statements for more than two years

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[11] *See* Consumer Financial Protection Bureau, supra note 9; Federal Trade Commission, The Structure and Practices of the Debt Buying Industry (Jan. 2013) at 36, available at http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf. ("Most significantly, debt buyers often did not receive the information needed to break down outstanding balances on accounts into principal, interest, and fees.")

[12] *See e.g.*, Uniform Retail Credit Classification and Account Management Policy, 65 F.R. 36903 (June 12, 2000); OCC Bulletin 2000-20 (June 20, 2000).

[13] *See* Connecticut Practice Book (2011), Page 274, section 274, section 24-24, commentary.

under the Federal Truth in Lending Act, Regulation Z[14]. Additionally, the rules would require all amendments to the contract (the Terms and Conditions) to be provided, which is especially onerous as there may be dozens of amendments the lifetime of the account.

The proposed court rules would create an impossible standard for debt buyers and original creditors, by requiring them to obtain unavailable or nonexistent documentation. Compelling debt buyers and original creditors to produce documents that do not exist would severely curtail the collection of valid, outstanding financial obligations in the state. This would, in turn, harm consumers by reducing the availability and affordability of credit, and preventing them from successfully resolving their obligations and repairing their credit.

Any New Rule Should Apply Prospectively. We applaud the OCA's efforts to protect consumers and create more transparency in the litigation process relating to charged-off consumer debt. However, debt purchasers like Encore have for years bought New York consumer accounts, negotiating for targeted data and documents so as to comply with the court rule and statutory requirements in effect at the time of purchase. To have any new rules apply retroactively to accounts purchased under the existing requirements would constitute an unconstitutional taking and interference with contract. It would also interfere with the contract between the creditor and the consumer.

Article 1, Section 10 of the U.S. Constitution prohibits states from passing a law impairing the obligation of contracts. It is well-established that statutory or court rule changes cannot be applied retroactively to unreasonably impair contracts or agreements negotiated under a previous standard. The New York Court of Appeals has held that court rules cannot "invade recognized rights of person or property."[15] Of particular relevance, the U.S. Supreme Court has ruled that states cannot "deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right."[16] As drafted, that is exactly what the proposed rules would do.

Given this concern, we ask that the OCA adopt prospective language that applies the default judgment requirements to accounts charged off or purchased on or after the effective date of the rules. This would ensure that, once the rulemaking takes effect, as original creditors collect on charged off accounts, or sell them to debt purchasers, the necessary data and documents to comply with the new rules would be maintained. It is important to note that, in part because of the increasingly stringent regulatory environment on both the federal and state levels, the industry is subject to unprecedented consolidation. As accounts are sold and transferred due to this consolidation, ensuring a prospective application of the rulemaking is essential to preserve the value of prior transactions that were compliance with the law at the time of the transaction. Additionally, significant process changes will be necessary, and it would be impossible

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[14] 12 C.F.R. § 226.25.

[15] *McQuigan v. Delaware, Lackawanna & W.R.R. Co.*, 129 N.Y. 50, 55 (1891).

[16] *See Richmond Mortgage & Loan Corporation v. Wachovia Bank & Trust Co.*, 300 U.S. 124 (1937); *See also Worthen Co. ex rel. Board of Com'rs v. Kavanaugh*, 295 U.S. 56 (1935).

for debt buyers and original creditors to make these changes by mid-June, therefore we request that the effective date for the court rules be extended to at least 180 days.

* * *

We sincerely appreciate the OCA's efforts to bolster consumer protections and create a fair and transparent consumer credit litigation system. Nonetheless, we urge the OCA to recognize the unintended consequences that certain provisions of the proposed rules – account-level affidavits, disallowing affidavits from debt purchasers, pre-charge off itemizations, and account-level Terms & Conditions – would impose on New York consumers and responsible businesses alike. We believe that a more reasonable approach can be reached through targeted amendments to the proposed rules, that still creates nation-leading, robust consumer protections and transparency in the litigation process.

Sincerely,

Sheryl Wright

Sheryl Wright
Senior Vice President
Corporate & Governmental Affairs
Encore Capital Group, Inc.

May 30, 2014

VIA ELECTRONIC MAIL TO RULECOMMENTS@NYCOURTS.GOV

Mr. John W. McConnell, Esq.
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: Comments of ACA International: New York State Unified Court System Proposed Reforms Relating to Consumer Credit Collection Cases (Published April 30, 2014)

Dear Mr. McConnell:

ACA International ("ACA") files this comment on behalf of its nearly 3,400 member organizations and their more than 300,000 employees worldwide including its nearly 200 members in the State of New York, in response to the New York State Unified Court System's ("NYSUCS") proposed reforms relating to consumer credit collection cases published in your memorandum dated April 30, 2014 (hereinafter "Proposed Reforms"). In that memorandum, NYSUCS proposes the adoption of reforms in consumer credit collection cases "to prevent unwarranted default judgments and ensure a fair legal process." While ACA fully supports these goals, ACA believes that any reforms considered to achieve these goals should be generally applicable to *all* types of cases, not just consumer credit collection cases. Singling out consumer credit collection cases for special treatment ignores broader, common concerns about appropriate access to, and functioning of, the judicial system. Moreover, it is ACA's position that the enactment of the specific Proposed Reforms would place burdensome economic, operational and technological requirements on our members that bring litigation to recover rightfully-owed debt from consumers in the State of New York, while providing consumers and the courts with little corresponding benefit.

Given the foregoing, ACA respectfully requests that the NYSUCS withdraw its Proposed Reforms, at least until a comprehensive and independent study can be conducted about the nature of default judgments in *all* types of cases in the NYSUCS in order to inform whether reforms are necessary and, if so, the nature and extent of such reforms. Should the NYSUCS decide to proceed, ACA respectfully requests due consideration be given to the comments on the Proposed Reforms listed below.

4040 WEST 70TH STREET 55435
P.O. BOX 390106, MINNEAPOLIS, MN 55439-0106
TEL +1(952) 926-6547 FAX +1(952) 926-1624

509 2ND STREET NE, WASHINGTON, D.C. 20002
TEL +1(202) 547-2670
FAX +1(202) 547-2671

ACA@ACAINTERNATIONAL.ORG WWW.ACAINTERNATIONAL.ORG

I. Background on ACA International

ACA International is the trade association for credit and collection professionals. Founded in 1939 and with offices in Washington, D.C. and Minneapolis, Minnesota, ACA represents approximately 3,400 members, including credit grantors, collection agencies, attorneys, asset buyers, and vendor affiliates.

The members of ACA comply with applicable federal, state and local laws and regulations regarding debt collection, as well as the applicable federal, state, and local rules of the courts in which debt collection litigation is brought. On a federal level, the collection activities of ACA members are regulated by the CFPB pursuant to the Consumer Financial Protection Act of 2010 ("CFPA")[1] and the Federal Trade Commission ("FTC") under the Federal Trade Commission Act,[2] and by federal laws including the Fair Debt Collection Practices Act ("FDCPA"),[3] the Fair Credit Reporting Act ("FCRA"),[4] and the Gramm-Leach-Bliley Act.[5] In addition to these and dozens of other federal, state and local laws, the collection activities of ACA members are subject to the New York State Fair Debt Collection Practices Act,[6] and the local debt collection practices and licensing laws of New York City[7] and the City of Buffalo.[8] The accounts receivable management industry is unique if only because it is one of the few industries in which Congress enacted a specific statute governing all manner of communications with consumers when recovering debts under the FDCPA.[9]

ACA members range in size from small businesses with a few employees to large, publicly held corporations. These members include the very smallest of businesses that operate within a limited geographic range of a single town, city, or state, and the very largest of national corporations doing business in every state. The majority of ACA members, however, are small businesses, collecting rightfully-owed debts on behalf of other small and local businesses. Approximately 75% of the association's company members maintain fewer than twenty-five employees.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars - dollars that are returned to, and reinvested by, businesses. Without an effective collection process, the economic viability of these businesses, and, by extension, the American and New York state economies in general, are threatened. Recovering rightfully-owed consumer debt enables organizations to survive, helps prevent layoffs, keeps credit, goods, and services available, and reduces the need for tax increases to cover governmental budget shortfalls. At the very least, New Yorkers, as with all Americans, are forced to pay higher prices to compensate for uncollected debt.

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[1] 12 U.S.C. § 5481 *et seq.*
[2] 15 U.S.C. § 45 *et seq.*
[3] 15 U.S.C. § 1692 *et seq.*
[4] 15 U.S.C. § 1681 *et seq.*
[5] 15 U.S.C. § 6801 *et seq.*
[6] N.Y. Gen Bus. Law §600 *et seq.*
[7] New York City, N.Y., Code § 20-488 *et seq.*
[8] Buffalo, N.Y. Code § 140-1 *et seq.*
[9] *See* 15 U.S.C. § 1692a(5).

In 2011, Ernst &Young conducted a study[10] to measure the various impacts of third-party debt collection on the national and state economies. In addition to recovering rightfully-owed consumer debt and $44.6 billion nationwide, $4.2 billion New York statewide in 2011, the study found that third-party debt collectors directly provided over 148,000 jobs and $5 billion in payroll, with over 14,100 jobs and $487 million in payroll in New York. When factoring in jobs created indirectly, those numbers doubled to 302,000 jobs and $10 billion in payroll, with nearly 27,000 jobs and $926 million in payroll in New York. The study also concluded that third-party debt collectors paid $509 million in state and local taxes and $495 million in federal taxes, with $71.1 million in state and local taxes in New York alone. The total state and local tax impact of third-party debt collectors was $1 billion, and the total federal impact was $970 million, with $134.4 million in total state and local tax impact in New York.

II. Comments of ACA International

With respect to the particular provisions of the Proposed Reforms, ACA offers the following comments:

A. Requirement to include a true and correct copy of the original agreement, and any amendments thereto, to the Affidavit of Facts should be modified to require either the most current written agreement or the final account statement or invoice.

The Proposed Reforms require that "[a] [t]rue and [c]orrect [c]opy of [the] [o]riginal [a]greement governing the account upon which the action is based, and any amendments thereto, shall be attached to the...Affidavit of Facts..." of the original creditor in both original creditor actions and debt buyer actions. This requirement, in practice, would be unduly burdensome to original creditors and unworkable. It does not take into consideration the accepted business practice of not retaining documentation after a certain period of time.[11] In order to bring a consumer credit collection case for which there was a written agreement, the Proposed Reforms would require such agreement be retained in perpetuity.

Moreover, not all consumer credit debts may be subject to a written agreement. As such, either the most current written agreement or the final account statement or invoice issued by the original creditor should be sufficient in evidencing the indebtedness on which a default judgment is based. The courts in a number of other states agree.[12]

B. Requirement to include an itemization of how the amount was calculated based on principal, interest and fees and charges to the Affidavit of Facts should be eliminated.

The Proposed Reforms require "an itemization of how the amount [the debtor allegedly owes] was calculated based on principal, interest and fees and charges" in the Affidavit of Facts by Original Creditor as part of an application for default judgment in an action by an original creditor plaintiff to collect on consumer credit debt.

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[10] Ernst &Young, *The Impact of Third-Party Debt Collection on the National and State Economies*, February, 2012, *available at* http://www.acainternational.org/files.aspx?p=/images/21594/2011acaeconomicimpactreport.pdf.

[11] *For example, see* 12 C.F.R. § 226.25(a).

[12] *For example, see* New Jersey Court Rule 6:6-3 ("[A] copy of the periodic statement for the last billing cycle, as prescribed by...12 C.F.R. §226.7...if attached to the affidavit, shall be sufficient to support the entry of judgment.")

This requirement is unnecessary, burdensome and unlikely to result in a meaningful corresponding benefit to the consumer or the court. In the vast majority of instances, the consumer has received periodic statements and other communications regarding the amount owed. In cases of revolving credit accounts such as credit cards, the contents of the periodic statements, including the applicable interest rate(s), are disclosed and calculated in accordance with federal law and, as such, are inherently reliable.[13] The consumer has already received the information that this requirement seeks to provide. Moreover, the consumer has had the ability to dispute the amount owed and in many instances has an affirmative obligation to do so timely.[14]

Also, in the case of revolving credit, the periodic interest and fees become part of the principal balance as the credit revolves, making it extremely difficult to meaningfully itemize especially given the fact that charges may have occurred over many years of the life of the revolving credit account.

C. Requirement for account-specific affidavits from the original creditor in debt buyer actions should be modified to allow for one affidavit for an entire asset pool.

The Proposed Reforms require that the original creditor provide an Affidavit of Facts and Sale of Account by Original Creditor as part of an application for default judgment in an action by a debt buyer plaintiff to collect on consumer credit debt.

When selling accounts to a debt buyer, original creditors routinely aggregate accounts in an "asset pool" until there are a sufficient number of accounts to warrant a sale. While the size of asset pools vary, there are normally thousands of accounts in any given asset pool. Upon sale of an asset pool, original creditors typically supply an affidavit regarding the sale of the particular asset pool.

However, given the required information to be contained in the Affidavit of Facts and Sale of Account by Original Creditor as outlined in the Proposed Reforms and the corresponding affidavit template, an affidavit would have to be made for each individual account sold. In order to ensure compliance with this requirement and not be precluded from obtaining an appropriate default judgment in a consumer credit collection case, the practical effect of such a requirement is that such affidavits likely would be required by debt buyers for *every account at the time of sale of an account* – even though many of these debts will never be the subject of a consumer credit collection case or a default judgment. This requirement would be extremely costly and unduly burdensome to original creditors.

NYSUCS should remove the requirement of an Affidavit of Facts and Sale of Account by Original Creditor as constructed. Instead, the NYSUCS should require an "Affidavit of Sale of Accounts by Original Creditor" that applies to all accounts in the specific asset pool that was sold to the debt buyer. Such a requirement is currently in place in the Civil Court of the City of New York.[15]

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[13] *See* 12 C.F.R. § 226.7.
[14] *For example, see* 12 C.F.R. § 226.13(b). *See also*, 15 U.S.C. §1692(b).
[15] *See* "Directives and Procedures for Default Judgments on Purchased Debt" (May 13, 2009), Civil Court of the City of New York.

D. Any implementation of the Proposed Reforms should apply prospectively only and have an effective date for compliance.

To the extent that the Proposed Reforms are enacted by the NYSUCS, they should apply only prospectively, with no effect on consumer credit cases that have already been filed or filed before the effective date of the reforms. Given the complexity of the implementation of the Proposed Reforms, including significant technological changes and expense that must occur, the effective date of the Proposed Reforms should be at least 180 days after enactment.

Finally, a retroactive application of the Proposed Reforms would likely have the unintended consequence of a large influx of civil cases, including class actions, alleging violations of the FDCPA as well as actions to vacate existing judgments.

E. The Proposed Reforms should define terms in order to ensure maximum clarity.

The Proposed Reforms use a number of terms that are undefined and, as such, have the potential to lead to confusion. ACA recommends that the NYSUCS clarify the following terms to ensure maximum potential compliance:

"Accounting"
For the same reasons discussed in Section II.A. & B. above, the final account statement or invoice should be sufficient for the provision of an accounting in an account stated cause of action.

"Complete chain of title"
It is unclear how this term applies in circumstances of mergers, acquisitions, or transfers among corporate affiliates of original creditors. Also, since an assignment can be the transfer of a part of one's rights, only complete ownership changes should be required to be reflected in the affidavit.

"Consumer credit"
It is unclear whether the NYSUCS intended to apply the Proposed Reforms to all types of consumer credit (including mortgages, student loans, and installment loans) or only certain types of consumer credit (e.g. credit cards). Given that most debt sales tend to be comprised of credit card debts, ACA believes that, to the extent NYSUCS moves forward with the Proposed Reforms, those reforms should apply to consumer credit card collection cases only. Should the NYSUCS determine that the Proposed Reforms apply to all types of consumer credit collection cases, it should define "consumer credit" consistent with federal law.[16]

"Debt buyer" and "Original creditor"
ACA believes that defining these terms is necessary to ensure appropriate clarity around who is covered by the Proposed Reforms and how the Proposed Reforms apply to them. For example, portfolios of consumer credit accounts are routinely sold and purchased in the context of banking acquisitions, as well as routine mergers, acquisitions, or transfers among corporate affiliates of original creditors – some of which may have predated the consumer credit collection case by many years. It is unclear how these terms apply in such circumstances.

[16] *See* 12 C.F.R. § 226.2(a)(12) ("Consumer credit means credit offered or extended to a consumer primarily for personal, family, or household purposes.")

"Records pertaining to/specific to/relating to the debt/account"
Because this term could be construed extremely broadly, ACA recommends that the specific records required be listed for the types of consumer credit cases that are covered by the Proposed Reforms.

"Transferred"
ACA recommends that ready access to records pertaining to the debt, including electronic access, be sufficient to fulfill the requirement that such documents are transferred to a debt buyer. The actual physical transfer of paper documents would be unnecessary, cost prohibitive and unduly burdensome for the original creditor and debt buyer.

F. The template for the Written Answer Consumer Credit Transaction and the Order to Show Cause Information Sheet on Defenses should be modified.

While ACA is supportive of making the legal process simpler and easier to understand – especially for unrepresented consumers – ACA believes that the template for the Written Answer Consumer Credit Transactions and the Order to Show Cause Information Sheet on Defenses should be modified.

First, the list of answers that can be checked by the consumer should be modified to remove any answers that pertain to legal concepts that are not likely to be readily understood by non-lawyers. For example, concepts such as unjust enrichment, duty of good faith and fair dealing, unconscionability, and laches are either foreign or likely to be misconstrued by non-lawyers.

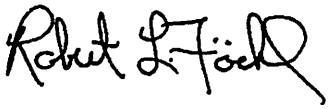
Second, some answers should be modified to ensure accuracy and appropriate applicability to the circumstances. For example, certain plaintiffs may not be required to be licensed by the NYC Department of Consumer Affairs, and the defendant's military service may not be active duty military service.

Finally, given the ease of selecting from a checklist of defenses, the Written Answer Consumer Credit Transactions and the Order to Show Cause Information Sheet on Defenses should contain a clear and conspicuous statement about the consequences to defendant of filing a false, inaccurate or misleading answer.

* * *

In summary, ACA believes that the Proposed Reforms would have the undesirable public policy consequences of creating a chilling effect on the pursuit of legitimate legal claims in the NYSUCS, leading to an increase in the cost of credit, goods and services to consumers. ACA appreciates the opportunity to provide comments on the Proposed Reforms of the NYSUCS. Please feel free to contact me at (952) 259-2103 if you have any questions.

Respectfully submitted,



Robert L. Föehl, Esq.
Vice President and General Counsel
ACA International, the Association of Credit and Collections Professionals

May 30, 2014

John McConnell, Esquire
Counsel
Office of Court Administration
State of New York Unified Court System
25 Beaver Street
New York, New York 10004

Card Coalition
P.O. Box 802
Occoquan, VA 22125-0825
Washington, DC 20001
T 703.201.7282
www.cardcoalition.org

Re: Proposal Relating to Consumer Credit Collection Cases

Dear Mr. McConnell:

The Card Coalition submits these comments in response to the *Proposal Relating to Consumer Credit Collection Cases* (hereinafter the "Proposal") outlined in your memorandum dated April 30, 2014.

Card Coalition consists of major national card issuers and related companies with an interest in state legislative, executive, and regulatory activities affecting the credit card industry and consumers. We are the only national organization devoted solely to the credit card industry and related legislative and regulatory activities in all 50 states.

We believe that the Proposal will impact the operations and practices of creditors throughout the country at a time when the federal government is undertaking an exhaustive review of debt collection practices.

We respectfully urge the Office of Court Administration to delay the effective date of the Proposal to allow the payment card industry and all interested stakeholders more time to determine their impact.

Both the New York State Legislature and the federal government are considering changes to debt collection laws and practices which may well impact changes posited in the Proposal. In Albany, 15 bills are pending that would change various aspects of New York's debt collection laws and practices. [1]

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[1] *See:* NY A 455, NY A 586, NY A 597, NY A 598, NY A 606, NY A 2246, NY A 6433, NY A 6654, NY S 52, NY S 83, NY S 136, NY S 570, NY S 1277, NY S 2010, NY S 3317 and NY S 6359.

CardCoalition

Meanwhile, on the federal level, the Consumer Financial Protection Bureau (CFPB) is now reviewing 399 comments filed in response to an Advanced Notice of Proposed Rulemaking (ANPR) on the debt collection system. [2] The comment period for the ANPR closed on February 28, 2014.

We urge the Office of Court Administration to consider these pending initiatives before proceeding with the Proposal.

Card Coalition
P.O. Box 802
Occoquan, VA 22125-0825
Washington, DC 20001
T 703.201.7282
www.cardcoalition.org

Finally, the Proposal has an effective date of June 15, 2014 —just over two weeks after the close of the comment period. This is insufficient time for creditors to review and change their practices — especially if the Office of Court Administration revises the Proposal after reviewing stakeholder comment letters.

For the foregoing reasons, the Card Coalition urges the Office of Court Administration to delay the effective date of the Proposal and to extend the comment period. Thank you for considering our views.

Respectfully Submitted,

Toni A. Bellissimo

Toni A. Bellissimo
Executive Director
toni@cardcoalition.org

Frank Salinger
General Counsel
frank@franksalinger.com

[2] *See:* Debt Collection (Regulation F), 12 CFR Part 1006, Docket No. CFPB-2013-0033-RIN 3170-AA41, 78 FR 67847 (November 12, 2013).

AFSA
American Financial Services Association

May 30, 2014

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Re: Proposed reforms relating to consumer credit collection cases

Dear Mr. McConnell:

The American Financial Services Association ("AFSA")[1] appreciates the opportunity to comment on the reforms in consumer credit collection cases proposed by the New York State Unified Court System ("UCS") to prevent unwarranted default judgments and ensure a fair legal process for debtors ("proposed court rules"). In this regard, the UCS press release announcing the proposed court rules notes that "most of [these cases] are brought by third parties who routinely purchase large portfolios of delinquent credit card debt, often for pennies on the dollar, commencing lawsuits based on little more than boilerplate language and a few fields of data from a spreadsheet." AFSA understands the concerns of the UCS with respect to collection lawsuits commenced by persons engaged in the business of purchasing portfolios of delinquent consumer credit debt ("debt buyers").

AFSA is concerned, however, that the proposed court rules will have unintended and inappropriate consequences for assignees of credit agreements who are not debt buyers. Cases in point include sales finance companies that purchase motor vehicle retail installment sale contracts ("RISCs") from auto dealerships either contemporaneously with, or within days of, their origination, and financial institutions that securitize consumer credit contracts by assigning them to special-purpose entities ("securitization trusts"). As explained below, neither scenario gives rise to the consumer protection concerns associated with collection actions commenced by debt buyers.

AFSA is also concerned that the proposed court rules do not accommodate the various methods by which consumer credit agreements are created and updated, do not take into account original creditors' use of subsidiary service agents and affiliates, and do not correctly reflect New York law.

If adopted in unmodified form, the proposed court rules would present many significant logistical and compliance difficulties for original creditors,[2] financing agencies[3] and financial institutions without conferring any benefit on consumers.

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[1] The American Financial Services Association is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA member companies offer vehicle financing, payment cards, personal installment loans and mortgage loans. The Association encourages and maintains ethical business practices and supports financial education for consumers of all ages.

[2] The term "original creditor" as used in this letter means the person to whom a consumer credit obligation is initially payable under the agreement evidencing the obligation.

Clarifying the Applicability of the Requirements for Debt Buyer Actions

A principal concern is that the proposed court rules require prescribed affidavit forms for collection actions commenced by an "original creditor" and those commenced by a "debt buyer," but they do not define either key term. As a result, one is left to attempt to infer scope limitations from the affidavit templates. For example, the proposed court rules require the use of a debt buyer affidavit "where the Plaintiff has purchased the debt."[4] The language of the proposed court rules thus suggests that any purchaser of a consumer credit contract would be a debt buyer.

Moreover, the template for the Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff does not suggest a scope limitation with respect to debt buyers. Instead, it merely contains the following averment:

> On or about _____ [*date*], Debt Buyer purchased or was assigned the account from _____ [*original creditor or seller*] (the "Purchase").

(Aff. ¶ 2.) The only suggestion of a scope limitation on a "debt buyer" is the following sentence in the Affidavit of Facts and Sale of Account by Original Creditor:

> Debtor defaulted and a demand for payment was made by Original Creditor.

(Aff. ¶ 2.) While this averment suggests that the UCS believes a "debt buyer" to be a purchaser of a credit obligation principally engaged in the business of purchasing bad debt for collection purposes, AFSA respectfully submits that the absence of key definitional provisions creates needless uncertainty for plaintiffs and their counsel.

The lack of a "debt buyer" definition creates an ambiguity with respect to the provisions regarding debt buyer actions that could result in the proposed court rules being construed to apply to plaintiffs who are not debt buyers, as that term is commonly understood. One of the problems this presents is that the affidavit templates for Debt Buyer Actions are not appropriate for use by assignees not principally engaged in the business of purchasing bad debt for collection. They are, for example, premised on the erroneous factual assumption that assignees only purchase credit agreements after the debtor has defaulted and a demand for payment has been made by the original creditor. Additionally, the proposed court rules require chain of title affidavits for Debt Buyer Actions. While these chain of title affidavits may be appropriate as applied to purchasers of portfolios of bad debt, AFSA respectfully submits that they are unnecessary, unduly burdensome, and impracticable as applied to assignees such as sales finance companies and securitization trusts, which acquire credit agreements shortly after origination. Indeed, the assignment by the original creditor often is apparent on the face of a motor vehicle retail instalment sale contract purchased by a sales finance company.

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[3] The New York Motor Vehicle Retail Instalment Sales Act defines a "financing agency" as follows: "Financing agency" means a person engaged, in whole or in part, in the business of purchasing retail instalment contracts from one or more retail sellers. The term includes but is not limited to a bank, trust company, savings bank, savings and loan association, private banker or investment company, if so engaged. The term also includes a retail seller engaged, in whole or in part, in the business of holding retail instalment contracts acquired from retail buyers. *See* N.Y. Pers. Prop. Law § 301(9).

[4] Proposed 22 N.Y.C.R.R. § 208.14-a(c).

AFSA therefore believes that this ambiguity should be addressed by including a "debt buyer" definition that is limited to a person whose principal purpose is the business of purchasing delinquent or charged-off accounts from unaffiliated third parties for collection purposes. A definition of this nature would be consistent with the Affidavits of Facts and Sale of Account by Original Creditor averment that "Debtor defaulted and a demand for payment was made by Original Creditor." (Aff. ¶ 2.) As noted previously, this averment suggests that the intent of the proposed court rules is to treat as "debt buyers" only persons engaged in the business of acquiring delinquent or charged-off indebtedness under consumer credit contracts. Expressly doing so would be consistent with the stated goal, announced by the Chief Judge, of addressing the problems posed by consumer credit collection actions "brought by third parties who routinely purchase large portfolios of delinquent credit card debt, often for pennies on the dollar, commencing lawsuits based on little more than boilerplate language and a few fields of data from a spreadsheet."[5]

This approach also would be consistent with the views expressed by the New York State Department of Financial Services ("DFS") in connection with its proposed debt collection regulations. Specifically, the DFS noted that "[t]he problem is particularly acute in the cases brought by debt buyers. Debt buyers purchase portfolios of debt for pennies on the dollar and only obtain spreadsheets with skeletal information; they do not have access to contracts, account statements, or other account level documents."[6]

Debt buyers are commonly understood to be persons principally engaged in the business of purchasing delinquent or charged-off consumer credit debt for collection purposes. AFSA notes by way of analogy that the "debt collection agency" definition adopted by the New York City Department of Consumer Affairs includes:

> a buyer of *delinquent* debt who seeks to collect such debt either directly or through the services of another by, including but not limited to, initiating or using legal processes or other means to collect or attempt to collect such debt.(emphasis added)[7]

Similarly, the debt collection rule proposed by the DFS defines the term "debt collector" to include "without limitation a buyer of *delinquent* debt who seeks to collect such debt either directly or indirectly."[8]

AFSA respectfully submits that these concerns are not implicated by collection actions brought by assignees who are not debt buyers. The concerns noted by the Court are, as the Chief Judge and the DFS have indicated, a problem associated with purchase of portfolios of delinquent or charged-off debt. Proposed definitions of an "original creditor" and a "debt buyer" are included in the proposed rule revisions attached hereto as Exhibit "A." As discussed below in greater

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[5] Press Release, Chief Judge Announces Comprehensive Reforms to Promote Equal Justice for New York Consumers in Debt Cases, *available at* http://www.courts.state.ny.us/PRESS/PDFs/PR14_03.pdf (April 30, 2014).

[6] Federal Trade Commission, The Structure and Practices of the Debt Buying Industry, *available at* http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf (January 2013).

[7] N.Y.A.D.C.Law § 20-489(a).

[8] *See* Proposed 23 N.Y.C.R.R. § 1(e), *available at* http://www.dfs.ny.gov/legal/regulations/proposed/debt-collection.pdf (August 2013).

detail, the proposed "debt buyer" definition would ensure, for example, that sales finance companies and securitization trusts are not inadvertently and inappropriately treated as "debt buyers" under the proposed court rules.

Application of Proposed Court Rules to Actions by Assignees Other than Debt Buyers

Retail Installment Sale Contract Concerns

None of the proposed template affidavit forms contemplate collection actions by assignees who are not debt buyers. One commonplace example of such an assignee is a sales finance company. Sales finance companies, including banks, engage in the business of purchasing a RISC not in default from retail sellers. A sample copy of a RISC is attached hereto as Exhibit "B."

The sales finance line of business is regulated under New York consumer protection and banking laws. The New York Motor Vehicle Retail Instalment Sales Act ("MVRISA")[9] and the New York Retail Instalment Sales Act ("RISA")[10] regulate, respectively, motor vehicle retail instalment sales and retail instalment sales of goods other than motor vehicles. These consumer financial protection laws, which are codified in Articles 9 and 10 of the Personal Property Law, regulate RISCs pursuant to which a retail buyer purchases tangible personal property *(e.g.*, a car) and/or services from a retail seller (*e.g.*, an auto dealership) on an installment sale basis. *See* N.Y. Pers. Prop. Law §§ 301(5), 401(6) (defining the term "retail instalment contract"). These laws, as well as Article 11-B of the Banking Law entitled "Sales Finance Companies," contemplate that the retail seller may assign its RISC to a sales finance company. *See, e.g.*, N.Y. Banking Law § 491(7) (defining a "sales finance company"); N.Y. Pers. Prop. Law §§ 301(9), 401(18) (defining a "financing agency"), 302(10) (effect of other laws on contract's purchase and written assignment), 411 (terms of purchase by financing agency).

A typical example would be a motor vehicle RISC that a consumer enters into with an auto dealership and assigns to a sales finance company such as Ford Motor Credit Company or Chase Auto Finance. Because motor vehicle RISCs typically are assigned contemporaneously with, or within days of origination, they are never in default when assigned.

None of the template affidavits contemplate collection actions involving debt attributable to RISCs that are entered into with retail sellers and assigned to a bank or sales finance company. As is evident from the statement that "Plaintiff and Debtor entered into a credit agreement," the Affidavit of Facts by Original Creditor for Original Creditor Actions is appropriately intended to be used only by a person who entered into a credit agreement with the debtor. (*See* Aff. ¶ 2.) Additionally, the Affidavit of Facts and Sale of Account by Original Creditor for use in Debt Buyer Actions recites that the "[d]ebtor defaulted and a demand for payment was made by Original Creditor." This suggests that the "debt buyers" contemplated by the proposed court rules are persons whose principal purpose is the business of purchasing delinquent or charged-off debt for collection purposes.

Accordingly, AFSA respectfully requests that the proposed court rules be revised to accommodate a third category of consumer credit collection actions – "Assignee Actions" – and

[9] N.Y. Pers. Prop. Law § 301 *et seq.*

[10] N.Y. Pers. Prop. Law § 401 *et seq.*

to provide for associated affidavit template(s) for use by assignees other than debt buyers. Additionally, AFSA recommends that the proposed court rules define the term "assignee" in order to clarify when the related affidavit template should be used. A proposed definition of an "assignee" is included in the proposed court rule revisions attached hereto as Exhibit "A." AFSA would appreciate the opportunity to assist the UCS in drafting an Affidavit of Facts by Assignee template suitable for use in connection with Assignee Actions.

Securitization Concerns

ASFA is concerned that the "debt buyer" provisions of the proposed court rules might be deemed applicable to assignees receivables sold for any purpose. This result would be overly broad given that some financial institutions securitize consumer credit obligations. A securitization involves a financial institution assigning contracts not in default to an affiliated special-purpose entity (a "securitization trust"), as collateral security for financing, while the assigning institution continues to service and administer the contract. As a result, the financial institution, as servicer of the account, remains the person with whom the debtor deals. An account may be transferred to different securitization trusts throughout the life of the contract with no impact on the debtor's account or change in the identity of the servicer.

Securitization trusts have no employees and do not service consumer credit contracts or collect on them if they go into default. The entity that assigned the contract to the securitization trust continues to service the contract. The securitization trust that holds the credit contracts should not be considered a "debt buyer" for purposes of the proposed court rules because the contracts were not in default when assigned, it does not maintain and administer the account records, and it does not perform any type of collection activity.

Accordingly, AFSA respectfully submits that the transfer of a current receivable to a securitization trust for the purpose of facilitating an asset-backed securitization transaction should be excluded from any of the proposed court rules requiring assignment or chain of title information. Assignments to securitization trusts should be irrelevant for collection suit purposes because the trusts have no contact with the debtor, do not maintain the account records, and present none of the problems the proposed court rules are designed to prevent. The transferor/servicer is the entity that would maintain and administer the account, address any delinquencies and provide all of the account information necessary under the proposed court rules. This entity would be the person with all of the information and decision making authority on the account.

Affidavit of Facts by Original Creditor

Exclusive Use of Loan Terminology

This affidavit template assumes that the consumer credit transaction will be a loan of money insofar as paragraph 4 requires the use of loan terminology ("principal" and "interest"). However, there are two distinct types of consumer credit transactions – consumer loans and consumer credit sales. (Closed end consumer credit sales are referred to, in the New York MVRISA and the New York RISA, as "retail instalment sales.") The terms "principal" and "interest" are not used in connection with retail installment sales because interest is a charge for

the loan or forbearance of money. This is in contrast to a retail installment sale in which a retail seller sells goods or services to a retail buyer on a deferred payment basis.

In order to accommodate the fact that the terms "amount financed" and "credit service charge" or "finance charge are used in connection with retail installment sales, this affidavit should be revised to permit the use of the words "amount financed" and "finance charge" instead of "principal" and "interest."

Personal Knowledge Requirement

The first sentence of paragraph one of the proposed affidavit templates includes the statement that the affiant has "*personal knowledge* and access to plaintiff's books and records, including electronic records, relating to the account" of the debtor. It is unclear what the words "personal knowledge" used in this sentence are intended to refer to given that the affiant is separately asserting that he or she: (1) has "access to [the] books and records; and (2) has "personal knowledge of the facts set forth in" the affidavit "[b]ased on [his or her] review of [the] books and records." AFSA thus is concerned that the words "personal knowledge" appearing in the first sentence of the first paragraph may be construed to mean that the affiant has personal knowledge of the making of the books and records, the specific underlying act, transaction, occurrence or event or some other fact in addition to the foundational averments required for the admission of a business record.

The foundational averments required for the admission of a business record are specified in CPLR Rule 4518(a), which provides as follows:

> Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was *made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.* An electronic record, as defined in section three hundred two of the state technology law, 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. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

(emphasis added); *See also Unifund CCR Partners v. Youngman*, 89 App. Div. 3d 1377, 1378 (4th Dep't 2011) (*citing West Val. Fire Dist. No. 1 v. Village of Springville*, 294 App. Div. 2d, 949, 950 (4th Dep't 2002)) ("A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures.").

AFSA respectfully submits that these foundational averments, and the requisite review of the books and records, are satisfied by the following statements in the proposed affidavit templates:

> In my position, I also have personal knowledge of Debt Buyer's procedures for creating and maintaining its books and records. Debt Buyer's records were made in the regular course of business and it was the regular course of business such business to make the records. The records were made at or near the time of the events recorded. Based on my review of Debt Buyer's books and records, I have personal knowledge of the facts set forth in this affidavit.

(Aff. ¶ 1) All circumstances not otherwise addressed in CPLR 4518(a) regarding "the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affects its weight, but they shall not affect its admissibility."[11] N.Y. C.P.L.R. Rule 4518(a).

Additionally, the required signature of an *employee, officer or member of Plaintiff that has personal knowledge* in the proposed Affidavit of Facts by Original Creditor concerns AFSA because it does not take into account some creditors' use of subsidiary service agents to manage their credit operations. Most major credit issuers, for example, utilize subsidiary service 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 them in the event of a default by the consumer. As a result, the individuals who have the requisite personal knowledge are not employees of the Plaintiff, but rather are employees of the servicing agent. The Affidavit does not provide for this scenario. Consequently, the proposed reforms as written create a bar to the New York courts for many original creditors that enter into revolving credit transactions in the state.

At a minimum, the court should address this concern and remedy this problem by expanding the reference in paragraph one from "Plaintiff," to "Plaintiff or its Servicing Agent or Affiliate." Accordingly, AFSA respectfully requests that, at a minimum, the first sentence of the first paragraph of the template factual affidavits be revised to read as follows:

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[11] *See also Chase Manhattan Bank (Nat'l Asso.), Bank Americard Div. v Hobbs*, 94 Misc. 2d 780 (N.Y.C. Civ. Ct. 1978). Under the statutory provision authorizing the admission of a business record into evidence if the judge finds that it was made in the regular course of business and that it was the regular course of such business to make it at the time of the transaction or event or within a reasonable time thereafter (CPLR 4518(a)), all other circumstances of the making of the record, *including lack of personal knowledge by the maker, may be proved to affect its weight, but not its admissibility. Id*, at 786 (emphasis added); *Plymouth Rock Fuel Corp. v Leucadia, Inc.*, 117 App. Div. 2d 727 (2d Dep't 1986) Delivery tickets and invoices prepared from information contained in tickets as to amount, location and date of fuel delivered or other services rendered are admissible under business records exception based upon testimony of president of delivery firm who, *while lacking personal knowledge of deliveries themselves, is able through testimony to establish that information provided in tickets is fully incorporated into records made in regular course of business through billing process. Id.* at 728 (emphasis added); *William Conover, Inc. v Waldorf*, 251 App. Div. 2d 727 (3d Dep't 1998) In action for breach of contract to pay plaintiff company to complete installation of heating system for defendants' residence, billing statements prepared by plaintiff's president on basis of job books maintain by plaintiff's employees were admissible as business records where each employee had his or her own job book, in which he or she would record number of hours worked on particular project each day, and *president's lack of personal knowledge of accuracy of job books went to weight, not admissibility, of billing statements. Id.* at 728 (emphasis added).

I am a/an _____ [title: employee/officer/member] of Plaintiff or its Servicing Agent or Affiliate, herein and I have access to Plaintiff's books and records relating to the account ("Account") of _____ [name of debtor] ("Debtor").

That said, the required affidavit still does not permit each individual Plaintiff to explain its relationship with the servicing agent or affiliate, 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. AFSA believes this situation can best be addressed by permitting original creditors to utilize an affidavit that best describes their business practices. As such, we respectfully request that the proposed court rules allow for these variations and alternatives by relaxing the requirements that the proposed affidavit be used verbatim. As an alternative to requiring a specific affidavit, the UCS 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.

True and Correct Copies of All Written Assignments of the Account

The Proposed Court Rules require that True and Correct copies of All Written Assignments of the Account be attached to the Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff. It is unclear whether this means that all written assignments must be attached to the affidavit or an assignment may be proven only by attaching a written assignment. Under the Uniform Electronic Transaction Act ("UETA"), it is not necessary for an assignment to be in written form and, as a result, a written assignment may not always exist when the contract assigned is an electronic contract. Rather, a debt buyer or an original creditor may swear in an affidavit that the assignment occurred. AFSA respectfully requests that the court modify the written assignment requirement in a manner that takes electronic contracting into account.

A True and Correct Copy of the Agreement

The Summary of Proposed Affidavits states that the original creditor must submit, in connection with an Original Creditor Action, "a true and correct copy of the original agreement governing the account upon which the action is based, and any amendments thereto." Credit card issuers send an account agreement to the consumer when the account is opened – an event that may have occurred years or even decades prior to the account delinquency and the commencement of a collection action. The original credit card agreement subsequently may be updated, often on multiple occasions, to change its terms and may even be superseded entirely by a completely new agreement. Once some of its terms have been changed, or once it has been superseded and replaced by an entirely new agreement, the terms of the original agreement no longer govern the account. Moreover, the original agreement is not maintained indefinitely, nor is it required to be by any applicable banking regulation.

AFSA respectfully submits that the apparent goal of this proposed court rule, providing documentary evidence of the agreement between the cardholder and the card issuer, can be more properly and accurately achieved by requiring the production of the most recent account agreement for the account that is the subject of the suit. This agreement would be the one that was in effect when the account was closed and reflects all revisions or updates as of the account closing date.

Further, if an original agreement is defined to mean the agreement in effect when the account was opened, thereby requiring its submission in connection with the application for a default judgment, it would result in a departure from a procedural rule which New York may apply to a federally-chartered depository institution into a banking/lending regulation that would be subject to federal preemption. Any such requirement would effectively render uncollectible any New York account for which the original, obsolete account agreement has not been retained.

In summary, the court should require submission of the current agreement governing the account, which includes any amendments made to the agreement through the change of terms process set forth in Regulation Z, rather than the original agreement. *See* 12 C.F.R. § 1026.9 (Regulation Z change in terms provision).

Affidavit of Non-Expiration of Statute of Limitations

The proposed court rules require the submission of a separate Affidavit of Non-Expiration of Statute of Limitations (the "Affidavit of Non-Expiration") to be executed by the Plaintiff or its counsel, stating as follows:

> Based upon reasonable inquiry, I have reason to believe that the applicable statute(s) of limitations for the cause(s) of action asserted herein has/have not expired.

(Aff. ¶ 2.) AFSA respectfully submits that the Affidavit of Non-Expiration effectively and inappropriately requires the Plaintiff to plead the absence of an affirmative defense.

The statute of limitations is one of the affirmative defenses listed in CPLR Section 3018(b), which apparently is statutory in nature and, hence, presumably subject to modification only by the New York State legislature. Pursuant to CPLR Rule 3211, the statute of limitations "is waived unless raised either by . . . motion [to dismiss] or in the responsive pleading." N.Y. C.P.L.R. Rule 3211(a)(5), (e).

Numerous reported decisions confirm that the statute of limitations is an affirmative defense that is waived if not raised in the prescribed manner. *See, e.g., Joseph T. Ryerson & Son, Inc. v Piffath*, 132 App. Div. 2d 527 (2d Dep't 1987) (Plaintiff not obligated to assert timeliness of his second action following dismissal of first action for failure to serve timely complaint, *since statute of limitations is not element of plaintiff's claim, but rather affirmative defense to be pleaded and proved, or waived, by defendant.*); *Doroski v. Mintler*, 49 App. Div. 2d 990, 374 N.Y.S.2d 721 (3d Dep't 1975); *In re Lipsit's Will*, 39 Misc. 2d 27 (Surrogate Ct. Westchester County1963), *modified on other grounds*, 21 App. Div. 2d 509 (2d Dep't 1964), *aff'd*, 15 N.Y.2d (1964) holding that the statute of limitations is a statute of repose, *and it is optional with a debtor as to whether or not he should raise it; for the claim exists, but is not collectible because of the bar of the statute*); *Toper v Rotach*, 62 Misc. 2d 290 (Sup. Ct. Special Term Oneida County1970) (holding the period of limitations is a matter to be pleaded as an affirmative defense).

Finally, AFSA notes that the Affidavit of Non-Expiration fails to recognize that, in addition to New York law or the law of the jurisdiction where cause of action accrued, the statute of limitations may be governed by the choice-of-law clause contained in the parties' contract.

Conclusion

For the reasons expressed previously, AFSA has significant concerns with the proposed court rules. In view of those concerns, AFSA respectfully requests, on behalf of its members, that the court revise the proposed court rules in accordance with its comments. As noted previously, AFSA would appreciate the opportunity to assist the UCS in drafting an "Affidavit of Facts by Assignee" template suitable for use in connection with "Assignee Actions."

If you have any questions or would like to discuss our comments in further detail, please do not hesitate to contact me by phone at 952-922-6500 or email at dfagre@afsamail.org.

Sincerely,

Danielle Fagre Arlowe
Senior Vice President
American Financial Services Association
919 Eighteenth Street NW, Suite 300
Washington, DC 20006-5517
952-922-6500 direct dial
202-412-3504 mobile
dfagre@afsamail.org

EXHIBIT A

Proposed Court Rules

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

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

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

(a) Applicability. In any action arising from a consumer 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.

(b) Where the plaintiff is the original creditor, the plaintiff must submit the AFFIDAVIT OF FACTS BY ORIGINAL CREDITOR ~~and the AFFIDAVIT OF NON-EXPIRATION OF STATUTE OF LIMITATIONS~~.

(c) Where the plaintiff is an assignee, the plaintiff must submit the AFFIDAVIT OF FACTS BY ASSIGNEE.

(ed) Where the plaintiff is a debt buyer who has purchased the debt, the plaintiff must submit the 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~~.

(e) Definitions. The following terms shall have the following meanings for purposes of this section:

(i) "Original creditor" means the person to whom a consumer credit obligation is initially payable under the agreement evidencing the obligation.

(ii) "Debt buyer" means a person whose principal purpose is the business of purchasing delinquent or charged-off consumer debt from unaffiliated third parties for collection.

(iii) "Assignee" means a person other than a debt buyer to whom a consumer credit contract or the indebtedness thereunder has been assigned.

square two

May 28, 2014

John W. McConnell, Esq.,
Counsel,
Office of Court Administration,
25 Beaver Street, 11th Floor
New York, New York 10004
Via Electronic Mail and US Mail

Re: Proposed Reforms relating to Consumer Credit Collection Cases

Dear Mr. McConnell:

SquareTwo Financial Corporation and its subsidiaries (collectively referred to as "SquareTwo") is pleased to provide comments on the New York State Court proposed reforms relating to consumer credit collection cases. SquareTwo fundamentally believes that debt collection, including selective and principled resort to the court system, adds significant value to the users and providers of the consumer finance market. SquareTwo further believes that sound rules add value to all participants in the marketplace, including consumers, creditors, ethical debt collectors and debt purchasers, but it is also believes that in doing so it is imperative not to place unnecessary barriers to legitimate collection of validly incurred obligations on which one side of the contractual obligation has defaulted and failed to remedy this default voluntarily.

While filing lawsuits is our least-preferred option[1], responsibility to our investors and lenders dictates that we protect their investment by bringing suit against those individuals whom we reasonably believe have the ability, but not the willingness to pay. This is appropriate because at the heart of the relationship is a contractual undertaking which has been performed fully by the lender (which extended credit in reliance upon the promise to pay) but not by the consumer (who received and used the borrowed funds).

As the Consumer Financial Protection Bureau has recently recognized:

> "Collection of consumer debts serves an important role in the functioning of consumer credits by reducing costs that creditors incur through their lending activities. Collection efforts directly recover some amounts owed to owners of debts and may indirectly support responsible borrowing by underscoring the obligation of consumers to repay their debts and incenting consumers to

[1] It is important to realize that notwithstanding the volume of lawsuits filed and some of the rhetorical flourishes in the media, for any creditor, collection agency, debt purchaser or collection law firm the resort to courts is at best a necessary evil. The costs of filing suit together with the uncertainty of outcome renders a lawsuit a far less optimal outcome for the creditor whose customer has defaulted, for whatever reason, in the fulfillment of their contractual obligations and also for the customer who is compelled to defend or ignore a summons.

do so. The resulting reductions in creditors' losses in turn, may allow them to provide more credit to consumers at lower prices."

Consumer Financial Protection Bureau, Advance Notice of Proposed Rulemaking Pertaining to Regulation F, pp 5-6.

Fundamentally, an individual with the ability, but not the willingness, to pay validly incurred obligations causes harm to the consumer credit system to the detriment of those consumers who need the most access to consumer credit. While the proposed court rules are a valuable tool to ensure that consumers have an appropriate level of protection, SquareTwo believes that the rules should not serve to encourage individuals to default on their financial obligations, refuse to participate in the process to obtain voluntary satisfaction of the obligation and then be shielded by a judicial system that incents them not to participate in the judicial process.[2]

While recognizing the substantial thought evidenced in the proposed rules, SquareTwo would suggest the following modification to the rules:

Proposal. To provide creditors with an alternative to providing the original credit agreement while protecting the justified desire to provide protections against systemic abuses, SquareTwo encourages the modification of Section A.2 and B.4. of the Summary of Proposed Affidavits to read in their entirety as follows:

A. "Original Creditor Actions.

In an action by an original creditor to collect on a consumer credit debt, the plaintiff must submit the following affidavits based on personal knowledge containing the following information as part of an application for a default judgment:
A True and Correct Copy of Original Agreement governing the account upon which the action is based, and any amendments thereto shall be attached to the Original Creditor's Affidavit of Facts, or the Affidavit shall include the following language:

[2] Subsequent to the passage of the rules, an individual who responds to the summons through answering the complaint will be required to participate in discovery and motion practice in preparation for the trial. This practice could provide alternative ways for the plaintiff to meet its evidentiary burden without the production of the original agreement and amendments. An individual who receives the summons and ignores it will, under the proposed rules, be protected by the rules which require production of documents which may in fact not be preserved for valid reasons and which would not be the exclusive way to satisfy the burden of proof at trial. This incentive to not participate in the judicial process is an unintended consequence of the rules which provides a perverse obstacle to respecting the power of the judicial branch. See, *In the Matter of Landau*, 243 N.Y.S. 732 (N.Y. App.Div. 1930)

"[Name of Creditor] creates its account records at or near the time of the events that they describe, and such records are created either by a person with knowledge of the matters described therein or by an automated process generated at the time of the event described and initiated by a person with knowledge of such events. Such records are made and kept in the ordinary course of business, and it is part of the ordinary course of [Creditor's] business to make and keep such records. According to account records pertaining to [name of Consumer], the account was opened on [insert date] ("Open Date") and the [Consumer] at various times incurred charges and made payments on the account. However, [Consumer] incurred a balance on the account and failed to pay that balance. The date of last payment on the account was [insert date]. The date the [Creditor] charged the account to profit and loss ("Charge-Off") was [insert date]. From Open Date through Charge-Off, the account was maintained in accordance with all applicable laws, including the Fair Credit Billing Act. This includes the distribution of a cardmember agreement and monthly statements with all applicable disclosures as required by Regulation Z. According to [Creditor's] account records, as of [insert date of affidavit], the balance on the account includes charges by the customer as well as interest and other fees assessed in accordance with the terms of the cardmember agreement up through the date of Charge-Off."

The same language should be added to Section B.4. of the proposed rules.

SquareTwo's proposal ensures that the creditor has administered the account in accordance with the underlying agreements in effect at the relevant time and also has complied with the requirements of federal law in terms of billing the account. Thus, the consumer is protected from issues arising out of the administration of the account while not barring the door to the courthouse for litigants who may have compelling reasons for not having physical possession of the agreement and all of its amendments.
SquareTwo submits that the existing rule is flawed because the requirement of producing the original credit card agreement, without an alternative, as a condition precedent to obtaining a default judgment is sub-optimal for four reasons:

1. It misapprehends the nature of a credit card relationship and the documentation of such;
2. It fails to acknowledge the substantial protections which existing law provides to consumer obligors;
3. It fails to recognize the limited obligations of credit card issuers to retain original credit agreements; and
4. It fails to provide the same flexibility as it does to other litigants who do not have possession of original instruments.

The Court Rules Misapprehend the Nature of a Credit Card Arrangement. Unlike typical commercial contracts, a credit card agreement is not an arrangement

that is formed by both parties signing a static agreement. It is well recognized that a credit card relationship constitutes an offer by the credit card issuer that is accepted by the consumer through the use of the card. The contractual relationship is governed by the terms of the credit card agreement which is in effect at the time of the usage. Credit card issuers retain (and regularly exercise) the right to modify the terms of the agreement, and continued usage of the card constitutes acceptance of the modified terms. *Garber* v. *Harris Trust & Savings*, 432 N.E.2d 1309, 1312 (Ill.Ct of App. 1982) quoting *City Stores Co.* v. *Henderson*, 156 S.E.2d 818, 823 (Ga. Ct of App. 1967). See also, *Bank of America* v. *Jarczk*, 268 B.R. 17 (W.D.NY 2001).
The heavy reliance on the card member agreement ignores the principle that even in the absence of an underlying agreement a consumer still has an obligation to pay for goods and services received on credit extended by the bank. *Feder* v. *Fortunoff*, 474 N.Y.S. 2d 937 (N.Y. 1984). See also, *Empire National Bank* v. *Monahan*, 370 N.Y.S. 2d 840 (1975). This principle also applies to the assignees of the bank. *New York and Presbyterian Hospital* v. *Country-Wide Insurance Company*, 934 N.Y.S.2d 54 (2011). See also, *In re Law Book Company, Inc.*, 267 N.Y.S. 169 (App. Div. 1933); *Sunridge Development Corporation* v. *RB & G Engineering, Inc.*, 230 P.3d 1000 (Utah, 2010); *Olvera v. Blitt & Gaines, P.C., 431 F.3d 285, 289 (7th Cir. 2005)* ("the common law puts the assignee in the assignor's shoes, whatever the shoe size"); *Munoz* v. *Pipestone Financial, LLC*, 2006 U.S. Lexus 69949 (U.S.D.C Minn. 2006).

The Court Rules Fail to Acknowledge the Substantial Consumer Protections Already Provided to Debtors. Given the ephemeral nature of the credit card relationship, courts and legislatures alike have been interested in providing substantial protections to both consumers and creditors in the open ended financing arrangement. In 1974, Congress adopted the Fair Credit Billing Act that provides legislative structure to the ongoing relationship between creditor and consumer. For any consumer credit card account, the creditor is required to provide the debtor with an itemized billing statement at least fourteen days prior to the payment due date. 15 USC 1637 (b). The creditors are required on a semi-annual basis to notify consumers of their obligations to review the billing statements and their rights to dispute within sixty days of the date of mailing of the statement as to any inaccuracies 15 USC 1637(a)(7). Once a dispute is received, the creditor has an obligation to investigate the dispute and take appropriate actions if the dispute is meritorious. 15 USC 1666(a). Through this statutory scheme the creditor and consumer are each assured of a way of maintaining accurate account balances. This is sensible because it is during this time, when memories are fresh and purchases are recent that detailed billing statements can best allow for correction of errors.

New York courts have recognized similar principles that support the Fair Credit Billing Act. As the Appellate Division has recently recognized:

> "The plaintiff met its prima facie burden of establishing its entitlement to judgment as a matter of law, tendering evidence that it generated account statements for the defendant in the regular course of business, that it mailed those statements to the defendant on a monthly basis, and that the defendant

accepted and retained these statements for a reasonable period of time without objection, and made partial payments thereon."

American Express Centurion Bank v. *Gabay*, 941 NYS 2d 863, 864 (App. Div. 2012).

Once a consumer defaults under their obligations and the account is placed with a third party collection agency or sold to a debt purchaser, additional protections are added to the benefit of a consumer. Within five days of the initial communication between collector and consumer, the collector is required to provide a written notice to the consumer detailing their rights to dispute the debt, obtain verification of the debt and obtain core information such as the current balance of the obligation. 15 USC 1692g(a). The consumer, if they dispute the account, can obtain additional information relating to the account. 15 USC 1692g(b). The customer also has the right to insist that, with certain narrow exceptions that the debt collector ceases communicating with the debt collector. 15 USC 1692c(c).

These protections are important to consider in the establishment of rules governing the granting of default judgments. Once a court has been assured that the proper parties are present in court through the requiring of strict proof of standing and enhanced service of process rules, then the court should examine the quantum of evidence of necessary to meet the plaintiffs burden of proof in light of these numerous opportunities provided to the consumer to dispute the debt or participate in the voluntary resolution of the contractual obligations of the parties.

The Court Rules Fail to Acknowledge the Limited Retention of Credit Card Agreements. Obtaining the original agreement is not merely an economic difficulty or an administrative burden on lawyers and judges, it may also be a matter of requiring a party to obtain the unavailable. Regulation Z provides a limitation on the amount of time that a national banking association is required to provide credit card agreements. 12 CFR § 226.25 provides for only a two year retention period If a requirement is placed on creditors that requires the production of agreements which is inconsistent with the record retention rules imposed by Regulation Z, the requirement will make it exceedingly difficult to enforce any relationship which began more than 2 years prior to the date of the filing. This means not only that those agreements which default within the last two years but even those agreements that were established more than two years ago on which there was an extended relationship are likely unavailable for production with a motion for default judgment.[3]

The Court Rules Effectively Override the Best Evidence Rule. Courts frequently deal with the circumstance where due to error or age, an original

[3] SquareTwo in no way claims that the original creditors have acted improperly in following the federally directed retention periods. They have merely done what law abiding institutions do throughout our country; follow clearly defined regulations.

contract is unavailable for submission to the court. This circumstance, while regrettable, does not preclude the party from obtaining redress. For example, if an individual brings an action on a lost financial instrument, courts do not preclude recovery. As the Appellate Division has recognized:

> "The fact that a negotiable instrument is lost, stolen or destroyed does not defeat the right of the holder or discharge his interest. The holder may bring suit upon the instrument in his own name just as if the instrument were available for production in court. It is, of course, necessary for him to prove the terms of the missing instrument, and this requires that there be sufficient evidence produced of his ownership of the instrument of and of the facts which prevent its production in court." *Kraft* v. *Sommer*, 387 N.Y.S. 2d 318, 319 (App. Div. 1976) quoting 1 Anderson, Uniform Commercial Code, Section 3-804:3). See also, *Marrazzo* v. *Piccolo*, 558 N.Y.S. 2d 103 (App. Div. 1990).

The lack of an alternative to the provision of original agreements not only effectively bars a class of litigants from meaningful access to the courts, but it also leads creditors to an unsatisfactory choice of (i) foregoing any legal remedy for the breach of contract which defeats a primary purpose of courts (namely to provide redress for aggrieved parties) or (ii) file actions, eschew the right to file default judgment motions, and engage the would be defaulting defendant in attempts at discovery, discovery motions and ultimately a summary judgment motion which the court will need to hear. The first option penalizes a non-breaching party; the second option penalizes both litigants and courts through forcing parties to engage in wasteful processes.

Conclusion

SquareTwo believes strongly in prudent protections for consumers. Prudent rules allow a marketplace to perform while providing significant guideposts for market participants. While SquareTwo agrees with substantially all of the requirements, a rule which inflexibly requires the production of an irrelevant and generally unavailable document not only penalizes the non-defaulting party to a contract but it also rewards those individuals who have the capability but not the willingness to pay their bills to the detriment of the other market participants, including creditors and the vast majority of consumers who comply with their undertakings and need the credit which has been extended.

Very Truly Yours,

Thomas Good, General Counsel
SquareTwo Financial Corporation

Global Debt Registry™
The Chain of Title Company™

2 Mill Road
Wilmington, DE 19806
(866) 660 2341
www.GlobalDebtRegistry.com

May 30, 2014

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: Comment to Proposed Court Rules 22 NYCRR §208.14-a, 22 NYCRR §210.14-a, and 22 NYCRR §212.14-a

Dear Mr. McConnell:

Global Debt Registry ("GDR") respectfully submits this Comment to the Office of Court Administration ("OCA") in response to the proposed amendments to the Rules of the New York City Civil Court, the City Courts outside New York City and the District Courts to require plaintiffs to submit certain form affidavits when seeking a default judgment in consumer credit matters. This Comment shall focus specifically on Proposed Court Rules §208.14-a, §210.14-a, and §212.14-a (collectively, the "Proposed Amendments"), and the corresponding form affidavits required of debt buyers and sellers in the chain of title.

Introduction

The Proposed Amendments signify a dramatic step forward in the effort to protect the rights of consumers in consumer credit litigation matters. Debt collection actions brought by debt buyers have been plagued, in some instances, by sloppy pleading practices and inadequate documentation, resulting in default judgments in cases where the plaintiff lacked sufficient evidence to prove a prima facie case for contractual liability. GDR applauds the OCA's intent in promulgating the Proposed Amendments, and supports OCA's overall goal to promote equal justice for consumers. GDR submits this Comment because we offer a complementary service that is the functional equivalent of the reforms included in the Proposed Amendments, and we seek to have the Proposed Amendments revised and interpreted to permit alternative forms of proof that offer additional systematic benefits that would be unavailable if the Proposed Amendments are applied too rigidly.

There is more than one valid way to prove chain of title to an asset. We believe that the evolution of property law demonstrates that use of a centralized, third party titling system for tracking ownership of assets is the best way – and is a method that has been effectively utilized for tracking ownership of other assets (automobiles, homes, intellectual property, securities, domain names) through the creation of registries like the Department of Motor Vehicles, county land records, the federal Patent and Trade Office, the Deposit Trust Corporation and the ICAAN.

A titling process is an efficient, reliable alternative means of proving account ownership that offers certain benefits not available in the process mandated in the Proposed Amendments. In some instances, registry records may be the only way of proving title if intervening debt buyers and debt sellers of an account are no longer available to complete the required form Affidavit of Purchase and Sale of Account by Debt Seller.

GDR is not a litigant in these matters, and does not collect or buy consumer debts. Since 2005, GDR has acted as a repository for titling information regarding the ownership of consumer accounts that have been sold to and amongst debt buyers. GDR currently allows consumers to confirm the sale or resolution of their accounts free of charge at any time. GDR is designed to resolve the same problems targeted in the Proposed Amendments, but in a manner that is more precisely-tailored to (i) the legitimate interests of consumers for transparency, (ii) the nature of debt sales transactions and related technology, and (iii) the larger national goal of a comprehensive and coherent system for efficient collection of valid consumer debts.

In this Comment, GDR proposes the following:

(1) The requirement of specific form affidavits in the Proposed Amendments should not be applied retroactively to accounts that were assigned prior to June 15, 2014 ("the Effective Date") without permitting alternative means of proof. The Proposed Amendments are an expansion and new addition to the existing legal requirements under Section 3215 of the Civil Practice Law and Rules ("CPLR"), not a mere reiteration. Plaintiffs could not have contemplated these specific forms when completing their transactions, and should be afforded alternative, functionally-equivalent options for proving account ownership.

(2) The Proposed Amendments should be modified to allow alternatives to the OCA's proposed form affidavits in going forward, so long as the alternative evidence provides the same substantive proof required with the necessary indicia of reliability. Allowing flexibility to litigants to prove their claims without mandatory forms is more consistent with revised pleading standards being implemented in other States that are addressing the same problems with debt buyer case, and is also more complementary to the system-wide reforms being considered at the federal level by the Consumer Financial Protection Bureau ("CFPB").[1]

(3) OCA should clarify that the "written assignments" requirement in the Proposed Amendments does not mean that each account must be assigned pursuant to its own, individual contract. Debts are sold in the context of portfolio sales often involving hundreds of thousands of accounts, multiple jurisdictions and multiple types of debt. It is not financially-feasible nor necessary to sell small-dollar debts pursuant to individually-crafted, account-specific contracts. Imposing the obligation of individual assignment contracts would result in the generation of millions of additional documents and affidavits that would have to be submitted to New York courts, and will only increase the likelihood of robosigning.

[1] A modest revision to the Proposed Amendments which would permit alternative means of proving assignments from previous debt buyers in the chain of title is attached hereto in the Appendix.

(4) OCA should consider a pilot program with a titling registry to standardize and digitize processes used in collection matters to increase the efficiency of the court system and the fairness to the respective parties.

Discussion

A. *Titling Records from a Debt Registry Should be Admissible as a Valid Alternative to the Form Affidavits if the Proposed Amendments are Applied Retroactively.*

OCA should permit the use of reliable alternatives to the form affidavits in the Proposed Amendments. While such alternatives should be available whether the Proposed Amendments are applied retroactively or prospectively, such alternative proof is especially compelling in the instance of retroactive application to debt buyers who have relied upon a valid, alternative system for providing the chain of title information sought by the courts. The form affidavits are new forms, and the Proposed Amendments are new requirements under CPLR § 3215(f). Plaintiffs are required to provide an affidavit or verification to support their claims, and it follows from the CPLR that an assignee of claims would also need non-hearsay evidence directly from the original owner of an account to establish the existence of the original contractual relationship and any amount due. But there is no statutory requirement that intervening owners sign a specific form affidavit if the same evidence of chain of title can be provided by a reliable alternative such as a registry that contemporaneously witnessed and validated the assignment. Where a registry that witnessed and recorded the transaction offers evidence of the assignment, parties should be able to submit evidence establishing chain of title even in the absence of an affidavit from each party to the intervening assignment.

CPLR § 3215(f) specifically requires that proof of the facts constituting the claim, the default and the amount due be made "by affidavit made by the party, or where the state of New York is the plaintiff, by affidavit made by an attorney from the office of the attorney general who has or obtains knowledge of such facts through review of state records or otherwise. Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney." CPLR § 3215(f) does not explicitly require an affidavit from any other witness, or favor one witness with personal knowledge of a relevant fact over another, alternative witness with the same personal knowledge.

Under New York law, a defendant who has defaulted has conceded or admitted liability, and the obligations on the party moving for default judgment do not expand beyond the particular requirements stated in CPLR § 3215(f). The Court of Appeals has held:

> 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.[2]

A plaintiff seeking a default judgment is "not required to prove its entitlement to judgment as a matter of law," but is required "only to present sufficient nonhearsay facts to demonstrate the existence of a viable cause of action."[3] Accordingly, there is no required form affidavit other than the plaintiff's affidavit, and there is no specific filing requirement that previous owners of property appear as witnesses or supply affidavits if the facts establishing the chain of title to that property can be supplied through another reliable affiant. Intervening debt buyers had no legal obligation to generate such affidavits at the time of sale, and had no reason to expect that such affidavits affirming the sale would ever be a strict requirement prior to the release of the Proposed Amendments. So long as the Court is provided with reliable information establishing the chain of title, there should be no strict restriction on which witness is permitted to provide the information if the Proposed Amendments are applied retroactively. In the event that intervening debt buyers are no longer available to provide the form affidavits, justice requires an accommodation for plaintiffs who can prove chain of title through the records generated by the titling system.

B. *The Proposed Amendments Should Be Modified to Allow Reliable, Alternative Means of Proof of Chain of Title.*

For similar reasons, the Proposed Amendments should be modified for prospective application after the Effective Date. OCA should permit the use of affidavits from a titling service as an alternative to the form affidavits mandated by the current version of the Proposed Amendments. Such affidavits and registry records are the functional equivalent of the affidavits in the Proposed Amendments. The registry serves as a witness to the underlying assignment of the account, has confirmed the data identifying the account, and has obtained contemporaneous signatures on a document confirming the sale which is also executed by the registry. The registry will therefore have firsthand knowledge of the portfolio sale, and of the fact that a specific account was transferred pursuant to the portfolio sale. The rationale behind accepting such records is similar to the various, enumerated exceptions to the hearsay rule, including exceptions for public records, operative instruments, birth certificates, and business records. In each instance, the reliability of the records and the processes by which they are created vastly outweighs the hearsay concerns attributable to any document, particularly in light of the enormous burden and inconvenience of obtaining live testimony to support every assertion made in a reliable document.

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[2] *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71, 760 N.Y.S.2d 727, 790 N.E.2d 1156, 1162 (2003) (citing *Rokina Optical Co. v Camera King, Inc.*, 63 N.Y.2d 728, 730, 480 N.Y.S.2d 197, 469 N.E.2d 518 (1984)). *See generally*, 7 Weinstein-Korn-Miller, NY Civ Prac ¶ 3215.24.

[3] *State of New York v. Williams*, 73 A.D.3d 1401, 1403, 901 N.Y.S.2d 751, 754 (3d Dep't), *leave denied*, 15 N.Y.3d 709, 909 N.Y.S.2d 24, 935 N.E.2d 816 (2010).

Courts around the country have held that the records of a debt titling service satisfy the requirements for the business records exception to the hearsay rule.[4] The records are generated in the course of business by a person with personal knowledge. A business record will be admissible in New York if that record "was made in the regular course of any business and ... it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (CPLR § 4518(a)). Parties selling accounts that are titled by a registry have a contractual duty both to the registry and to the buyer to provide accurate information about the account being transferred, and the registry also has a contractual, contemporaneous business duty to verify the identity of the account when completing the registration. This process gives a registry's reports "sufficient indicia of reliability to qualify as business records."[5] The evidence is even more reliable because the registry's records are supported by an affidavit from the registry's custodian of records.[6]

The recent experience in other jurisdictions that are instituting similar reforms demonstrates that OCA can accomplish its intended goals of improving pleading practices in collections by debt buyers without mandating the forms. No other State currently requires a particular form affidavit to technically supply the ownership information for intervening buyers, and States that have recently amended their pleading requirements by statute or court rule have not imposed such a requirement.[7] Excessively rigid local forms may also conflict with efforts

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[4] *See, e.g., Runyon v. DH Capital Management, Inc.*, NO. 2011-CA-002033-MR, 2013 WL 2257683 (Ky. App. May 24, 2013) (affirming judgment for debt buyer plaintiff who "provided documentation from the Global Debt Registry"); *Delaware Acceptance Corp. v. D'Aurizio*, No. CPU-09-008370 (New Castle County Court of Common Pleas) (December 2, 2010) (Debt owner prevailed on motion for summary judgment on standing issue, relying on registry's chain of title documents); *Symmetric Acquisitions, LLC v. Troyer*, No. 09 CVF 7891 (Canton Municipal Court, Stark Cty., OH) (February 2, 2010) (registry records supported by live testimony of GDR witness established standing for purposes of judgment).

[5] *Pencom Sys. v Shapiro*, 237 AD2d 144, 144, 658 NYS2d 258 (1997); *see also People v Cratsley*, 86 NY2d 81, 88-91, 653 NE2d 1162, 629 NYS2d 992 (1995) (third-party psychologist's report was a business record where report was prepared for program and state agency, in accordance with agency's program requirements, and counselor for agency was familiar with report); *Corsi v Town of Bedford*, 58 AD3d 225, 230, 868 NYS2d 258 (2008), *leave denied*, 12 NY3d 714, 911 NE2d 860, 883 NYS2d 797 (2009) (company that produced photograph was under a contractual duty to produce photographs according to certain specifications and on a regular basis); *People v DiSalvo*, 284 AD2d 547, 548, 727 NYS2d 146 (2001) (court properly admitted "dump tickets" that third party generated and Westchester County routinely relied upon in creating its invoices); *Plymouth Rock Fuel Corp. v Leucadia, Inc.*, 117 AD2d 727, 728, 498 NYS2d 453 (1986) (where plaintiff used information on delivery tickets to prepare its invoices, delivery tickets were properly admitted as business records although nonparty contract truckers supplied the information on them).

[6] GDR provides its affidavits in conjunction with its reports as its standard practice, even though such affidavits are not a requirement under current New York law. New York law permits the introduction of third party titling records through an affidavit from the plaintiff to prove ownership of the transferred asset. *See, e.g., K&K Enters., Inc. v. Stemcor USA Inc.*, 100 A.D.3d 415, 954 N.Y.S.2d 512, 513 (App. Div. 2012) (permitting introduction of bills of lading created by third party without testimony of the third party since agent had contractual duty to create records which were adopted by the party and appeared to be reliable); *see also, Saks Int'l, Inc. v. M/V "Export Champion,"* 817 F.2d 1011, 1013 (2d Cir. 1987) (holding that documents may be properly admitted "as business records even though they are the records of a business entity other than one of the parties, and even though the foundation for their receipt is laid by a witness who is not an employee of the entity that owns and prepared them.").

[7] See, e.g., California Fair Debt Buying Practices Act, 2013 Cal Stats. ch. 64 (Cal. 2013), available at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0201-0250/sb_233_bill_20130711_chaptered.pdf; Massachusetts

being made by the CFPB to write rules updating the interpretation of the Fair Debt Collection Practices Act -- including the CFPB's public consideration of rules to encourage the widespread use of titling repositories.[8]

C. *The Acceptability of Account Assignments Consummated in Larger Portfolio Sales Transactions Now Requires Clarification, and Executed Registry Reports Provide a Less Cumbersome Source of Evidence of the Written Assignment.*

OCA should eliminate any confusion as to the form that written assignments must take in order to be acceptable proof for a motion for default judgment, and should continue to accept any valid contractual documents that demonstrate that the assignment took place. The Proposed Amendments require that affidavits regarding assignment of an account include "true and correct copies of all written assignments of the account." Nothing in the language of the requirement suggests that new standards are being imposed on the assignments themselves. Accounts are typically sold to debt buyers in the context of large portfolio sales involving thousands of accounts. The contractual documents typically include a bill of sale for the entire portfolio and include lengthy attachments listing all of the accounts being transferred. In instances where debt is not titled by a registry, plaintiffs will often submit a copy of the lengthy portfolio sale documents, with redactions of information concerning other accounts included in the portfolio. The Proposed Amendments appear to merely make production of that portfolio sale document mandatory.

However, the remarks made by Chief Judge Jonathan Lippman at the Law Day announcement of the Proposed Amendments suggest that OCA may be requiring production of individual assignment contracts for each consumer account.[9] Judge Lippman's comments suggest that the typical spreadsheet of accounts attached to a portfolio sale agreement may not be satisfactory to prove the assignment of a particular account, as he announced:

> *Plaintiff debt buyers will be required to submit full and complete documentation in order to make out a prima facie case in support of a default judgment – **no more affidavits that rely on boilerplate language and cryptic data taken from spreadsheets and bulk files that merely list the debtor's account as one among dozens or even hundreds of credit card accounts.** Instead, plaintiffs will be required to submit affidavits from: the original creditor, identifying the specific*

Office of the Attorney General, Debt Collection Regulation, 940 C.M.R. 7.00 and Massachusetts Division of Banks and Loan Agencies, Conduct of the Business of Debt Collectors and Loan Servicers, 209 C.M.R. 18.00; September 8, 2011 Rules Order of the Court of Appeals of Maryland, available at http://www.courts.state.md.us/rules/rodocs/ro171.pdf.; Minn. Stat. § 548.101 (2013); 940 C.M.R. 7. 08(2); *see also* 209 C.M.R. 18.18(2). North Carolina Consumer Economic Protection Act of 2009, 2009 N.C. Sess. Laws 573 (N.C. 2009), available at http://www.ncga.state.nc.us/Sessions/2009/Bills/Senate/PDF/S974v5.pdf. Similarly, the Attorney General of New Mexico recently recommended that the Supreme Court of New Mexico make changes to the procedural rules applicable to debt buyer collection actions, but the proposal does not include restrictive form affidavits. The proposal can be found at https://nmsupremecourt.nmcourts.gov/rules/pdfs/Proposal_30.pdf.

[8] Advance Notice of Proposed Rulemaking by Consumer Financial Protection Bureau, *Debt Collection (Regulation F)*, 78 Fed. Reg. 67,847 (Nov. 5, 2013) *available at* https://www.federalregister.gov/articles/2013/11/12/2013-26875/debt-collection-regulation-f.

[9] The transcript of Judge Lippman's remarks is available at http://www.nycourts.gov/ctapps/lawday13trans.pdf.

account at issue with a copy of the credit agreement; each prior owner of the debt, stating when they purchased and sold the debt and the amount owed at the time of sale; and the plaintiff, stating the amount owed itemized by principal, interest and other charges and the complete chain of ownership of the debt with copies of all written assignments of the debt. (Emphasis added.)

These comments could be interpreted to mean one of two things. Either Judge Lippman was suggesting that the form affidavits in the Proposed Amendments are necessary to provide account-level specificity to the more general language found in the portfolio sale documents, or the Proposed Amendments now impose a requirement for individual, account-specific contracts to consummate an assignment worthy of acceptance in the default judgment setting. This ambiguity needs to be addressed.

As the United States Supreme Court observed when discussing New York law on the assignment of accounts,[10] consumer debts constitute choses in action arising in contract, which are freely-assignable. New York law does not dictate any precise formula for such assignments. All that is required is evidence of the intent to transfer one's rights and a description of the intangible right being assigned sufficient to make it readily identifiable.[11] An assignment takes no particular form and requires only so much of a description of the intangible assigned to make it readily identifiable. The key is the intent of the assignor to transfer specific accounts, and that intent is gleaned from the documents themselves and surrounding circumstances. New York law does not require that consumer accounts be transferred pursuant to individual assignment contracts where the intent to include the sale of the account is set forth in the portfolio sale documents. Nor would imposing such a requirement be desirable, as it would make debt sales and debt collection actions excessively document-intensive, and would likely increase the practice of robosigning when parties are transferring thousands of accounts at a time.

OCA could reduce the burden on plaintiffs and on the courts in the processing and administration of these voluminous submissions in small dollar collection actions by accepting the certified records of a titling registry as a more efficient and user-friendly written means of establishing the assignments. Where registry reports capture the written signature of buyer, seller and the registry itself and clearly set forth the chain of title to the account, courts have the written assignments to establish chain of title in ruling on motions for default judgment. OCA should consider the proposed amendments proposed by the Attorney General in New Mexico, which use alternative language for offering written proof of the assignment. The proposed rules in New Mexico employ the more flexible standard of the submission of "any writing establishing

[10] *Titus v. Wallick*, 306 U.S. 282, 59 S.Ct. 557, 83 L.Ed. 653 (1939)).

[11] 3 *Williston on Contracts* § 404 (Jaeger ed. 1957).

such assignment" – language that could permit the submission of an executed report by a registry as an alternative to the portfolio sale documents or individualized assignment contracts.[12]

D. *Consideration of a Pilot Program for Modernizing the Manner in Which Chain of Title is Proven in New York Consumer Collections Litigation.*

Even if OCA does not alter the Proposed Amendments before the Effective Date, it should consider testing the benefits of utilizing a debt titling registry to simply the processing of debt collection matters involving assigned consumer debt. A pilot program designed to test the benefits of standardizing and digitizing the documentary evidence used to prove sales transactions would be an innovative step towards further modernizing the New York court system.

GDR recommends that any debt titling service included in such a pilot program should possess the following characteristics to best extend the benefits of titling to consumers, industry participants, and the court system:

- Tracks the "chain of title" from the original creditor to the current debt owner for all consumer debts, such as credit card, medical, student, personal loans, auto loans, payday loans, utility bills, telecommunications bills, government fines, mortgage liens, unpaid judgments and taxes.
- Empowers consumers to independently verify the existence of a debt and its ownership history, while also offering permanent written confirmation when an account has been resolved. The registry should have a website providing this information to consumers for free.
- Enhances data integrity by validating, documenting and retaining the business records for each registration and transfer of ownership.
- Provides the original creditor continuous visibility into the ownership status and other information after a debt has been sold or resold.
- Provides a common set of documents which can be used to communicate key information about the debt to all parties, which are admissible in courts, and convey clear information to the consumer.
- Enhances documentation used by third party collection agencies and legal collection firms to address consumer concerns.
- Ensures original creditors, debt buyers, and collection agencies have a tool to provide immediate account-level information to consumers or regulators.
- Reports to regulatory oversight by State and Federal regulators.
- Employs strict security standards.

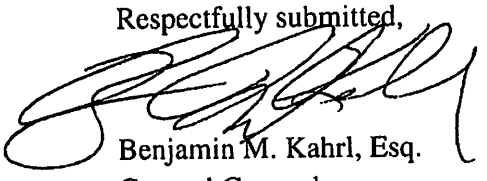
The implementation of a pilot program incorporating these features will encourage confidence in new technologies designed to bring great transparency to debt sales and debt collections, and greater efficiency to the court system.

Conclusion

[12]The proposed revisions to NMRS § 2-201(D)(8), § 3-201(8), and the newly proposed provision § 100.2(B)(8), can be found at https://nmsupremecourt.nmcourts.gov/rules/pdfs/Proposal_30.pdf.

For the foregoing reasons, GDR urges OCA to consider the use of reliable debt titling documents from a registry as an alternative means of proving chain of title to debts. Titling documents also provide a modern, efficient means of satisfying the requirement that written assignments be submitted with an application for default judgment. These alternative sources of proof provide the same substantive information regarding account ownership as the form affidavits, and may be the only evidence available to protect the claims of litigants who utilized a registry process to title debt if affidavits from intervening debt buyers can no longer be obtained. Acceptance of registry records could be implemented with only a minor revision to the Proposed Amendments. We urge OCA to explore the benefits of a pilot program to implement a titling system that could provide enormous progress in the effort to resolve the problems in debt collection matters that are the source of OCA's concerns.

Respectfully submitted,



Benjamin M. Kahrl, Esq.
General Counsel

APPENDIX

Redline of Proposed Court Rules

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

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

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

(a) Applicability. In any action arising from a consumer credit transaction, a default judgmcnt 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.

(b) Where the plaintiff is the original creditor, the plaintiff must submit the AFFIDAVIT OF FACTS BY ORIGINAL CREDITOR and the AFFIDAVIT OF NON-EXPIRATION OF STATUTE OF LIMITATIONS.

(c) Where the plaintiff has purchased the debt, the plaintiff must submit the 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, the AFFIDAVIT OF FACTS AND PURCHASE OF ACCOUNT BY DEBT BUYER PLAINTIFF and the AFFIDAVIT OF NON-EXPIRATION OF STATUTE OF LIMITATIONS. As an alternative to the AFFIDAVIT OF PURCHASE AND SALE OF ACCOUNT BY DEBT SELLER, plaintiff may substitute an affidavit from a titling registry or other competent witness who can provide nonhearsay evidence of the sale of the debt to each debt buyer who owned the debt prior to the plaintiff.