JOSEPH RUBIN (1927-1994)
KEITH H. ROTHMAN[1]

DAVID K. KOWALENKO[1,2]
Managing Attorney
New Jersey Office
190 NORTH AVENUE EAST
P.O. BOX 8
CRANFORD, N.J. 07016

MARY LACOSTE
DIRECTOR OF OPERATIONS

RUBIN & ROTHMAN, LLC

ATTORNEYS AT LAW
1787 VETERANS HIGHWAY SUITE 32
P.O. BOX 9003
ISLANDIA, N.Y. 11749
TEL (631) 234-1500

FAX (631) 234-1138

MICHAEL K. JOHNSON[1]
DAVID K. KOWALENKO[1,2]
JOSEPH LATONA[1]
AARON DEACON[1]
SUBY MATHEW[1]
ERIC S. PILLISCHER[1]
FRANK ROTHMAN[1]
SCOTT H. RUMPH[1]
ANGELO L. SIRAGUSA[1]

[1]MEMBER N.Y. BAR
[2]MEMBER N.J. BAR

X REPLY TO N.Y. OFFICE
_ REPLY TO N.J. OFFICE

May 29, 2014

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

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

Dear Sir:

I. INTRODUCTION

We thank the Office of Court Administration for the opportunity to provide comments to the "Proposed Reforms Relating to Consumer Credit Collection Cases" ("the Proposed Reforms"). Rubin & Rothman, LLC is a creditor's rights law firm whose core values include the fair and ethical treatment of all participants in the debt collection process. We represent many direct lenders such as national banks and local credit unions, indirect lenders such as auto-finance companies, as well as local businesses. Although we represent some debt purchasers, this letter concerns the impact of the Proposed Reforms on direct and indirect lenders.

Judge Lippmann noted in his Law Day remarks that the Proposed Reforms are primarily intended to apply to "third party debt buyers who routinely purchase large portfolios of delinquent credit card debt - often for pennies on the dollar - and then commence lawsuits against individual debtors based on little more than boilerplate language and a few fields of data from a spreadsheet." Judge Lippmann went on to note that "all too often, these credit card debts are several years old, have been resold multiple times, and critical documents like the original credit agreement and accounts statements are missing."

None of these alleged practices exist when the party seeking to collect the loan is a direct or indirect lender. Direct and

indirect lenders have loaned the principal amount sought to be recovered, have not purchased portfolios of delinquent debt and have all account records. Judge Lippmann has recognized the difference between debt buyers and direct lenders by proposing different requirements for each.

II. THE PROPOSED REFORMS MUST CLEARLY DEFINE WHO IS A DEBT BUYER

A. "Consumer Credit Transaction" Applies to a Wide Range of Credit Transactions

The term "Consumer Credit Transaction" applies to "a transaction wherein credit is extended to an individual and the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes." N.Y. C.P.L.R. 105(f) (McKinney). This definition is liberally construed to prevent abuses to consumers. *See*, Executive Department Memorandum, 1973 McKinney's Session Laws of N.Y., at 2171-2172; 2 Weinstein-Korn-Miller, NY CivPrac ¶ 503.16. As a result, it is common practice for law suits filed for a large range of credit transactions to be filed as a "Consumer Credit Transaction." This includes a wide variety of credit transactions, including auto-finance loans, student loans, medical services and many others. If the intent of the Proposed Reforms is to cover credit card transactions, we respectfully recommend applying the reforms solely to "Revolving Credit Transactions."

B. The Proposed Reforms do Not Define Debt Buyer

Although the Proposed Reforms have different requirements for "debt buyers" and "original creditors," they fail to define what type of transaction creates a "debt buyer." Rather, section (c) of the Proposed Reforms simply states that affidavits are required from the original creditor, each debt seller and the debt buyer plaintiff "where the plaintiff has purchased the debt." As we shall see, this construction is vague and overly broad and risks an interpretation that could include transactions that do not involve debt buyers and were never intended to be included in section (c).

The language contained in the affidavits adds to this ambiguity. The template for the "Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff" and the "Affidavit of Purchase and Sale of Account by Debt Seller" ambiguously reference the date the debt buyer "purchased or was assigned the Account" (¶2). These terms risk being interpreted in a manner that could apply to many

creditors who are not debt buyers, as that term is generally understood.

C. Debt Buyer Defined

The Proposed Reforms build on the chain of title affidavits set forth in Directive DRP-182 (Default Judgments on Purchased Debt) from the Civil Court of the City of New York. The official form for an "Affidavit of Sale of Account by Original Creditor" included therein, which is signed by the original creditor of the account, says the following about accounts sold to a debt buyer:

> On or about ____(date)_____ (creditor) sold a pool of Charged off accounts (the Accounts) by a Purchase and Sale Agreement and a Bill of Sale to _____ (debt buyer). (emphasis supplied)

N.Y.C. Admin. Code §20-489(a), which requires collection agencies and debt buyers to be licensed, similarly defines debt buyers as follows: "'Debt collection agency' shall mean a person engaged in business the principal purpose of which is to regularly collect or attempt to collect debts owed or due or asserted to be owed or due to another and shall also include 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 supplied).

Hence, the Civil Court defines a debt buyer as an entity that has purchased "Charged off" accounts, while N.Y.C. Admin. Code §20-489(a) defines a debt buyer to include a buyer of "delinquent debt." Both agree that the rules governing licensing and chain of title affidavits only apply to purchasers of defaulted receivables.

In January 2014, California made effective the Fair Debt Buying Practices Act, which is intended to protect consumers from many of the same perceived abusive tactics by debt buyers as the Proposed Reforms. The act clearly defines debt buyer to only include purchasers of charged-off debt:

> (a) As used in this title:
>
> (1) "Debt buyer" means a person or entity that is regularly engaged in the business of purchasing charged-off consumer debt for collection purposes, whether it collects the debt itself, hires a third party for collection, or hires an attorney-at-law for collection litigation. "Debt buyer" does not mean a person

or entity that acquires a charged-off consumer debt incidental to the purchase of a portfolio predominantly consisting of consumer debt that has not been charged off.

(2) "Charged-off consumer debt" means a consumer debt that has been removed from a creditor's books as an asset and treated as a loss or expense." (emphasis supplied)
Cal. Civ. Code § 1788.50 (West)

D. The Failure to Define "Debt Buyer" Risks Unintended Outcomes

The Proposed Reforms do not define the term "debt buyer" other than to make passing reference in the affidavits indicating that the debt buyer "purchased or was assigned the debt." However, many financial transactions that do not involve the acquisition of a defaulted receivable by an entity that is in the business of collecting debt could be erroneously thought to involve a "purchase" of debt. For example, it may appear that a debt was "purchased" or transferred from one entity to another even though it was not sold to a debt buyer in the following common situations:

1. CORPORATE MERGER: The current creditor may have acquired an account through a corporate merger. Following a merger, the original lender and current creditor become one and the same entity. The loan may have been made by one of the predecessor entities and the merged entity incorporated the business records of the original lender into its own. The account may not have even have been in default when the merger took place. Clearly, the merged entity cannot be considered a "debt buyer" and should not be held to the same requirements as a "debt buyer." However, without a definition of "debt buyer," a court clerk could easily believe that the merged entity "purchased or was assigned" the account and may require an affidavit from the entity that originally made the loan.

2. CORPORATE ACQUISITION: The current creditor may have acquired an account through a corporate acquisition. In an acquisition, a predecessor entity is acquired by the successor entity. The predecessor entity may have directly extended credit to the customer and the successor entity incorporated the business records of the predecessor lender into its own. The account may not have even been in default when the acquisition took place. Clearly, the successor entity cannot be considered a "debt buyer" and should not be held to the same requirements as a "debt buyer." However,

without a definition of "debt buyer," a court clerk could easily believe that the successor entity "purchased or was assigned" the account and may require an affidavit from the entity that originally made the loan.

3. AUTO LEASES AND CONTRACTS: When a customer enters into a lease or retail installment contract to purchase a vehicle from an auto dealer the contract explicitly states that the dealer may transfer the account to a specified lender. The dealer then simultaneously assigns the loan to the lender specified in the lease or retail installment contract. This is the standard practice of virtually all auto lenders. The loan agreement is typically on a form prepared by the lender and the lender provides the capital required for the loan and services the loan, creating a relationship with the customer. The business records maintained for the loan are entirely those of the lender. Yet, the lack of an explicit definition of a "debt buyer" could result in the clearly erroneous belief by a court clerk that the account was purchased from or assigned by the dealer. In such event, it will be impossible for an auto lender to get affidavits from thousands of dealerships, who have no obligation to provide them, and many of which are now defunct.

4. GUARANTEED STUDENT LOANS: Private student loans are often guaranteed by a private business. Upon default, the original lender will assign the note to the guarantor. The guarantor hasn't purchased the student loan for "pennies on the dollar" but rather provided a legitimate service that lowers the cost of credit. However, it is not clear how these requirements would be applied in this circumstance. While the guarantor has clearly not purchased the loan, would the guarantor be required to obtain an affidavit from the original lender, which may now be defunct, to exercise its right to enforce obligations through the courts of this state?

Hence, the lack of a definition of "debt buyer" will make it impossible for the court clerks to determine which set of affidavits must be submitted by a creditor. This will create administrative confusion, inconsistent application and limit access to the courts.

E. The Proposed Reforms Should be Modified to Clearly Define "Debt Buyer"

We respectfully request that the Proposed Reforms be modified to include a definition of "Debt Buyer." The definition of "debt buyer" and "charged-off" account forth in California's Fair Debt

Buying Act appear to be highly suitable for this purpose. These definitions emphasize that a debt buyer "regularly" purchases "charged-off" accounts for collection purposes and clearly distinguish debt buyers from original creditors.

III. THE FORM AFFIDAVITS

A. Background

The Proposed Reforms contain a requirement that the plaintiff "must submit the Affidavit of Facts by Original Creditor." Proposed Reforms, §§208.14-a, 212.14-a, 210.14-a (c). The forms require that both original creditors and debt buyers provide an itemization of the amount owed. This itemization requires that the balance due be broken down by principal, interest, fees and charges (Affidavit of Facts By Original Creditor at par 4). The forms also require the plaintiff attach "all documents modifying the interest rate or fees applicable to the account." Id at 4.

B. Federal Law Governs the Charge Off of Accounts by Credit Card Issuers

Congress has already preempted regulation of credit issuers. *See* Consumer Credit Protection Act, 15 U.S.C. §1601-I(A)(a). The Truth-in Lending Act, Regulation Z, requires creditors to send periodic statements to consumers for credit card accounts. The statements must disclose the balance at the end of the billing cycle, the previous balance due at the start of the billing cycle and all transactions, credits and finance charges incurred throughout the billing cycle. The consumer has 60 days from receipt of the statement to challenge any charge. Federal regulations allow finance charges consisting of interest and fees to be added to the total balance due on the account. The contract between the creditor and consumer discloses that interest and fees become part of the next month's principal balance.

Pursuant to federal regulations promulgated by the Office of the Comptroller of Currency and Federal Financial Institutions Examination Council Rules, a financial institution must charge-off a credit card account where no payment has been received within 180 days. The bank "charges-off" the entire outstanding balance due on the account. The charge-off balance includes principal, interest, fees and charges and becomes the new principal balance due on the account. The charge-off balance is maintained by all creditors, and it is disclosed to all consumers in the form of a statement provided to the consumer by the creditor pursuant to the Fair Credit Billing Act. It is also typically the amount that creditors use when

selling accounts to third party debt buyers. The federal courts have recognized this amount as the principal balance due by consumers when an account is bought by a third party. *See, e.g., Wahl v. Midland Credit Management, Inc.*, 556 F.3d 643 (7th Cir. 2009).

C. New York Courts Recognize the Reliability of Bank Records

The First and Second Departments have held that certain business records such as bank statements and monthly statements regarding the balance due on a loan are self-authenticating and do not require the foundational testimony of a witness to admit them into evidence. *See Thomas v. Rogers Auto Collision*, 69 A.D.3d 608 (2d Dept. 2010); *Merrill Lynch Business Financial Services, Inc. v. Trataros Const., Inc.*, 30 A.D.3d 336 (1st Dept. 2006); *Elkaim v Elkaim*, 176 AD2d 117 (1st Dept. 1991). Accordingly, the charge-off balance is a highly reliable and consistent starting place upon which to require any disclosure.

D. The Fair Debt Buying Practices Act Recognizes the Reliability of the Charge-Off Balance

California's new "The Fair Debt Buying Practices Act" relies on an itemization of interest and fees postcharge-off. First, the act does not allow a debt buyer to make a written statement to a debtor unless the debt buyer possesses:

> (2) The debt balance at charge off and an explanation of the amount, nature, and reason for all post-charge-off interest and fees, if any, imposed by the charge-off creditor or any subsequent purchasers of the debt. This paragraph shall not be deemed to require a specific itemization, but the explanation shall identify separately the charge-off balance, the total of any post-charge-off interest, and the total of any post-charge-off fees. Cal. Civ. Code § 1788.52 (West)

Next the act requires that the complaint allege the following in any suit brought on behalf of a debt buyer:

> (4) The debt balance at charge off and an explanation of the amount, nature, and reason for all post-charge-off interest and fees, if any, imposed by the charge-off creditor or any subsequent purchasers of the debt. This paragraph shall not be deemed to require a specific itemization, but the explanation shall identify separately the charge-off balance, the total of

any postcharge-off interest, and the total of any post-charge-off fees. Cal. Civ. Code § 1788.58 (West) (emphasis added)

E. The Required Balance Itemization and Agreements Are Overly Burdensome and Contrary to State Law

The Proposed Reforms require the original creditor to submit an affidavit of facts that includes a "summary of the amount debtor allegedly owes, including an itemization of how the amount was calculated based on principal, interest and fees and charges" (Unified Court System Memorandum dated April 30, 2014, Exhibit "A," Paragraph "A[1][c]"). In addition, the Proposed Reforms require that "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" (Unified Court System Memorandum dated April 30, 2014, Exhibit "A," Paragraph "A[2]"). These requirements are overly burdensome and contrary to the requirements of the CPLR and existing case law.

The requirements of the CPLR are clear. CPLR 3215(F) requires "proof by affidavit made by the party of the facts constituting the claim, the default and the amount due." The court does not simply rubberstamp a submitted judgment. Rather, some proof of liability is required to satisfy the court of the validity of the cause of action. 4 Weinstein, Korn and Miller, *New York Civil Practice,* ¶¶ 3215:22-27. "This minimal requirement is necessary to assure the court that the action has a jurisdictional basis." Zelnik v. Bidermann Indus. U.S.A., Inc., 242 A.D.2d 227, 228, 662 N.Y.S.2d 19 (1997). However, "the standard of proof is not stringent, amounting only to some first-hand confirmation of the facts" Joosten v. Gale, 129 A.D.2d 531, 535, 514 N.Y.S.2d 729, 732 (1987).

The party seeking the entry of a default judgment meets their burden of proof by establishing a prima facie cause of action. "The legal conclusions to be drawn from the applicant's complaint and factual allegations are reserved for the court's determination, and the court retains the discretionary obligation to determine whether the applicant has met the burden of stating a prima facie cause of action." Dyno v. Rose, 260 A.D.2d 694, 698, 687 N.Y.S.2d 497, 501 (1999), citing *Green v. Dolphy Constr. Co; see also, Zelnik v. Bidermann Indus. U.S.A.,* 242 A.D.2d 227, 230, 662 N.Y.S.2d 19; *Lippman v. Hines,* 138 A.D.2d 845, 525 N.Y.S.2d 955; Muhlhahn v. Triple Cee Bar & Rest. Supply Co., 133 A.D.2d 996, 997, 521 N.Y.S.2d 146, 147 (1987); *Silberstein v. Presbyterian Hosp. in City of N.Y.,* 463 N.Y.S.2d 254; 7 Weinstein-Korn-Miller, N.Y.Civ.Prac.§§ 3215.24, 3215.27.

While it is the affidavit of facts that sets forth the facts underlying the claim, it is the default that "constitute[s] an admission of all the factual allegations of the complaint (including the basic allegation of liability) and all reasonable inferences therefrom." Dyno v. Rose, 260 A.D.2d 694, 697, 687 N.Y.S.2d 497, 501 (1999), citing Rokina Opt. Co. v. Camera King, 63 N.Y.2d 728, 730, 480 N.Y.S.2d 197, 469 N.E.2d 518; Silberstein v. Presbyterian Hosp. in City of N.Y., 95 A.D.2d 773, 774, 463 N.Y.S.2d 254; *see also*, Muhlhahn v. Triple Cee Bar & Rest. Supply Co., 133 A.D.2d 996, 997, 521 N.Y.S.2d 146.

IV. THE AFFIDAVIT FORMS MUST BE MODIFIABLE

The Proposed Reforms indicate that "where the plaintiff is the original creditor, the plaintiff must submit an "Affidavit of Facts by Original Creditor" (emphasis supplied) in a prescribed format. A plaintiff should not be expected to sign a boilerplate affidavit without the ability to alter the language used in the affidavit to fit the circumstances of the lawsuit. For instance, a plaintiff may wish to add more detail regarding the circumstances of their procedures for maintaining the account. Or, the plaintiff may want to specify in greater factual detail the circumstances of the account opening. As credit grantors come under increasing scrutiny by federal regulators, many wish to create more detailed and transparent affidavits for national use.

In addition, the Affidavit of Facts by Original Creditor has content that is not applicable to all creditors. The Affidavit of Facts by Original Creditor indicates that it must be signed by an "employee/officer/member" of Plaintiff" who has "personal knowledge and access to plaintiff's books and records . . . relating to the account." However, most major creditor grantors utilize servicing agents to manage their credit operation, including opening the account, issuing credit, posting payments, mailing statements, maintaining the balance and retaining attorneys to represent the creditor upon default. As a result, the individuals who have personal knowledge of the facts are not plaintiff's employees but employees of the servicing agent. The Affidavit of Facts by Original Creditor does not allow for this scenario.

Furthermore, the required form does not permit the plaintiff to describe the relationship between the servicing agent and plaintiff, which is necessary if the court is to determine whether the affiant is the proper person to execute the affidavit.

Accordingly, we respectfully recommend that the Proposed Reforms be amended to require "an affidavit that meets the factual

elements" of the required affidavit template but is not a verbatim copy of the document. Please see the annexed red-lined rules.

V. CONCLUSION

The Proposed Reforms require a creditor to retroactively "deconstruct" the charge off balance into its constituent components even through the charge off balance is recognized by Federal law as the new principal balance. To retroactively break down the charge off balance in connection with a revolving credit account that may have been opened 20 years ago will require a massive programming project on the part of all creditors who intend to utilize the New York State courts.

Small creditors, such as credit unions, may not be able to afford this programming and large creditors will take months and even years to complete it. Meanwhile the statute of limitations will expire on many existing debts. The practical effort of such a requirement would be to permanently bar credit unions and other small creditors from the courthouse door while, at least, temporarily barring large creditors.

The requirement that a creditor provide a retroactive balance itemization and attach what could be years of account agreements to an affidavit raise the evidentiary burden far beyond that of establishing a prima facie case. Rather, these requirements upend a century of established case law and statutory authority and improperly limit access to the courts of this state.

The social implications of the Proposed Reforms should not be ignored. Word will soon spread by word of mouth and through the press that loans made to New York consumers need not be repaid, with the result that interest rates will rise as financially solvent consumers are required to pay the debts of those who take advantage of the Proposed Reforms.

Finally, the lack of a definition of "debt buyer" will make it impossible for the court clerks to determine which set of affidavits must be submitted by a creditor.

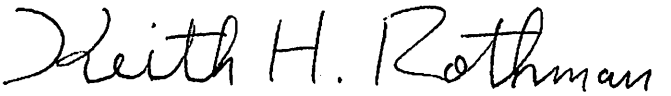
Accordingly, we request that the Proposed Reforms be modified to utilize the crystal clear definition of "debt buyer" and "charged-off" account forth in California's Fair Debt Buying Act. These definitions emphasize that a debt buyer "regularly" purchases "charged-off" off accounts for collection purposes and clearly distinguish debt buyers from original creditors.

Similarly, we request that the affidavits of facts required by the Proposed Reforms only include the charge-off balance, the total of any post charge-off interest and the total of any post charge-off fees in the manner set forth in California's Fair Debt Buying Practices Act, as well as limiting the documentation requirement to the existing agreement.

In addition, if the intent of the Proposed Reforms is to cover credit card transactions, we respectfully recommend applying the reforms solely to "Revolving Credit Transactions."

Finally, we ask that an original creditor be allowed to modify the "Affidavit of Facts by Original Creditor" in order to explain facts that may be unique to that creditor as long as the final version meets all requirements set forth in the Proposed Reforms.

Very truly yours,



KEITH H. ROTHMAN

KHR/js
Enclosure

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~~ revolving credit transaction, a default judgment shall not be entered against the defendant unless the plaintiff has complied with the requirements of CPLR 3215 and submitted the affidavits required under this section.

(b) Definitions:

(1) "Debt buyer" means a person or entity that is regularly engaged in the business of purchasing charged-off consumer debt for collection purposes, whether it collects the debt itself, hires a third party for collection, or hires an attorney-at-law for collection litigation. "Debt buyer" does not mean a person or entity that acquires a charged-off consumer debt incidental to the purchase of a portfolio predominantly consisting of consumer debt that has not been charged off.

(2) "Charged-off consumer debt" means a consumer debt that has been removed from a creditor's books as an asset and treated as a loss or expense."

(~~b~~c) Where the plaintiff is the original creditor, the plaintiff must submit an affidavit that meets the factual elements of the AFFIDAVIT OF FACTS BY ORIGINAL CREDITOR and the AFFIDAVIT OF NON-EXPIRATION OF STATUTE OF LIMITATIONS.

(~~c~~d) Where the plaintiff ~~has purchased the debt~~is a Debt Buyer, the plaintiff must submit an affidavit that meets the factual elements

Comment [FMR1]: This revision is suggested to ensure that the Proposed Reforms apply only to law suits that relate to credit cards if that is the intent of the reforms. Consumer Credit Transaction is defined as "a transaction wherein credit is extended to an individual and the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes." N.Y. C.P.L.R. 105(f) (McKinney). Consumer credit transactions include medical services, auto-finance, student loans and myriad other financial transactions.

Comment [FMR2]: This revision is suggested to ensure that the Proposed Reforms are not erroneously applied to law suits brought by plaintiffs who are not "Debt Buyers." This reform will ensure much needed clarity to the Proposed Reforms and prevent unintended outcomes, administrative confusion and ensure fair access to the courts for parties who are not "Debt Buyers."

Comment [FMR3]: This revision is suggested to make clear that the affidavit template can be modified.

Comment [FMR4]: This revision is suggested to call the earlier definition of "Debt Buyer."

Comment [FMR5]: This revision is suggested to make clear that the affidavit template can be modified.

of 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.

AFFIDAVIT OF FACTS BY ORIGINAL CREDITOR
(Original Creditor Actions)

The undersigned, being duly sworn, deposes and says:

1. I am a/an _____ *[title: employee/officer/member]* of Plaintiff herein and I have personal knowledge and access to plaintiffs books and records, including electronic records, relating to the account ("Account") of _____ *[name of debtor]* ("Debtor"). The last four digits of the account number of the Account are_____ *[last four digits]*. In my position, I also have personal knowledge of Plaintiffs procedures for creating and maintaining its books and records. Plaintiffs records were made in the regular course of business and it was the regular course of such business to make the records. The records were made at or near the time of the events recorded. Based on my review of Plaintiff's books and records, I have personal knowledge of the facts set forth in this affidavit.

2. On or about _____ *[date]*, Plaintiff and Debtor entered into a credit agreement ("Agreement"). Debtor agreed to pay Plaintiff for all goods, services and cash advances provided pursuant to the Agreement. The amount of the last payment made by Defendant was $ _____made on ____[date]. Debtor is now in default and demand for payment has been made.

3. *[Include this paragraph if seeking judgment on an account stated cause of action.]* I have personal knowledge of Plaintiffs procedures for generating and mailing account statements to customers. It is the regular practice of Plaintiff's business to provide periodic account statements to its customers. Plaintiff sent one or more account statements relating to the Account to Debtor and Debtor retained the account statement without objection.

4. At this time, Debtor owes $____on the Account. This amount includes a charge-off balance of $_____ ~~in principal~~, $_____in post-charge- off interest, and $_____ in post-charge-off fees and charges. A true and correct copy of the Agreement~~, as well as all documents modifying the interest rate or fees applicable to the Account,~~ is attached as an exhibit to this affidavit.

Comment [FMR6]: This revision is suggested to ensure that only post-charge off itemization is required.

Comment [FMR7]: This revision is suggested to ensure that only a copy of the agreement is required.

WHEREFORE, deponent demands judgment against Debtor for $____(plus interest from____*[date]*, if applicable), together with the costs and disbursements of this action.

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

Dated:_____ _____*[Name]*

Sworn to before me this__day
of_____, 20_

_____
Notary Public

Comments to Chief Judge Lippman's 2014 Law Day Proposals

Chief Judge Lippman's proposals are well intentioned. However, it is clear that the Judge consulted only with consumer groups, and not with creditor groups. I strongly recommend input from, and consultation with, experts representing both sides, who can suggest solutions and ascertain any potential ramifications which may be unintended or not readily foreseeable. This provides the most complete picture of any situation.

One of the three rules proposed by Judge Lippman requires an additional mailing of the Summons and Complaint by Court clerks. I have no opposition to this. I have not found this procedure, which was implemented several years ago by the City Court of the City of New York, to have impacted the amount and frequency of default judgments to any measurable degree. Personally, I feel that service of process should be conducted by the Court by certified mailing of all initial pleadings, as in New Jersey. Alternatively, the utilization of modern GPS devices to record the location of service of process goes a long way to deter fraud by process servers and should be implemented statewide.

The next area affects purchased debt. The proposed requirement of obtaining affidavits of sale from debt sellers should only be applied prospectively, for any debt that is sold after the implementation of these rules. Requiring said documents *ex-post facto, i.e.,* after the sales have already taken place, places a potentially insurmountable burden on assignees. Debt sellers may be unable, unwilling or unavailable to execute affidavits of sale after the closing has already taken place. This requirement also makes purchased debt that has yet to be sued upon worthless and detrimentally affects the purchasers of such debt who entered into good faith transactions under the current rules.

The last, and most significant, item is the new proposed requirement that an affidavit of facts be submitted in consumer credit cases. Currently, the law provides that, "Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due...." NY CPLR 3215(f). The proposed rules change the law by adding new requirements, including, but not limited to, the submission of the following items to the clerk with the application for default judgment: (a) an itemization of how the debt was calculated based upon principal, interest and fees; (b) the date and terms of the original agreement; and (c) true and correct copies of the original card member agreement, together with any amendments thereto.

Perhaps it would make more sense to require the production of the last account statement. However, I cannot fathom how copies of the original card member agreement and any amendments thereto would aid a consumer defendant or the court. In practicality, how would a clerk who examines an application for default judgment know whether the documents submitted are the correct card member agreements or whether any amendments have been made thereto? Said agreements are not executed by the applicant or the financial institutions. They are generally printed in small hard to read type and enclosed in the envelope accompanying the credit card when initially sent to the consumer.

Consider, hypothetically, the circumstances presented with respect to an account that was opened many years ago. For illustrative purposes, I obtained my American Express Card during my first year in college in 1984. I have been in good standing for the last 30 years. What would happen if financial constraints suddenly caused me to default? If American Express pursued a lawsuit against me, the new rules would require it to submit the original card member agreement from 30 years ago, plus any amendments (American Express often issues two or three amendments per year). These documents would amount to approximately 2 inches of paper, inundating the Courts and the Clerks who already have little time to read these documents, let alone find the shelf space to store them. How would this benefit the process? What information would the Clerk glean from these documents? Perhaps the submission of such documents should only be required if the Plaintiff is seeking suit fees or interest over and above the 9% statutory interest.

If these rules were implemented as proposed, and financial institutions were unable to produce these card member agreements in total, what options would banks have to recover on unpaid accounts? Modern America is a credit based economy. We use credit to make purchases rather than accumulate cash in savings. Most people appreciate and utilize the benefit of credit and remit their obligations timely. It is only the relatively minor percentage of people (less than 5%) who default. However, such defaults amount to trillions of dollars. The proposed rules have a far reaching effect upon the remainder of consumers (95%) who are not in default and maintain their current accounts in good standing.

The mergers of financial institutions result in the potential loss of documents held by or originated with the primary institution after sale to secondary or tertiary institutions. A recent experience of mine underscores the effect of the proposed rules. When I opened my law practice, I obtained a credit line, issued by National Bank of North America, to cover cash flow challenges. This institution was taken over by National Westminster Bank, which was taken over by Fleet Bank, which is now Bank of America. The current bank may be unable to locate the original credit application that governed the original credit line, if one even existed. In order to protect against the need to produce documentation should I default, taking into account the proposed rules, my current bank declared that they would no longer offer this credit line to me, that they were terminating this product, and thus, my account. However, the bank offered me a new product, for a one year term to be reviewed each year for renewal and an annual fee to be paid each year, at a similarly competitive introductory interest rate, which would be variable. The bank offered to transfer the outstanding balance from my existing credit line to this new line of credit. I had to execute a new written credit application and agreement and provide financials in order to obtain the new line of credit. Otherwise, my existing line of credit would be closed as of July 1 and the balance would then have to be **paid in full**. Coming up with the balance due of about $50,000.00 would create a hardship for me.

If the promulgated rules were to take effect, banks would have no alternative but to terminate existing credit lines and credit card accounts and require their customers to either pay them off in full or open up brand new lines of credit. By doing so, banks will be able to obtain and maintain copies of all the necessary documents and comply with the new proposed documentary requirements. This would also allow the banks to recover higher interest rates upon default, and attorney fees, which are now often waived in consumer credit and purchased debt matters due to the lack of such documents, thus providing deep discounts to consumers. What other alternative would financial institutions have, under the newly proposed rules, in order to avert the detrimental effects of being unable to recover on the remaining current accounts in good standing, should those account holders default? Only by possessing these new account documents, would the banks be able to recover the full amounts due, plus interest and attorney fees, without any troublesome issues of lack of proof.

Imagine if one day, banks suddenly advised their customers that they would be closing their existing credit card accounts or lines of credit and then required every current credit account to be paid in full. This would be devastating to our economy! While new accounts could be established, their terms would undoubtedly be more favorable to the financial institutions. Moreover, such an act would cause significant panic to consumers, at best, and a major economic crash, at worst...and the cause may be these well intentioned rules. I am certain that this is not what our Chief Judge would desire as this would certainly not be in the best interest of all consumers. In the Court's attempt to help a small percentage of consumers whom have allegedly defaulted on their financial obligations, significant damage would be caused to the vast majority of consumers who pay their debts timely.

These rules are far more than just rules. They change our long standing well established laws. They have a significant and far reaching impact upon our economy and upon current banking practice, legal practice and procedure. I welcome the opportunity to meet with the Chief Judge and/or his designees to further discuss these matters and assist in developing other solutions to these or any other issues that may arise in the future.

Todd Houslanger, Esq. is the current President of the Consumer Credit Association of Metropolitan New York, Inc. [CCAMetroNY.org] a NY not for profit corporation. He is a Board Member of the Commercial Lawyers Conference Collection Bar (CLC), a member of the National Association of Retail Collection Attorneys (NARCA), the Creditors Interchange Association (CIA), the Association of Credit and Collection Professionals (ACA), the American Bar Association (ABA), the Nassau and Suffolk Bar Associations (where he served as Chairman of the Creditor Rights Law Committee) and is a past President of the Huntington Lawyers Club. He is a Court Examiner in Nassau County and is in private practice with offices in Huntington and Westchester. Contact information: Todd E. Houslanger, Esq., HOUSLANGER & ASSOCIATES, PLLC, 372 New York Avenue, Huntington, New York 11743 631-427-1140, TEH@TODDLAW.COM

MSH
MEL S. HARRIS AND ASSOCIATES, LLC

Scott E. Wortman
Partner
212.660.1060
swortman@melharrislaw.com

May 30, 2014

Via Email: rulecomments@nycourts.gov

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

Re: COMMENTS BY MEL S. HARRIS AND ASSOCIATES, LLC TO THE COURT'S PROPOSED REFORMS RELATING TO CONSUMER CREDIT COLLECTION CASES

INTRODUCTION

On behalf of this law firm, our employees and their families and other individuals and companies associated with this field, including our current roster of clients, which includes both global financial institutions and small business owners, Mel S. Harris and Associates, LLC, ("MSH" or "law firm"), is writing this letter in response to the Court's proposed reforms relating to consumer credit collection cases. MSH is a New York law firm specializing in creditors' rights with a primary practice of consumer debt collection and creditors' rights defense litigation, serving as Regional Insurance Defense Counsel, while also managing the nationwide defense litigation and compliance for other collection agencies and debt buyers. This firm is also the author of the White Papers for New York Debt Collection Laws, published by the National List of Attorneys.

POINT I. NO ONE SHOULD BE DENIED DUE PROCESS PROTECTIONS

In his Law Day Remarks, the Chief Judge expressly stated "No one should be deprived of the roof over their head without these kinds of basic due process protections." However, based on the

Court's proposed reforms, the credit and collection industry, which employs thousands of taxpaying New Yorkers, will potentially suffer an extreme and permanent fate of business extinction and mass layoffs without first being afforded that same guarantee. In contrast to the instant proposed reforms, when the original civil court directives for judgment entry on purchased debt (DRP-182) first went into effect, although the effective date of the regulation was 5/13/2009, the directive *only* addressed the entry of judgments where the debt was purchased by the plaintiff after 9/1/2009. Even though the DRP-182 requirements significantly increased the standards set forth by CPLR § 3215 for judgment entry, there was at least a promulgation and notice period that allowed creditors, law firms and purchasers of distressed receivables the ability to prospectively modify their existing policies and procedures to comply with the rules. Here, there is no such grandfathering clause, which would mean that if a debt was purchased *consistent with* all the requirements expressly addressed and directed by the Civil Practice Law and Rules and DRP-182, the debt/property would be completely extinguished and no longer have any value. Further, while the proposed rules require drastic changes to already existing rules that already govern this heavily regulated industry, they shouldn't also force companies such as small law firms and local businesses that specialize in the credit and accounts receivable industry to go out of business simply because there's no opportunity afforded to implement the proposed changes. As currently worded, these proposed regulations, especially those related to the requirements for individualized contemporaneous affidavits from original creditors and copies of original agreements that never existed in the first place[1], simply amount to a *debt amnesty bill*, which will eventually lead to significant unintended consequences, specifically adversely impacting potential credit for those consumers the rule purports to benefit. The procedural due process required by the U.S. Const., 14th Amendment, the N.Y. Const., Art. I § 11, amongst other requirements, is not simply a statutory right, but a moral and ethical right that should not be looked at unsympathetically and without

[1] As many credit cards and loans are now opened electronically on the internet, among other things.

sensitivity to those protected by these safeguards, including the credit and accounts receivable industry. Although supporting this unpopular but necessary industry may not be politically prudent, this industry should not be singled out as being forced to lose substantial property as a matter of an arbitrary and selective enforcement contrary to 42 U.S.C. § 1983.

Point II. THE OVERLY BROAD, AMBIGUOUS AND UNCONSTITUTIONAL CONSUMER CREDIT FAIRNESS ACT SHOULD NOT BE A MODEL FOR THESE PROPOSED COURT RULES

Based on the Chief Judge's comments, much of the impetus behind these proposed reforms seems to stem directly from the proposed New York Consumer Credit Fairness Act. Interestingly, on 5/28/2014, when the sponsor of the Bill, Hon. Helene Weinstein, was posed a question regarding distressed receivables purchased prior to implementation of the bill as it relates to this industry and the thousands of people employed by this industry, her sole response was "I guess they're out of luck." This statement is diametrically inapposite to the Chief Judge's stated concerns with basic due process protections, which is why this law firm still remains hopeful that at least the intention is for these proposed rules to be applied prospectively rather than retroactively with an eye towards fairness to all.

Point III. IF THE RULE IS APPLIED RETROACTIVELY IT WILL EXTINGUISH SIGNIFICANT AND UNRECOVERABLE PROPERTY

A primary rule of statutory construction is that a new statute [or rule] is to be applied prospectively, and will not be given retroactive construction unless an intention to make it so can be deduced from its wording. *30 E. 33rd Realty LLC v. PPF Off Two Park Ave. Owner, LLC*, 105 AD3d 515, 963 N.Y.S.2d 106, 107 (1st Dept. 2013). Moreover, a postponement of the effective date of a statute is strong evidence that the Legislature did not intend for it to be retroactive. *O'Connor v. Long Island Rail Road*, 63 AD2d 1015, 1015, 406 N.Y.S.2d 502, 503 (2nd Dept. 1978), appeal dismissed, 48 NY2d 668, 421 N.Y.S.2d 880, appeal dismissed, 48 NY2d 605, 424 N.Y.S.2d 1025 (1979); *Stroud v. State*, 184 Misc 2d 876, 878, 711 N.Y.S.2d 305, 306 (Ct. Cl. 2000). Here, without an express indication that the proposed rule only addresses the entry of judgment where the debt was

purchased by the plaintiff at some reasonable point in the future, I fear the rule will be governed and administered retroactively, thereby further extinguishing significant and unrecoverable property. Similar to DRP-182, we humbly recommend that if this proposed rule takes effect, that it only addresses the entry of judgments based upon the defendant's failure to answer on consumer credit actions where the debt was purchased by the plaintiff after 4 months from the proposed rule's effective date.

Point IV. THE PROPOSED RULES ARE NOT BASED ON QUANTIFIABLE INFORMATION AND DO NOT TAKE INTO ACCOUNT THE PLETHORA OF STATUTES, RULES AND GOVERNING BODIES ALREADY REGULATING THIS HIGHLY SCRUTINIZED INDUSTRY

After reading the proposed reforms, I am alarmed and concerned by the prospect of entering a judicial system where change is prompted by anecdotes and generalized fear rather than quantifiable empirical reality. Under the current system, in addition to CPLR § 3215 and a plethora of federal requirements, in May 2009, due to an acknowledged change in how lenders collect or recoup defaulted or charged off debts, Deputy Chief Administrative Judge Fern A. Fisher issued a Civil Court Directive (DRP-182), that increases the requirements for entry of a default judgment based upon the defendant's failure to answer on a consumer credit action, where the debt was purchased by the plaintiff after 9/1/2009. As a result of DRP-182, in addition to the requirements listed under CPLR § 3215, a debt buying plaintiff must submit the following supplemental affidavits:

- An Affidavit of Sale of Account by Original Creditor completed by the original lender,
- If an account which has been purchased is subsequently sold to another debt buyer an Affidavit of the Sale of the Account by the Debt Seller must be completed by the seller. There shall be one Affidavit of the Sale of the Account by the Debt Seller for each sale, and
- An Affidavit of a Witness of the Plaintiff, which includes a chain of title of the accounts, completed by the plaintiff/plaintiff's witness.

Although these additional requirements are comprehensive and complex, they are realistic in protecting consumers, and well principled in treating charged off debts that are subsequently

sold as an asset with value. This Civil Court Directive provides uniformity and consistency, and promotes positive change while balancing the rights of all parties involved in a consumer credit transaction. We should not forget that as laws require banks to charge off debt that is delinquent more than 180 days, purchasers of distressed receivables play an important role in the consumer lending process by returning owed money to the original lenders, thereby allowing lenders to focus on what they do best – lending, as opposed to collecting – while protecting the ability of responsible people to get the credit they need to maintain, ease, and improve their quality of life.

Of course, this is all highly regulated, especially by the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., ("FDCPA") and similar state and municipal regulations and laws putting clear restrictions on what steps a debt buyer or collection law firm may take. As well, in NYC, there are various regulations that protect individuals from wrongfully obtained default judgments, such as the administrative code's technology requirements for process servers, and the New York Civil Court Directive requiring an additional court mailing of pleadings to a defendant. Point being, these proposed rules do not appear to have a sound basis in fact and are even inconsistent with the already highly regulated nature of the industry. By way of example, regarding the Chief Judge's reference to "zombie debts" ("whether [the consumer] actually owes the debt at issue") as the genesis of this proposed reform, there is simply no evidence to support the "zombie debt" allegation or conclusion. In fact, in reading through each and every one of the 122 consumer complaints filed in New York federal courts during April 2014 alone, there is not one example of an allegation that even impliedly claims a debt to be a "zombie debt" or a problem stemming therefrom. Considering the fee shifting provisions available under the FDCPA and various other state statutes governing this industry, there is no doubt that a consumer attorney would stand to benefit from bringing such allegations on behalf of an allegedly injured consumer. Yet, due to all the already heightened regulations and scrutiny by both the state and federal governments, there is not one example of this objectively unsubstantiated rationale. Rather, these consumer complaints, primarily based under

the FDCPA, mostly regard alleged technical violations of the FDCPA (i.e., a debtor's daughter accessing a compliant telephone message left for the debtor, a collection letter which omitted a required word, etc) and usually claim severe emotional distress and other maladies as a result. In this regard, as stated by Hon. Harold A. Ackerman, Senior United States District Judge for the District of New Jersey in an opinion he authored while sitting by designation in a matter heard by the Sixth Circuit (*Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504 (6th Cir. Ohio 2007))[2]:

> "Ironically, it appears that it is often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by [the FDCPA], not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the 'widespread and serious national problem' of abuse that the Senate observed in adopting the legislation, 1977 U.S.C.C.A.N. 1695, 1696, nor to ferret out collection abuse in the form of 'obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.' Id. Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs."

See also, *Majerowitz v. Stephen Einstein & Assocs.*, P.C., 2013 U.S. Dist. LEXIS 115664 (E.D.N.Y. Aug. 15, 2013); *Murphy v. Equifax Check Servs.* Inc., 35 F.Supp.2d 200, 204 (D. Conn. 1999); *Miller v. Javitch, Block & Rathbone*, 561 F. 3d 588 (6th Cir. 2009); *Cohen v. American Credit Bureau, Inc.* 2012 U.S. Dist. LEXIS 33687; and *Lemire v. Wolpoff & Abramson*, LLP, 256 F.R.D. 321 (D.Conn. 2009). By advancing these proposed reforms, especially without any realistic prospective opportunity for implementation, we are simply adding additional causes of action for "professional plaintiffs" as opposed to assisting those consumers in need.

To that end, this firm responsibly represents various professional and ethical creditors throughout the country that do business in New York that simply seek uniformity and balance (such as DRP-182). Although this rule does offer uniformity, there is no semblance of balance when the proposed rules solely rely on the voices of what appears to be the same self-proclaimed

[2] Quoting from *Jacobson v. Healthcare Fin. Servs., Inc.*, 434 F. Supp.2d 133, at 138 (E.D.N.Y. 2006)

consumer attorneys that published the unsubstantiated and flawed study entitled *Justice Disserved*, which has seemingly been the genesis of numerous manufactured consumer lawsuits against this industry. As it turns out, the paralegal (Herman De Jesus) responsible for this "research" did not bother to actually review the details of any of the 124,838 cases he referenced in the report – admitting that he "could not determine the exact number of default judgments entered in these cases" (thus solely using ECourts while conflating the generic and multi-purpose term "disposed" with "default").

Again, considering consumer attorneys stand to financially benefit from these proposed rules, there should be balance in hearing from creditors and members of this bar specializing in creditors' rights prior to proposal and certainly prior to implementation. Rather than entertaining anecdotes and the mythology of the zombie debt, sewer service, wrongfully frozen bank accounts, hearsay allegations, cases brought outside the statute of limitations, unwarranted default judgments, unknown and un-cited Attorney General actions, and un-published ex parte complaints from the consumer bar, we humbly urge you to take the more principled approach of researching and verifying the actual numbers and facts. Further, we humbly request that you to take a step back and consider the bigger picture; that not all, or even close to all, debt collectors/collection law firms are the unscrupulous enemy that the consumer bar paints, and that they serve a necessary purpose in facilitating a healthy credit market and economy, even to the federal and state governments. To that end, there is no prejudice to any individual by delaying this especially short comment and implementation period to further study the actual foundation for the regulation, especially with so much at stake, where the alternative would be the swift death knell for this industry.

Point V. THE PROPOSED RULES ARE INCONSISTENT AND CONTRADICT CPLR § 3215 AND ARTICLES 31 & 45

This proposal is inconsistent with the entire concept behind the driving force for a judgment on default under § 3215 for a sum certain amount (the lack of a responsive pleading by

defendant) and is contrary to findings of courts throughout the United States. *See, Harvey v. Great Seneca Financial Corp.*, 2005 WL 1669355 (S.D. Ohio 2005), affirmed, 453 F.3d 324 (6th Cir. 2006); *Davis v. NCO Portfolio Mgmt., Inc.*, 2006 WL 290491 (S.D. Ohio 2006); *Deere v. Javitch, Block & Rathbone, LLP*, 413 F.Supp.2d 886 (S.D. Ohio 2006); *Clark v. Unifund CCR Partners*, 2007 WL 1258113, *3-*4 (W.D. Pa. Apr. 30, 2007); *Nickoloff v. Wolpoff & Abramson, L.L.P.*, 511 F. Supp. 2d 1043, 1045 (C.D. Cal. 2007); *Pack v. Unifund CCR Partners, G.P.*, 2008 WL 686800 (M.D. Fla. Mar. 13, 2008); *Kelly v. Great Seneca Financial Corp.*, 443 F. Supp. 2d 954 (S.D. Ohio 2005); *Heintz v. Jenkins* (1995) 514 U.S. 291, 295-296; *Smith v. Transworld System, Inc.*, 953 F.22 1025, 1032 (6th Cir. 1992); and *Lipa v. Asset Acceptance, LLP*, 70 Fed.R.Serv.3d 1096 (E.D. Mich. 2008). Similar to these cases, we have followed all the rules as they have existed for numerous years, but are now being punished for following those very rules, and not being able to prognosticate the proposed new rules, which, as stated, have the effect of simultaneously voiding all contracts, sales, debts and transactions. Furthermore, these proposed rules are contrary to the fact that New York does not require an assignee/debt buyer to possess hard copy transactional history, and that a debt buyer can rely on electronic data dating back to the original creditor as a reasonable basis for a collection case as well as an affidavit of merit.[3] In fact, bringing suit and moving forward with a judgment on default on an assigned or purchased credit card debt is an action that legally can be taken; and the fact that the assignee of a credit card debt does not acquire the entire documentary record when the debt is assigned does not deprive the debt of its legitimacy, nor its right of action on the debt. Likewise, the volume of paper accompanying the assignment has no bearing on whether the party will or will not prevail at trial. This is because of the uncontroverted fact that New York law permits proof of an account claim to come from business records, oral testimony and discovery responses. See CPLR, Article 45, and see specifically § 4518; and NYS Technology Law § 302.

[3] Which underscores the inherent flaws in the argument; it is not as if your office will disregard this response by virtue of the fact that it is being submitted electronically with an e-signature.

By the simple statutory definition of a default,[4] a defendant does not respond to the complaint, which in turn prevents plaintiff from moving forward with litigation specifically to the benefit of the discovery process. Accordingly, if a defendant defaults, a creditor plaintiff does not have the advantage of receiving full disclosures as provided under Article 31 of the CPLR.[5] It seems that this proposal is seeking to hold plaintiffs responsible for not fully pursuing litigation against defendants without actually having an opportunity to pursue litigation. If a defendant responds to a complaint, there is a mandatory disclosure of all evidence and material necessary in the prosecution or defense of the action regardless of the burden of proof. See *Allen v Cromwell-Collier Publ'g. Co.* (*Allen v Cromwell-Collier Publ'g. Co.*, 21 N.Y.2d 403 [1968]); *Kooper v Kooper*, 901 N.Y.S.2d 312 [2nd Dept. 2010]), and Sinosky v Sinosky, 26 A.D.3d 874, at 875; 809 N.Y.S.2d 743, at 744 [4th Dept. 2006].

Point VI. <u>THERE IS NO EVIDENCE OF "SEWER SERVICE" AND THE PROPOSED RULES SHOULD NOT BE PREMISED ON ANTIQUATED ANECDOTAL INFORMATION</u>

The rules appear to be premised on the erroneous belief in the existence of sewer service, which was thankfully rendered as an impossibility by the industry years ago with the usage of basic technology. In fact, under rules mandated by the NYC Department of Consumer Affairs and various statewide agreements with the Office of the Attorney General, which has been in effect since 2010, law firms specializing in accounts receivable litigation are responsible for mandating that process servers are equipped with smart phones capable of embedding date, time and image along with a GPS locator. Upon an attempt at service, the process server is responsible for taking a photograph which transmits an email to the law firm containing the defendant's account number, the time of service, immediate location of the process server and an image of the service location taken by the process server's smart phone. What's more, in order to guarantee a valid address, most law firms

[4] See CPLR § 3215(a).
[5] *See Welch v American Employers Ins Co*, 25 AD2d 598, at 599; 267 NYS2d 38, at 40 [3rd Dept. 1966].

use a variety of professional skip tracing sources. As well, consistent with CCM-184[6], since 2010 official NYS DMV searches are utilized prior to attempting effectuation of service of process. Furthermore, and most importantly, the NY City Civil Court System has been providing notice to defendants before the entry of any default judgment since April 2008. See CCM-176. In fact, "no default judgment based on defendant's failure to answer shall be entered unless there has been compliance with this subdivision and at least 20 days have elapsed from the date of mailing by the clerk." See 22 NYCRR 208.6(h). There is only so much that can be done to persuade a consumer to respond to a complaint seeking the collection of a debt that they have already been avoiding for so many years. The fact that consumers continue to ignore legal process regarding debts, even after receiving correspondence directly from the courts, is unfortunately the reality of the process that will never be overcome and cannot be unfairly deflected to the credit and collection industry. Thus, for these reasons and others, the conclusion and proposed rules stemming from the "nefarious practice of sewer service" is unsupported, inaccurate, and based on antiquated and inapplicable information.

Point VII. THE CURRENT WORDING OF THE AFFIDAVIT OF NON-EXPIRATION OF STATUTE OF LIMITATIONS SHOULD MIRROR CCM 186-A

Additionally concerning is that the affidavit of non-expiration of statute of limitations will simply lead to a greater amount of FDCPA lawsuits brought by self-proclaimed consumer attorneys. Currently, under CCM 186-A, an attorney must state that "after reasonable inquiry, he/she has reason to believe that the statute of limitations has not expired." This is consistent with the narrow holding of *Portfolio Recovery Associates, LLC v. King*, 14 N.Y.3d 410, 927 N.E.2d 1059, 901 N.Y.S.2d 575 (2010), which does not address a limitation scenario wherein the state of incorporation and principal place of business are in different states. However, the decision does not provide guidance in a statute of limitations analysis for various other grey areas that the affidavit seems to expect to

[6] The judgment clerk will accept as a valid address the address of the defendant(s) on a Certified Abstract of Driving Record issued from the New York State Department of Motor Vehicles. CCM-184.

be averred with factual certainty. For example, it does not address the subject of national banks, which have articles of association, a creature of federal law, that are easily distinguishable and different from articles of incorporation. The question is how can an attorney sign an affidavit swearing to the residency of an entity, primarily a legal conclusion, without the court's absolute guidance on the issue, especially where it could reasonably be subject to more than one supported interpretation? In fact, unlike the presumed state of incorporation analysis proffered by this regulation, the sole residency of a business entity for the purpose of the New York borrowing statute is its principal place of business rather than the state of incorporation. In *Antone v. General Motors Corp.,* 64 N.Y.2d 20, 30, 484 N.Y.S.2d 514, 473 N.E.2d 742 (1984), the Court of Appeals held that the "term 'residence' [as] employed in the CPLR ... is not equivalent to domicile," and that the test of residency is "whether the plaintiff has a residence in New York" or "whether he has a significant connection with some locality in the State as the result of living there for some length of time during the course of a year." All related decisions by federal courts have extended *Antone* by reasoning that, if state of incorporation does not govern, residency must instead be determined by a corporation's principal place of business. However, taken to its logical conclusion, the proposed court rule's position would potentially treat quintessentially New York establishments, such as the New York Stock Exchange, Madison Square Garden, the Empire State Building, and countless others, as non-residents, merely because they are organized in other states. Further, due to the ambiguity of the proposed form affidavit regarding the term "resides," any creditor attorney would be potentially opening themselves up to liability under the strict liability provisions of the FDCPA, even if the statute of limitations inquiry and statement is supported and reasonable. Also, the form affidavit does not take other considerations into account, such as applicable out-of-state tolling statutes and citing any relevant on-point authority.

CONCLUSION

This law firm and our clients have made significant changes and invested substantial monies into fulfilling all the new rules and regulations from the CFPB to the New York Civil Court system. The instant proposed rules and the genesis of those rules as referenced on *Law Day do not* reflect the reality of this industry and the microscope we are already under. If anyone in this industry forgets to dot an "i" or cross a "t" they are immediately served with a summons and complaint with class allegations and vicious personal attacks primarily based on the goal to build enormous fees from gratuitous protracted litigation. Likewise, even without a typographical error, all it takes is a consumer to say that a third party opened their mail or overheard a phone conversation and a lawsuit is immediately filed. What will not be found are any recent cases consistent with the hurtful statements aimed at this industry as part of the remarks made on Law Day.

It is our strong opinion that, if positive, justified, and worthwhile change is the goal, that the Court system should make every effort to hear from both sides of the fence and strive to uphold the values and virtues of both the United States Constitution and the New York State Constitution. I fully understand that certain groups have been recklessly exaggerating allegations against this industry in support of a false narrative, but the proposed regulations go much further than simply disparaging this industry and the dedicated New Yorkers that work as credit and collection professionals, while serving an important purpose in society. If these regulations take effect without change, they will lead to unprecedented consequences for the dedicated workers in this industry while also adversely impacting consumers at large that are dependent on all forms of credit in this credit and consumer based market economy.

As a leader in this industry, our law firm looks forward to continuing the dialogue on the important matter of compliance and quality, and we value the integrity of the Court and the role it plays in taking an unbiased and factually intensive and legally sound position on this and other

matters. We are hopeful that these comments are useful in further studying and analyzing evidenced based best practices and that any proposed changes are entirely prospective while maintaining consistency with the tenets of due process of law.

Thank you for your attention and consideration of the foregoing.

Respectfully submitted,

/S/ Scott E. Wortman
Mel S. Harris and Associates, LLC
By: Scott Wortman, Esq.
5 Hanover Square, 8th Floor
New York, NY 10004
(212) 660-1060
swortman@melharrislaw.com

KIRSCHENBAUM & PHILLIPS, P.C.
ATTORNEYS AT LAW

40 Daniel Street, Suite 7, P.O. Box 9000
Farmingdale, NY 11735-9000

TEL: 516.746.1144
FAX: 516.742.2735

May 30, 2014

VIA Electronic Mail to rulecomments@nycourts.gov

John W. McConnell, Esq.
NYS Unified Court System
Office of Court Administration
25 Beaver Street, 11th floor
New York, New York 10004

Re: OCA Proposed Reforms Relating to Consumer Credit Collection Cases

Dear Mr. McConnell,

Please consider the following comments on the Office of Court Administration's proposed reforms (hereinafter "the Reform") relating consumer credit collections cases. Kirschenbaum and Phillips, P.C. is a debt collection law firm with over fifty years of experience of advocating for creditor's rights while maintaining high standards in compliance with state and federal laws to promote integrity in the collections industry. Our clients consist of direct lenders, collection agencies, medical professionals, purchasers and servicers of debt, and the general business community. Many of our clients have been with us for decades, confirming the confidence and trust they have in our abilities.

We respectfully agree with and adopt the official comments of the Commercial Lawyers Conference of New York, and the New York Bankers Association, and submit the following additional comments on the Reform's silence on its prospective statutory application, Fair Debt Collections Practices Act consequences, as well as the conflict of the Reform with federal regulations of chartered national lenders.

Prospective Application of the Reform

Appositely, the objective of the court's proposed Reform is to broaden consumer protection by expunging debt collection practices that infringe upon consumers' due process rights, while balancing the need for effective litigation so that creditors can collect on debts contractually entered into and duly owed by consumers. This objective is best served by a prospective application of the Reform. After careful consideration we are of the position that any application of the Reform in a retroactive capacity would emphatically counter the court's aim, as the Reform modifies evidentiary requirements and sets new precedent for both litigants as well as the courts to adhere to. The rules should be applied prospectively.

Specifically, any proposed retroactivity of the Reform could have a chilling effect upon the integrity of the judicial process; a process that litigants have always relied upon and should still have the confidence to rely upon without having the end result of their prior resolution being undone. In further consequence, retroactive application of the Reform jeopardizes the finality of satisfied judgments, compels defendants to re-litigate previously resolved disputes, and otherwise disintegrates the current reliance that parties have upon consistent court procedures. In contrast, prospective application of the Reform promulgates clear application of lawsuit requirements for all creditors and consumers alike, and avoids inconsistent and multifarious pronouncements of current court administration procedures that would result from retroactive construction of the Reform. As such, it is humbly submitted that the Reform should only be applied prospectively.

Fair Debt Collections Practices Act Implications

The Federal Fair Debt Collections Practices Act (hereinafter "FDCPA") provides consumers with substantial safeguards in communications with creditors and establishes comprehensive protocol for commercial and consumer debt collection entities to comply with. Failure to strictly adhere to the confines of the FDCPA has costly ramifications for both creditors and their counsel; as such, it is respectfully submitted that the proposed Reform fails to consider the impact that its statutory construction has upon creditors who must adhere to FDCPA regulations. Specifically, the proposed Reform exposes creditors and their counsel to harmful and superfluous class action lawsuits premised upon failures to adhere to the FDCPA by virtue of ex-post facto application of the Reform. In point of fact, the filing of the matter of Steven Italiano et al. v. Midland Funding, LLC et al., on May 16, 2014, is evidence that class action suits have already begun to distend at the heels of the proposed Reform and Judge Lippman's pronouncement. (see *Steven Italiano et al. v. Midland Funding, LLC* et al., United States District Court, Eastern District of New York, under Index No. CEC-11 0006838).

Document Retention Requirement

As currently proposed, the Reform mandates that creditors keep records of all statements, all original terms and conditions, as well all amended terms and conditions retained by the consumer in their credit agreement, for a period in excess of the twenty-four month directive of Regulation Z of the Federal Truth In Lending Act (hereinafter "TILA"). Consequently, the new mandate could have the effect of penalizing creditors for their adherence to federal law which requires that records be maintained for duration of two years, and have a dire effect on the climate of lending in New York State. Banks might find it easier to just reduce or refuse lending in New York, which would decrease competition. Increasing competition is a net gain for consumers as a whole, and is otherwise integral to the lending industry.

In addition, the proposed Reform substantially increases the amount of documents that must be retained and submitted by creditor's to obtain judgments on default. Therefore, we adopt the New York Bankers Association's commentary that the proposed changes limit the number of documents to be submitted when entering judgment. To require documents from the inception of the opening of an account, which could range decades, would create great difficulty for the court system. Each judgment application would be accompanied by hundreds of pages of documentation. The judiciary staff would inevitably be overwhelmed in not only volume of documents in processing judgments, but also with the cumbersome task of preserving such voluminous documentation and making same available to the public in an expedient manner. Unreasonable delay is anticipated in both processing and entering judgments with the current requirements of the Reform. Particularly, the court could be exposed to potential lawsuits and liability if the delay in docketing a judgment directly hampers a party's right of recovery.

Also to be considered is the fact that if a lender were unable to produce all of the documents suggested by the Reform, the lender may never be able to enter judgment and recover the debt owed. This may result in the unintended consequences of banks limiting credit to consumers or raising interest rates to those consumers who are not otherwise in default, to spread the effect of the lender's losses. This would have unanticipated widespread economic consequences that extend beyond the judicial system.

Summary

One of the fundamental principles of the legal system is reliability. As such it is important for both creditors and consumers to know that once a decision has been made, they can rely in confidence that their legal issue is resolved with finality. Applying this Reform retroactively will set a precedent of unreliability that will undermine the ultimate goal of the legal system and infringe upon due process implications of fair notice and opportunity to be heard. In closing, we join the court's effort to enhance consumer protection in collections litigation and support maintaining the integrity of the judicial system in New York State. It is after detailed consideration that we firmly adopt the comments of both the Commercial Lawyers Conference of New York, and the New York Bankers Association and incorporate the aforementioned comments to the OCA Proposed Reforms Relating to Consumer Credit Collection Cases.

Respectfully submitted,
Kirschenbaum & Phillips, P.C.

By: Irwin S. Kirschenbaum

LACY KATZEN LLP
Attorneys at Law

DAVID D. MACKNIGHT
Attorney
▪ *Direct Line* 585.324.5724
▪ *Direct Fax* 585.269.3047
▪ *Email* dmacknight@lacykatzen.com

May 30, 2014

Via email (rulescomments@nycourts.gov) and 1st Class Mail

Unified Court System
25 Beaver Street
11th Floor
New York, New York 10004

Re: Rules for proposed reforms relating to consumer credit collection cases

Attn: John W. McConnell, Esq., Counsel

Dear Mr. McConnell:

This letter responds to the Unified Court System's invitation to submit comments dated April 30, 2014 relating to the above-referenced matter.

General Comments:

1. Certain of the proposed rules appear on their face to contradict or amend the existing provisions of Civil Practice Law and Rules ("CPLR") §3215(a) and controlling case law, including, but not limited to Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 70-1 (2003) which provides:

> 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 (see 7 Weinstein-Korn-Miller, NY Civ. Prac. ¶3215.24 at 32-326). Indeed, defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them (see Rokina Opt. Co. v. Camera King, 63 N.Y.2d 728, 730 [1984]).

The proposed rules meaningfully exceed the requirements for CPLR 3215(a) and (b). U.S. Bank, N.A. v. Rozon, 2014 NY. Slip. Op. 01602 (2nd Dept. 2014) notes that a party's right to a default judgment after a party's failure to answer or appear is governed by CPLR §3215.

2. CPLR §3215(a) permits entry of a default judgment in an action, "If the plaintiff's claim is for a sum certain or for a sum which by computation can be made certain,..." CPLR §3215(f) provides for supporting proof, which "may be used as the affidavit of the facts..." The

word "may" in CPLR §3215(f) is permissive with the plaintiff. On the other hand, under CPLR §3215(a) where the "requisite proof" is submitted, "The clerk...shall enter judgment..." The word "shall" in a statute is a legislative word of command. In Re Barbieri, 199 F.3d 616, 619 (2nd Cir. 1999). CPLR §§ 3020 and 3021 provides for verification and the form of affidavit for verifications. The affidavits under the proposed rules are much more detailed than the CPLR §3021 form of affidavit. No one could justly or reasonably assert that the proposed affidavits and the CPLR §3021 affidavits are synonymous or, put in other words, that one could be exchanged for or replaced by the other without any change in meaning. To the contrary, there is much in the proposed affidavit that is not in the CPLR §3021 affidavit. Nor would it be fair to assert, that there is little difference between the CPLR §3021 affidavit and the proposed affidavit, that is, they are close enough alike for "government work" and, therefore, justifiable court procedural rules.

3. There is a second, related concern arising from the CPLR and the proposed rules. The CPLR §107 authorizes official forms which "...shall illustrate the simplicity and brevity of statements which the civil practice law and rules contemplate." The official forms created to date are, indeed, simple and brief. CPLR §3013 provides for general forms of pleadings. All this rule requires is to give notice of the substance of the complaint and, if notice is given, does not require evidentiary fact or detail. CPLR §§ 3015 and 3016 provide when particularity in pleading is required. The requirement for particulars is limited and does not extend to the type of actions and specific matters proposed in the rules. When notice pleading and the form of verification authorized, indeed, encouraged by the Legislature are taken together, a question arises of whether the proposed rules override, thwart, or defeat the law providing for notice pleading enacted by the Legislature, which laws courts must enforce and uphold. CPLR §102 provides that rules may be amended or rescinded "by act of the Legislature." Rule 102 also provides the rules shall not abridge or enlarge "the substantive rights of any party." Court rules that burden or impede or add materially to the requirements thought sufficient by the Legislature may simply lead to attempts to invalidate or evade the proposed rules by anyone objecting to them.

4. The CPLR's provisions lead to the conclusion that the Legislature has enacted the procedural protections it deems proper for consumer debtors so that additional unenacted rules are in violation of the Legislature's prerogatives to set procedural rules. See, CPLR §305(a), §317, and §4544. The Legislature has not chosen to enact further consumer protections or to create a two-tiered system for a) consumer credit litigation rules in inferior courts and b) all other contract claims. Instead, CPLR §101 provides that in the absence of inconsistent legislation the CPLR "...shall govern the procedure in civil judicial proceedings in all courts of the state..." Once again, the "shall" in the quoted language appears mandatory, not an invitation to exercise discretion.

5. There is a third concern. The proposed rules, which are undoubtedly intended to be procedural, reasonably may be viewed as having substantive effect, especially by limiting a cause of action for an account stated. First, an account stated does not require proof of the original or amended contract, but, instead, proof that an account has been stated and accepted, whether actually or impliedly. Interman Ind. Prod. Ltd. v. R.S.M. Electron Power, Inc., 37 N.Y.2d 151, 153 (1975) explains:

> "As was stated nearly one hundred years ago by Chief Judge Folger, "[a]n account stated is an account balanced and rendered, with an assent to balance express or implied; so that the demand is essentially the same if a promissory note had been given for the balance" (Volkening v. DeGraaf, 81 N.Y. 268, 270).

6. Interman fails to create any implication that the original agreement or any agreement need to be produced, merely that there is some agreement on which the balance due has been agreed. It is for this reason careful pleaders serve account stated claims seeking interest at the legal rate as if there was a note providing for interest for use of the money with no rate specified. Second, the proposed rules fail to take into account the existing common law of a cause of action on an account stated. Chisholm-Ryder Co. Inc. v. Sommer & Sommer, 70 A.D.2d 429, 431 (4th Dept. 1979) and Morrison, Cohen, Singer and Weinstein LLP v. Waters, 13 A.D.3d 51, 52 (1st Dept. 2004) recognize that payments on an account stated can create an account stated as well as retention of the statement without objection for more than a reasonable time. For the reasons stated above, the proposed rules have a substantive effect by requiring more than required by law as it now exists to obtain a judgment and by failing to recognize a viable right of recovery after partial payment(s) on the account.

7. There is a fourth concern. The proposed rules have an economic impact that is a matter properly subject to legislative regulation, not judicial discretion. CPLR §104 provides that the CPLR shall be "...liberally construed to secure the just, speedy, and inexpensive determination of every civil proceeding." The quoted language is the fundamental legislative purpose of the CPLR. The Legislature enacted the fundamental objectives of "just, speedy, and inexpensive determination" using that most basic conjunctive "and." The use of "and" in fixing legislative policy calls for the application of each of the purposes at all times as co-equals. It may be worthwhile to consider why he Legislature could be concerned about speed and expense, in addition to some an abstract sense of justice standing alone. One of those concerns may have been historical leadership of New York in national economic affairs. Efficient, timely, inexpensive legal proceedings are an aid in maintaining New York's economic pre-eminence with the benefits for the state entailed in that standing. A second legislative concern may have been to avoid the drag of a legal superstructure that impaired New York's local or international economic growth and, thereby, attract funds for investment.

8. Practitioners question whether the proposed rules are calculated to attain the goals of speedy and inexpensive determinations of consumer credit litigation or add to the justice of the outcome. Such practitioners argue that the burdens imposed by the proposed rules to the extent that they add to CPLR 3215(a) requirements defeat justice for creditors and adversely impact interest rates and access to credit by those New Yorkers with doubtful credit.

9. Arguments advanced by those who question the impacts on speed and expense of added burdens of the rules may have merit. Once an original creditor has disposed of an account because the creditor has deemed it economically uncollectible by the creditor, the original creditor has a disincentive to invest additional time and effort in the collection of the divested account. Divested unsecured accounts typically sell for a small fraction of the sums nominally due under the account. The devotion of additional time by the original creditor to carefully

assessing the sums due and the documentation supporting the sum due results in further (and unrecoverable) expense to the original creditor. The accrual of additional expense defeats one of the reasons motivating the creditor to divest the account in the first place. It is fatuous to expect the original creditor to transfer post-sale verification expense to the purchaser of the defaulted account without a reduction in the sale price paid. In the practical world, the proposed rule is likely to result in the barest minimum effort the original creditor believes will suffice. The proposed rule is an open invitation to superficial review by the original creditor. At the same time, debt buyers, with the "backstop" in the form of the original creditor's affidavit, has less incentive to examine the documentation for shortcomings. If the original creditor cannot identify shortcomings in he documentation despite theoretical diligence by the original creditor which, in theory, should have the best knowledge of the creditor's business practices, organization, systems, and record-keeping, how could one fault the, in theory, less informed and knowledgeable debt buyer? In short, the proposed rule, in the practical world, has a propensity to be counterproductive by promoting, not avoiding, "robosigning."

10. The longer the original creditor and the account debtor have a contractual relationship the greater the original creditor's expense in once again verifying the account. First, if the account is old enough, the account may have been initiated while manual systems of recordkeeping were in use. Obtaining paper or optically recorded documentation is labor intensive. Possibly, the quality of the storage media may have deteriorated. Often, the initial application and agreement is entirely irrelevant because the initial agreement was for a term of 2 or 3 years and the agreement has been replaced by a new agreement (sometimes multiple new agreements) on the expiration of the old one(s).

11. For older accounts it would be no surprise to find that all credit extended years ago has been paid in full or so substantially paid that no one reasonably could argue that the borrower has failed to adopt, ratify, acquiesce in or otherwise agreed to accept or be bound by the account statements. See, Chisholm-Ryder cited above. Going back to the "creation" rarely is relevant and meaningful to a just outcome. On the other hand, the cost of retrieving and presenting documentation from the beginning of a long-lived account is a needless, costly, burdensome, unjust and most often irrelevant requirement for creditors, while of questionable value for anyone else.

12. There is another practical reality indicating records going back to the "creation" of an unsecured account fails to make a contribution to justice. It is extremely rare to find unsecured consumer credit in which there has been a long-running dispute between the original creditor and the account debtor over the account balance, yet the account continues in active use. Typically the lender-borrower relationship breaks down rather rapidly once a dispute arises if not resolved in a period of months. In the past, before credit card lenders had to provide at least 21 days to pay, objections to late payment charges might arise. These disputes did not last long. One of the parties becomes exasperated then "pulled the plug" on the account.

13. Identity theft claims sometimes arise, but usually come to a resolution long before anyone thinks of litigation. The victim typically objects early and strenuously in the process, then cooperates in providing fraud affidavits, making police reports, or otherwise cooperating in demonstrating their victimization. It is a rare account debtor who will not respond to pre-suit

contacts to cooperate in demonstrating they have been victimized. Rarely do identity theft claims lead to unopposed litigation unless the defendant has failed to respond to and cooperate with the creditor or the creditor's attorneys. When litigation arises involving identity theft, the issues are not with the accuracy of the creditor's records of charges but involve proof of the author of the signature found on the creditor's documentation or the account debtor's control of access to electronic devices and/or safeguarding of personal information. [An example of an identity theft waiting to happen which came to my attention was a veteran offering for sale service-related items bearing his name, rank, and service number (SSAN) at a garage sale on his front lawn]. Valid identity theft claims generally have a history of no payment or very few payments before a default, yet identity theft claims are asserted when there is a history of payments extending over years even though the account statements have been mailed to the defendant's mailing address over the life of the account. [It would be interesting to compare identity theft defenses to the defendants' resort to the credit reporting protections in 15 U.S.C. 1681s-1, 2, and 3.]

14. This phenomenon of identity theft claims contrary to the reasonable person's expectations of how a person would react suggests problems that will not be addressed by the proposed rules. A central problem is the non-reactive account debtor/defendant. There are many reasons that account debtors/defendants fail to react. A study in the bankruptcy courts of one district in North Carolina identified approximately 20% of consumer debtors suffer from some type of diagnosable personality disorder or mental illness. In New York City and maybe elsewhere in the state immigrants lack familiarity with credit, customary business practices, social practices and customs in dispute resolution and the available alternatives and vastly underestimate or discount the fairness and accessibility of courts and legal proceedings. [These phenomenon are prevalent in those born in the United States, as well]. The inability of many account debtors to read adequately to understand process served on them may also contribute to a failure to react before or at the point of suit. The proposed rules, except for the supplemental notice from the court clerk, do not begin to address the "non-reactive account debtor/defendant" concerns. The additional documentation in the proposed rules are irrelevant to the "non-reactive" defendant concerns.

15. A fifth concern is whether federal statutes and regulations have pre-empted the field. Pre-emption issues flow from two sources. The E-Sign Act, 15 U.S.C. 7001 et. seq., provides for federal regulators approving the minimum functionality of electronically maintained records of federally chartered banks. It is my understanding that all federally chartered banks have standards set and monitored by the appropriate regulator.

16. Title 15 U.S.C. §7001(a) precludes denial of the effectiveness of a signature or contract because they are in electronic form, if the transaction is in interstate commerce as is the agreement at bar. Further, §7004(b)(3)(A) permits State or Federal regulatory agencies to specify performance standards for accuracy, record integrity, and access.

17. Defendant's hearsay claims are preempted by the National Bank Act, 12 U.S.C. §1 et. seq. which vests in national banks "such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. §24 Seventh. Further, 12 U.S.C. §484 shields national banks from state or other visitorial powers unless authorized by federal law. When state

regulation impacts, impedes, or significantly interferes with a national bank's exercise of its powers or the Office of the Comptroller of the Currency's duties as regulator, the state law must give way. Watters v. Wachovia Bank, N.A., 550 U.S. 1, 127 S.Ct. 1559, 1567 (2007). "Visitation" is the process of the superintending officer visiting a corporation to examine its methods of conducting business and to enforce the corporation's compliance with law and regulations. Watters, 127 S.Ct. at 1568. Watters notes that the Supreme Court repeatedly has held federal control shields national banking from unduly burdensome and duplicative state regulation. 127 S.Ct. at 1567. Watters noted that in determining whether state law hampers permitted activities of national banks, courts focus on the exercise of a national bank's powers. 127 S.Ct. at 1570.

18. The OCC has created detailed regulations in respect to visitorial powers and electronic activities. See, 12 C.F.R. 7.4000 et. seq. and 12 C.F.R. 7.5000 et. seq. Sec. 7.4000(a)(3) asserts the OCC exclusive visitorial authority. Sec. 7.5001 defines which electronic activities are part of the business of banking. Sec. 7.5001(c)(1)(i)-(iv). Electronic record-keeping falls within the scope of all the listed factors. Sec. 7.5001(d) defines which electronic activities are incidental to banking. Subsec. (d)(1)(i) and (ii) list factors including "...improves the effectiveness of efficiency of the bank's operations..." Sec. 7.5002 incorporates a list of permissible electronic services which extend far beyond "Providing electronic bill presentment services;" (for a national bank and on behalf of others). Subsec. (a)(2). Subsec. (a)(1) makes electronic services subject to OCC guidance. Subsec. (c) notes that as a general rule, state law is not applicable to a national bank's conduct of OCC authorized electronic activities. Sec. 7.5006(a) authorizes data processing and transmission services for banking, financial and economic data.

19. The proposed rules tend to hinder the functioning of all national banks by, in effect, questioning the adequacy of national bank record-keeping systems and the adequacy of such records. The proposed rules do not do so directly, but the implicit premise of the proposed rules is the presumed questionable nature of records of banks regulated by the national banking authorities.

20. National banks have an obligation to collect their defaulted loans. They have an option of doing so directly. They also may sell defaulted accounts. Applying rules of evidence so rigidly or strictly as to limit or preclude the admission of records into evidence which are maintained as required by law both as to the methodology and the content and by technical means that are authorized by law, examined and enforced by a federal regulator intrudes impermissibly on the powers of national banks and the OCC in performing its regulatory and visitorial functions. The real question is whether the records presented are bank records, not whether the records are sufficiently reliable to qualify as business records. The OCC and Congress have specified standards for the content of bank credit card records and the functionality of the record-keeping systems. The proposed rules invite a fight with the OCC and Congress on what information should be in national bank records, how national bank records should be maintained, the propriety of the lending authorized by Congress and federal regulators, and the adequacy of the record-keeping systems selected under OCC guidance and approval. It is a fight that Watters holds is a losing fight. A state's procedural rules "tail" cannot "wag" the federal substantive banking law "dog." When Congress exercises its Constitutional powers over

national banking and interstate commerce under the Commerce Clause and the OCC fills in the details, the duty of courts is to obey, not contradict and impede.

21. The legislative and regulatory enactments discussed above may be viewed as creating a public policy which, essentially, renders credit card statements self-authenticating. (See Thomas v. Rogers Auto Collision; 69 A.D.3d 608 (2nd Dept. 2010); Merrill Lynch Bus. Fin. Serv. v. Trataros Const. Inc., 30 A.D.3d 336 (1st Dept. 2006); Elkaim v. Elkaim, 176 A.D.2d 117 (1st Dept. 1991). Title 15 U.S.C. §1637(b) provides for the contents of monthly consumer credit card and like credit plan statements. This statute legislatively establishes the regular course of business of credit card issuers, both state and federally chartered and creates the duty to use, maintain, and rely on the required information, as well as the supporting record-keeping systems. Given 15 U.S.C. 1637(b) and the highly automated and substantially human-free record-keeping systems, one would be compelled to conclude that credit card lenders' records necessarily comply with the CPLR §4518(a) business record exception to the hearsay rule as explained in People v. Kennedy, 68 N.Y.2d 569 (1986) as a matter of law, unless New York courts are prepared to pick a fight with the federal regulators as to the adequacy of federally required record-keeping requirements. People v. Kennedy expresses an expectation that interpretation of CPLR 4518 will advance with advances and changes in technology and economic progress, then traces the history of changes in Rule 4518 and its predecessors over time. The proposed rules tend to burden or impede the expected development.

22. As a practical matter, most people have a reasonably good idea of how credit card lenders maintain their records, although the statutory and regulatory background discussed above may not be that well known. It would be odd to find that debt buyers' employees are any less informed than loan officers as to the operating of credit card lenders' information systems unless the loan officer was also a software engineer engaged in maintaining the software. Since software generally has a finite life after which the developer no longer supports the software, one would expect a turnover after a history of software patches as glitches are identified in software. Thus, the more senior the creditor's employee, the further removed the employee from the software's functionality and record-keeping process. It is fatuous to argue that when statutes govern a heavily regulated business provide record-keeping standards for the regulated business that the statutes and regulations fail to provide a standard of record keeping worthy of being accepted by New York courts. It would seem presumptuous of New York courts to assert they are smarter than bank regulators and examiners or legislators.

23. A related point should be taken into account. Many of credit card lenders' transactions are electronically initiated by the credit card borrower (e.g. cash advances) or by persons acting on the borrower's behalf in using a credit card terminal. It would be unsurprising to learn that the borrower knows of most transactions and has access to a "hard" copy record of the transaction before any human being employed by the lender has any awareness of the transaction. Indeed, one might reasonably state that the borrower has better access to the facts and records and better knowledge of the validity of the charges than anyone else. Because 15 U.S.C. 1637(b) requires detailed statements of charges, borrowers are better situated than lenders to know the accuracy of statements and to detect errors, if errors exist. The proposed rules turn this reality upside down to burden the party with the least access to first hand information with the heaviest burden, especially when the plaintiff is a debt buyer.

24. The reality that account debtors/borrowers create records of transactions or initiate the record keeping process for both charges and payments creates yet another problem. Credit card records are of a special type in which the customer is often better situated to know about any errors than the lender and be in possession of proof of an error. If a customer uses a credit card to purchase an item that generates a receipt and a sales contract, the customer will be in possession of the receipt and sales contract, while the lender will have to retrieve such information from the merchant. The customer obtains the receipt and/or sales contract long before any bank employee actually learns of the transaction or has any reason to delve into the details. Sec. 1637(b)(2) requiring specific dates, amounts, and identity information permits the customer to "zero in" on the specific transaction in which the customer or an authorized user participated and typically in which no bank employee had any personal role whatever.

25. In reality, many credit card records are not hearsay, but declarations by the defendant customer to which CPLR §4518 has no application at all. At most, the lender must establish a foundation concerning how it came into possession of the customer's declaration that "I borrowed $XX" since that is exactly what an ATM cash advance record says. It makes little difference if the testimony is that the customer walked into a branch and left a note signed by the customer or the customer electronically sent the same message. The Court can take notice we have moved past the horse and buggy age. The Electronic Signatures and Records Act (State Technology Law, Article 1, §§ 101 et. seq. was enacted to complement the federal ESIGN law (15 U.S.C. §§ 7001 et. seq.) The legislative history (L. 2002, c. 314, §1) states as a legislative finding:

> "...it is in the best interest of the state of New York, its citizens, business and government entities for state and federal law to work in tandem to promote the use of electronic technology in the everyday lives and transactions of such individuals and entities."

STL §104.2 permits electronic signatures to have the same force and effect as manual signatures. STL §105.3 gives electronic records the same force and effect as non-electronic records. STL §106 allows electronic records to be admitted into evidence under any section in CPLR Article 45, which, of course, includes CPLR 4543 allow proof by methods not in CPLR Article 45.

26. The proposed rules pose a sixth problem. Payments have long been an affirmative defense for a defendant to allege and prove. CPLR 3018(b). Seeking account statements to detail borrower-initiated charges and payments under the guise of upholding CPLR 4518 or promoting justice does violence to the concept that the CPLR should be construed in pari materia so that one section does not defeat another absent the Legislature's direction that result should occur. The proposed rules reallocates the burden of pleading in the context of default judgments.

27. Likewise, the emphasis in the proposed rules on account agreements fails to recognize that agreements can be accepted by action as well as consent expressed in a signed writing. In the context of credit card action with a defaulting borrower one court noted:

> A defendant who has defaulted is "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them." The affidavit in support of the entry of a default judgment pursuant to CPLR 3215(f) "need only allege enough facts to enable a court to determine that a viable cause of action exists"; however the plaintiff is still required to prove damages.
>
> Upon a review of the record, we find that it was not necessary for plaintiff to present a signed credit card agreement and/or signed charge slips. Rather, plaintiff established its cause of action based on an account stated by showing that monthly statements had been sent to defendant and had been retained by defendant without objection.

(cites omitted). Capital One Bank (USA), N.A. v. Tashman, 2013 NY. Slip. Op. 5163(U) (App. Tm. 2nd Dept. 2013). See, also, Feder v. Fortunoff, Inc., 123 Misc.2d 857, 859-60 (Sup. Ct. Nassau Cty. 1984). The Legislature in enacting Banking Law §108 specifically provided that in certain instances credit card agreements can be accepted by use of the new card. The proposed rules risk contradicting and impeding this legislative determination of how agreements may be manifested since the provisions of Banking Law §108 and similar provisions of New York law are not widely known.

28. A seventh consideration should be taken into account. The proposed rules, especially the provision of all account terms, may be intended to make information regarding account terms available to borrower-defendants, if the defendant chooses to defend or seeks to reopen or vacate a judgment. If gathering information for benefit of borrower-defendants is a motivation for the rules, it is proper to note that the Legislature already addressed the very issue. General Business Law §520-c requires all credit card lenders to file their terms and charges with the New York Department of Financial Services. That requirement has been in effect since January 1994. There are some credit card accounts that have been in effect for more than the 20 years that have elapsed since the statute became effective. For any practical purpose, one has to question the likelihood that a dispute has been simmering or even merely latent and potential for 20+ years. No matter how highly one holds the work ethic and diligence of New York judges, law clerks, and/or court attorneys, no one would expect any judicial officer or employee to look at more than 20 years of records to support the foundation for entry of a default judgment on a credit card action. The most one would expect is that the court would assess documents meaningful to the dispute. Should a judge do more than determine that charges were made and payments were made for a reasonable period without dispute one would have to wonder, if the judge had enough work to keep occupied.

29. Once the volume of paper the rules require exceeds the papers a court reasonably would consider, the excess paper is a burden and a waste of time. Insisting on paper to which no one reasonably would resort as a price of obtaining a default (or other) judgment merely creates what is commonly described as a "fire drill." "Fire drills" are contrary to the Legislature's intent that rules provide just, speedy, and inexpensive court proceedings. See CPLR §104. Insisting

that creditors provide information on account terms to defendant-borrowers when those terms are available elsewhere is also a waste of effort. A reasonable alternative is for the clerk's office to direct the defendant to the DFS website for information, if such information is sought.

30. An eighth consideration must also be taken into account. The proposed rules raise questions about the effectiveness or wisdom of the Legislature's provisions in the CPLR for service of process. If the Unified Court System is concerned with the adequacy of service and believes that service by mail under the control of court clerks would be proper (the system of service of process used in Ohio is an example), the issue should be put to the Legislature to remedy, with disclosure of the facts and circumstances indicating a need for the proposed change, not engage in an end-run under the guise of a procedural rule. There is something to be said in favor of Ohio's system for service of process.

31. Service abuses, if present in meaningful numbers, under the existing rules can be and are addressed by the courts, for example, the Pfau proceeding in Erie County. Service abuses are of a distinctly different kind or nature from service of process that faithfully complies with the legislative requirements for providing more than a minimally Constitutionally sufficient notice of legal proceedings. When a party faithfully complies with the CPLR's service provisions the party serving the process has complied with the Legislature's decision on the standard New York will uphold. Abusive service practices seek to thwart the Legislature's public policy or, at least, fails to uphold the Legislature's decision on what steps must be taken to give adequate notice of legal proceedings.

32. There is a ninth factor to consider. The proposed rules are likely to adversely affect those with the least access to credit. The proposed rules will certainly add to the cost of collection by adding more steps, thus requiring more inputs to attain a judgment and increasing the time (and, thus, the carrying cost of the defaulted claim) needed to attain a judgment before any attempt can be made directly to collect money from defendants. As collection costs increase, the needed return to induce lenders to extend credit will increase. The upshot is likely to be alternatives to unsecured debt such as secured credit cards (see GBL §520-b) or resort to licensed lenders with high cost (usually very high cost) loans as permitted by Banking Law §340, et seq. or loan sharks. Some people would argue that it is right, wise and proper to deprive the needy or credit-impaired of access to reasonably priced credit or credit on reasonable terms because the financially-debilitated or financially-reckless raise the cost of credit for others and/or there is nothing wrong and much right with paying in cash. On the other hand, the Federal Credit Union Act, 12 U.S.C. §1751 et seq., is based on a concept that reasonably priced credit should be more readily available to avoid loan sharking and caps interest at 18% per annum, a rate far less than can be charged by licensed lenders. Given that about two-thirds of Gross National Product is consumer spending, one hopes that the Unified Court System adequately assesses the macro-economic effects of the proposed rules. The rules have a distinct deflationary impact not unlike bankruptcy by causing money loaned to permanently disappear from the economy by becoming uncollectible while causing non-productive collection expenses to increase. The Federal Reserve Board has plenty of help controlling inflation, but far less help in stimulating the economy. Courts and the legal system generally are thought by many to already be a negative influence on the economy by the costs and unanticipated risks imposed by litigation.

Specific Comments:

1. The term "Debt Buyer Actions" should be defined or otherwise clarified. Presumably, a "debt buyer" is a person/entity buying defaulted obligations after the original creditor had determined to abandon direct collection activities and has disposed of the account as part of a bulk sale of similarly defaulted accounts. The above meaning would exclude finance agencies which are financing retail installment contracts or credit plans under Personal Property Law Articles 9 and 10 and/or leases of motor vehicles and other tangible property under the same law. PPL Articles 9 and 10 separate the seller from the lender/finance agency, commonly referred to as "indirect lenders." A large percentage of motor vehicle purchase money lending is by means of indirect lending.

2. Indirect lenders typically seek to finance valid contracts/credit plans on which the borrower/customer is not in default. Usually indirect lenders extend credit at the inception of the transaction. Although in theory credit is extended by the merchant seller or supplier of the consumer goods or services with the obligation then assigned, the reality is that the lender/finance agency is the credit grantor. If so-called "indirect" purchase money lenders are included in the scope of "debt buyer" for purposes of the rules, indirect lenders will be heavily burdened. In my experience it is difficult to gain the cooperation of a new vehicle retail motor vehicle dealer whose usual sales are in the range of $15,000-$30,000. Gaining the cooperation of sellers of power equipment such as snowmobiles or jet skis is likely to be less feasible. If sales of items such as hand tools, vacuum cleaners and sewing machines or services such as health club memberships are involved, the chances of cooperation dwindle to essentially zero. Cooperation, as explained above, creates a cost for the merchant seller. As a practical matter, one would not expect retail salesmen to remember customers even for many significant dollar value sales, especially years after the sale. The finance company is far more likely to have an ongoing relationship, though not necessarily a close or even person-to-person relationship, than the original creditor the moreso in the absence of any dispute.

3. Another type of lending that requires care in separating original creditors from debt buyers is student loan lending. A meaningful portion of student loans are guaranteed by third-party compensated guarantee companies providing a species of credit default insurance. Sometimes the borrower explicitly pays a guarantee fee.[1] Sometimes the lender purchases credit default insurance without disclosing that action to the borrower. The provider of the credit default insurance is often an insurance company. Sometimes the guarantor is a state agency, e.g. in New York the New York State Higher Education Services Agency. The original creditors can be banks, credit unions, schools/colleges of all types, endowment funds, and governmental units. These obligations can take many forms, such as traditional loans, grants, tuition bills, scholarships on conditions and other programs. Many programs have deferral provisions with terms that add deferred payments or deferred interest to principal.[2] The vast majority of the programs require certification from the school to be attended. Often, the original creditor does

[1] Credit default insurance has a role in residential mortgage lending, often for vacation/recreational type property or low down-payment mortgages. These obligations often turn into unsecured obligations when the property is located in states lacking statutes analogous to §1301 and §1371.

[2] This compound interest feature will create a separate challenge under the proposed rules.

not administer the loans it originates, but has a third party servicer, such as American Educational Services, Great Lakes, or what is now Student Loan Marketing while SLM was a Citibank, N.A. subsidiary up to 2010.

4. Student loan lending poses a serious policy challenge in any event before analyzing the effect of the proposed rules. First, student lending has an important economic impact, not only on New York, but the national economy. It is important to "get it right" to avoid serious nation-wide dislocations. Second, Congress enacted highly detailed provisions for student lending in Title 20 U.S.C. as portion of a national policy for the overall support of higher education. Much of the national education policy was revamped and greatly strengthened in and after 1958 in response to the October 1957 launch of Sputnick, along with a wide variety of legislation to strengthen science, technology, knowledge, and intellectual property for national defense. The linkage of national defense to education was unmistakable in the creation of the National Defense Student Loan program.

5. Student loans are not merely a state or local problem, although education is big business in New York,[3] but a national issue. Third, student lending is an exercise in faith in the future and the honesty and integrity of borrowers. Typically, students are not creditworthy standing on their own. Lenders need a means of recovery that is certain and workable, not one that involves onerous procedures to collect loans that may have been granted 20 or more years before by schools that no longer exist.[4] (This is a problem not only for profit schools, but also of non-profit schools which failed to adapt to the current realities of higher education). Fourth, student borrowers are mobile. New York City and its environs attract students from all parts of the nation. Rules need to be flexible enough to allow collection of debts incurred in all parts of the nation.[5] In short, the distinction of original creditor, debt buyers, and the parties which fill or may fill the gaps between the two classifications is inadequately addressed, especially for student loan obligations. No one, no matter what their position on the rules, could believe the proposed rules are sufficient for proceedings involving student loans.

6. Likewise, it is important to define "consumer credit debt" as used in the proposed rules. Presumably, given the courts in which the rules will apply, the rules are not aimed at mortgage lending or major home remodeling disputes which typically would fall within the scope of "personal, family or household" use when incurred by individuals for owner occupied property. Often mortgage lending for vacation/recreational purposes with property located in other states has a distinct profit motive that could take the credit out of the usual scope of "personal, family or household" use or purpose, especially if future rents from the financed property are needed to support the borrower's creditworthiness. Home improvement financing could create questions under both the "debt buyer" and "consumer credit" definitions.

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[3] Institutions of higher education are the largest employers in some New York counties, including Monroe County.

[4] Education loans can run up to 30 years from inception even in the absence of valid deferments. Income contingent repayment plans or financially distressed student loan borrowers can add 20 years to a loan and usually follows a period of borrower default. One example of a defunct non-profit institute of higher education is Eisenhower College, formerly of Seneca Falls.

[5] An example of the complexity or intricacy of student lending is a New York resident in military service in the southern United States taking distance learning courses from the University of Southern California because that school provides the highest quality education possible.

7. "Personal knowledge" as used in the rules, unless defined with extreme care, will repeal CPLR §4518 and trample on the very reason for that statute and, in many instances of credit card use or transactions conducted electronically, will be impossible to provide, for example, in the cash advance at an ATM scenario discussed above or a transaction validated by 15 USC 7001 et seq. in which the only person with actual personal knowledge is the customer/defendant.

8. The proposed general form of written answers could be improved by inviting, if not requiring, the answering defendant(s) to amplify their answers. Para 1 (Answer) should be divided into two parts: "I admit the statements of fact in the following paragraphs of the Complaint: _____" and "I deny the statements of fact in the following paragraphs of the Complaint: _____." The word "allegations" is too technical and unclear to be meaningful to an unrepresented consumer defendant unless the court clerks will provide legal advice and explanation. Plain English would be far better.

a) Paragraphs 5 and 6 could be productively rearranged to read: "5 _____ I have paid all of the debt claimed." "6 _____ I dispute the amount of the debt claimed above $_____." The proposed ¶5 reading in the disjunctive as it does provides less information than it could. It does so by lumping full and partial payments into one response when the difference is significant. Rephrasing ¶6 may have the beneficial and productive outcome of creditors agreeing to take the undisputed amount, save defendants accruing interest well in excess of the judgment rate, and save courts much effort. The proposed response may cut through uncontested issues on liability to focus on the amount actually due.

b) Paragraph 7 (up to the "and/or") is a legally invalid statement. A party may have a legally valid claim in the absence of business dealings, see the comments above concerning debt buyers and credit default insurers. The proposed rules explicitly reference debt buyers. If the intent is to provide an option to assert lack of standing ¶7 would better read: "7 _____ Plaintiff is not the legal owner of the debt and lacks authority to sue me."

c) Paragraph 10 would better read "10 _____ Statute of limitations (the time fixed by law to sue since the later of the time (usually six years) I entered into the agreement or last paid on the agreement has passed."

d) Paragraph 11 would more constructively read, "11 _____ This debt has been discharged in my bankruptcy case filed in _____ (year) in _____ (city), _____ (state)."

This disclosure will permit the creditor to easily and rapidly use the bankruptcy court PACER electronic records system to verify the petition and type of case, review the creditor's list in the bankruptcy case, verify a discharge was granted, and determine the rule in the district of filing whether unscheduled debts are discharged if the case is a "no asset" case. [See In Re Massa, 187 F.3d 292 (2nd Cir. 1999) for reasons explaining why these issues are germane.] The suggested information can lead promptly to accurate information that is decisive for courts and all parties.

e) Paragraph 15 referencing unjust enrichment is legally incorrect. The "amount demanded" language used suggests that the response duplicative of ¶6 (disputing the amount due) or ¶17 (alleging unconscionability) if the sum demanded is authorized by the agreement but is so overreaching as to horrify the court. Unjust enrichment claims, if they have any application, would seem to be claims against a co-defendant or a third party claim against someone who unjustly benefitted from the defendant's action who should, in justice, be primarily liable. This defense has a propensity to aid no one while burdening everyone.

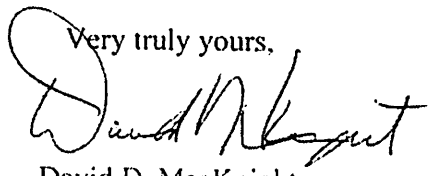
f) Paragraph 17 addressing unconscionability is legally incorrect. Unconscionability usually requires a showing of both unfair terms and unfair negotiating tactics to bring about the agreement. ¶17 would be better if it read "17 _____ Unconscionability (the agreement is grossly unfair to an average businessman and was brought about by unfair methods."

g) Paragraph 21 is somewhat misleading because military service makes a difference only if the defendant is on active duty or orders for active duty impair the defendant's ability to defend. Second, ¶21 is incorrect because it wholly fails to alert those secondarily liable, see 50 U.S.C. App. §513, of their rights under the Service Members Civil Relief Act (SCRA).

h) Finally, the form should encourage the answering defendant to explain their "check off" of defenses. Paragraphs 14-18 inclusive would be much more useful if a line for an explanation and an instruction to continue on an attached page were provided to sharpen the issues. Often the defendant's failure to fully explain the point made at the beginning of the court proceedings leads to repeated court appearances. The defendant's loss of time from employment and the plaintiff's attorney's appearances on multiple occasions does no one, including the courts, any good. The absence of space for explanations may discourage explanations and impair defendants' right to have their say and defend timely and effectively. If unstated arguments get lost, defendants are deprived of their rights. If arguments the defendant knew all along, but did not state at the outset, are raised in a later proceeding, plaintiffs and the courts are injured. The absence of space to explain is both unfair and inefficient.

9. If an intended purpose of the proposed rules is to instill discipline on judges of lower courts by means of setting standards that courts must accept as good and sufficient, then the proposed rules fail to achieve that goal by explicitly providing that submissions which comply with the proposed forms must be found acceptable.

Very truly yours,



David D. MacKnight

COHEN & SLAMOWITZ, LLP

Attorneys at Law
199 Crossways Park Drive
Woodbury, New York 11797
(516) 364-6006
Fax (516) 364-3431

David A. Cohen, P.C.
Mitchell G. Slamowitz, P.C.

Carol Van Houten
Carolyn Williams ◊♯
Tiffany LaMar
Madelyne L. Mostiller
Mike M. Barchak
Bryan Houde
Peter Withey* ♯
Eric Greenberg *
Ashlee Colonna Cohen
Alexander Ponze

Mitchell Selip, P.C.*
Of Counsel

Denise Pavlides
Managing Compliance Attorney

Stephen Giametta✧
Managing Litigation Attorney

***Admitted NY & NJ**
◊ Admitted NY & MA
✧ Admitted NY & CT
♯ Admitted FL

May 30, 2014

Via email

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

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

Dear Mr. McConnell:

We are submitting this letter in response to the "Proposed Reforms Relating to Consumer Credit Collection Cases" (the "Proposed Reforms"), which are currently under consideration by the Office of Court Administration ("OCA"). Thank you for providing us the opportunity to comment on the Proposed Reforms.

We wish to express some concerns regarding how the Proposed Reforms may impact our clients, many of whom are banks that issue credit cards. It is our belief that the Proposed Reforms will adversely impact our clients' access to New York's court system should any of their customers default on his or her credit card account because the proposals include requirements with which our clients may be unable to comply.

The first concern relates to the use of the terms "original creditor" and "debt buyer," which are not defined in the Proposed Reforms. Some of our clients have purchased the assets of other banks, including open and active credit accounts (i.e., not charged off).[1] The Proposed Rules, as written, require a plaintiff to use the debt buyer affidavit "where the plaintiff has purchased the debt." Accordingly, it is possible that a court clerk could consider one of these creditors a "debt buyer"

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

because it purchased the assets of another bank and could reject an application for a default judgment that is filed with the proposed Affidavit of Facts By Original Creditor instead of the affidavit required in a Debt Buyer Action. Clearly, these clients are not "debt buyers": they simply are banks that have purchased the assets of another banking institution.

Thus, for clarification purposes, we would ask that OCA consider the addition of a definitions section that would define an "original creditor" as the owner of a revolving consumer credit account at the time of default, and a "debt buyer" as an entity that is strictly engaged in the business of purchasing delinquent debt. We believe the definitions used in California's Fair Debt Buying Act provide an excellent example of the clarifying language needed, and we would respectfully request the adoption of similar language in New York:

> 'Debt buyer' means a person or entity that is regularly engaged in the business of purchasing charged-off consumer debt for collection purposes, whether it collects the debt itself, hires a third party for collection, or hires an attorney-at-law for collection litigation. 'Debt buyer' does not mean a person or entity that acquires a charged-off consumer debt incidental to the purchase of a portfolio predominantly consisting of consumer debt that has not been charged off.

Cal. Civil Code §1788.50(a). This definition will avoid the unintended consequence of defining a financial institution that purchases the assets of another financial institution as a "debt buyer." It is also consistent with Judge Lippman's goal of regulating the litigation activities of entities in the business of purchasing delinquent debt, without negatively affecting major corporations that are in the business of banking, not debt buying.

The second issue of concern is the use of form affidavits. The proposed Affidavit of Facts by Original Creditor in Original Creditor Actions ("Original Creditor Action Affidavit") requires the signature of an employee, officer, or member of the plaintiff. Most major financial institutions, including our clients, utilize wholly-owned subsidiary servicing agents to manage their credit card businesses. These servicing agents oversee the clients' entire credit operations, including opening accounts, posting payments, mailing statements, and maintaining account balances. As a result, only the servicing agents' employees have the requisite personal knowledge to sign the Original Creditor Affidavit, yet the Proposed Reforms require signature of an employee, officer or member of the plaintiff. The unintended consequence is that our clients will be unable to comply with the Proposed Reforms, and as such will be denied access to New York's courts when a customer defaults on a credit card issued by one of our clients.

We believe that this issue is best addressed by allowing original creditors to utilize individual affidavits that particularly describe each creditor's business practices, so long as the affidavits contains all the factual allegations contained in the Original Creditor Action Affidavit. In the alternative, this issue may be remedied by expanding the reference to "Plaintiff" in paragraph one of the proposed affidavit to "Plaintiff or its Servicing Agent or affiliate"; however, this suggestion still would not allow individual creditors to explain the relationship between the plaintiff and its servicing agent or affiliate to the plaintiff. We believe this element is necessary to establish the

proper relationship of the affiant and the affiant's employer to the plaintiff so that the court will be able to determine if the affiant is in fact the proper person to execute the affidavit.

Another issue of concern related to the Original Creditor Action Affidavit is the requirement in Paragraph 4 that original creditors break down the balance due at the time of the signing of the affidavit into three balance components: principal, interest, and fees and charges. The terms and conditions that govern credit card accounts generally provide that the amount due in the beginning of each month consists of the total prior month's balance, plus new transactions, plus the periodic interest charge, plus any fees incurred, less payments and credits. This amount is treated as the next month's principal balance, on which interest is then computed. By applying the contractual terms to the balance due, the total due at the beginning of each month constitutes the principal balance, until such time as the account is charged off. The Proposed Reforms effectively void the relevant portion of the contract between creditors and their customers. Consequently, we request that the Proposed Reforms be modified to require the break down on post-charge-off balances only.

Furthermore, our clients do not seek to collect any additional interest, fees or other charges post-charge-off, and the amount sought in lawsuits based on their unpaid accounts is only the charge-off amount, less any payments made after the charge-off date. Consequently, assuming that the break down applies to amounts added to the account balance after charge-off, this requirement does not apply to our clients' accounts. Unless our clients can change the form of affidavit being proposed to explain their individual business practices, the court clerks may feel constrained to reject applications for default judgments because of blanks contained in the affidavits.

This request is consistent with federal law, which already dictates the manner in which original credit issuers maintain account balances. *See* Consumer Credit Protection Act, 15 U.S.C. §1601-I(A)(a). In addition, the Truth in Lending Act, Regulation Z, requires creditors to send periodic statements to holders of credit card accounts. The statements must disclose the balance at the end of the billing cycle, the previous balance due at the start of the billing cycle, and all transactions, credits and finance charges incurred throughout the billing cycle. These federal regulations allow the addition of finance charges, consisting of interest and fees, to the total balance due. Pursuant to these federal regulations, the terms and conditions applicable to consumer credit transactions specifically provide for the "rolling over" of fees and charges into the subsequent month's principal balance.

The breakdown of the charge-off amount into the three component parts required by the Original Creditor Action Affidavit is simply not information that is maintained as part of our clients' books and records. The unintended result will be the requirement that original creditors maintain a separate set of financial records solely for the purpose of seeking legal redress for defaulted accounts belonging to customers who reside in New York. Accordingly, we respectfully request that the OCA consider amending Paragraph 4 to read as follows: "***This amount includes the charge-off balance of $_____, post-charge-off interest of $_____, and post-charge-off fees and charges of $_____.***" This change will insure that New York law is consistent with federal law and that creditors will be not be denied access to the courts because of their inability to maintain their otherwise-sound financial records in the manner required by the Proposed Reforms.

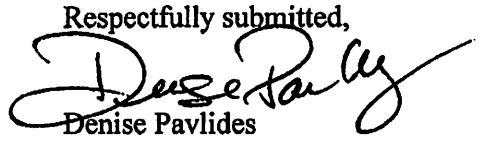
An additional area of concern presented by the Original Creditor Action Affidavit is the requirement that "[a] true and correct copy of [the] Original Agreement governing the account upon which the action is based, and any amendments thereto, shall be attached to the Original Creditor's Affidavit of Facts." This provision is in direct conflict with 12 C.F.R. § 226.25, which mandates that original creditors retain documents for only 2 years after the date disclosures are required to be made or action is required to be taken. Although in reality these documents may be kept for more than 2 years, for older accounts, some of the required agreements simply will not be available and as a result, our clients will be precluded from collecting on defaulted accounts.

This result is particularly inequitable in the mater of an application for a default judgment, as the Court of Appeals has held that the proof needed is simply enough to enable the court to determine that the plaintiff has established a cause of action. "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." Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 (2003). We respectfully suggest that, instead of requiring each and every agreement that governed the account, the OCA consider the following alternative for revolving credit transactions: the agreement in effect at the time the customer defaulted, if it still available, and the most recent monthly statement recording a purchase transaction, last payment, or balance transfer, in addition to the final statement reflecting the charge-off balance of the account. Given that account statements provide actual proof of the balance due at the time of charge-off, this proposal will be beneficial to both the court and the litigants. The monthly statements, in combination with the information set forth in the Original Creditor Action Affidavit, will allow the court to confirm the accuracy of the amount sought in an application for a default judgment.

The third and final issue of concern to the Firm is the proposed effective date of the Proposed Reforms. Inasmuch as they create an entirely new standard that is applicable only to actions related to revolving credit transactions, our clients will have to adjust their business practices in order to pursue legal redress in New York for defaulted accounts. And because the Proposed Reforms are not limited to suits filed after the proposed effective date of June 15, 2014, our clients will be precluded from seeking judgments on already-filed legal actions as well as future defaulted accounts where the balances maintained were not broken down into the three components required by the Proposed Reforms. This result will cause irreparable harm to our clients by rendering millions of dollars of otherwise valid debts uncollectible. Furthermore, until our clients can amend their record-keeping systems to comply with the requirements of the Proposed Reforms, they may be forced to cease issuing new credit card accounts to customers in New York state.

We hope that the OCA will consider these comments and the practical issues raised by the Proposed Reforms. We believe that the Proposed Reforms can be re-drafted to address the concerns of all litigants who come before the court without undermining any aspect of their intended purpose.

Respectfully submitted,



Denise Pavlides

ATTORNEYS AT LAW

Smith Carroad Levy & Wan, P.C.

ROBERT S. LEVY
TIMOTHY WAN

PRAGNA PARIKH
JANEEN M. HOWARTH

Senior of Counsel:
GERARD D. DE SANTIS

Of Counsel:
DONALD VICTOR
NANCY WASSERSTEIN
JAY I. WALDHAUSER
ROBERT H. MONTEFUSCO

JULIUS S. SMITH (1894-1966)
ALEXANDER CARROAD (1905-1951)

5036 JERICHO TURNPIKE, SUITE 201
COMMACK, NY 11725-2805

TELEPHONE (631) 499-5400 FACSIMILE (631) 493-0189

May 28, 2014

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

RE: Proposed Reforms Relating to Consumer Credit Transactions

Dear Mr. McConnell,

I am writing with an entirely different perspective than many others who are likely commenting and inundating you with letters. My firm does not represent giant banks and credit card companies. We do not represent national financial institutions who place thousands of claims with us for collection. The majority of our clients are creditors ranging from health care providers, to small business owners, to commercial business creditors.

We are fearful that these regulations and reforms will be applied by the Courts to cases in which they were not intended to apply. Indebtedness is not automatically a consumer credit transaction.

The very definition of "*consumer credit transaction, is stated in CPLR § 105(f) as "a transaction wherein credit is extended to an individual and the money, property, or service which is the subject of the transaction is primarily for personal, family or household purpose.*"

However, in practice, the clerks of the Court often apply the standards for a "consumer credit transaction" to essentially any action against any individual person. Clearly, these reforms are intended to apply to financial institutions that lend money, either by credit account, credit card, or some other credit application. What is excluded from these reforms should be any case that does not fall into this category

For example, there are a whole host of transactions which are not consumer credit transactions, but have already been interpreted in practice by Court Clerks to be construed as consumer credit transactions. These reforms should address this issue, and better define what actually constitutes a consumer credit transaction, and remove any subjectivity in the analysis.

Case law states that signs of consumer credit transactions are loan interest, periodic payment provisions, or late charges.

In Ratner v. Drucker 79 Misc.2d 216, 359 N.Y.S.2d 859 (N.Y.City Civ.Ct. 1974.), the Court held that "The plain and simple legislative intent of the bilingual summons requirement was to assure that our Spanish-speaking citizens would fully understand the legal papers which might be served upon them as a result of some purchase on credit into which they had entered and in which they may well have been 'taken.' The unexpressed idea was that, hopefully, they should not be 'taken' again by the myriad processes of the Law."... Moreover, "The key words in the definition of 'consumer credit transaction' for our purposes are 'a transaction wherein credit is extended to an individual' (NYCCCA, sec. 2101(g))..
this was not meant to apply to members of the medical profession and related arts, who traditionally do not extend credit as such to patients as a business or medical practice. That a physician might permit payment, or even time payments, after the rendition of his total bill for services performed, for the convenience of his patients, instead of demanding cash payment immediately, cannot serve to transform an original cash basis transaction into one denominated as a 'consumer credit transaction'."

In State v. Monteleone, 38 A.D.2d 821, 525 N.Y.S.2d 740 (N.Y.A.D. 3 Dept.,1988.), the Court held that a hospital bill was not a consumer credit transaction. "Unlike the businesses whose abuses the statutes were aimed at curbing, plaintiff is not involved in the business of providing credit to its citizens. Nor is plaintiff a profit-seeking entity. There is no indication in the legislative history that these statutes were meant to apply to plaintiff and the mere fact that the Legislature did not specifically exempt plaintiff from these statutes does not mandate the conclusion that they apply to it."

In Westco Closet Corp. v. Friedman Not Reported in N.Y.S.2d, 2001 WL 940281 ZYNY, the Court stated, "Upon review and consideration of the subject contract, applicable statutes, and legislative intent, the Court does not find that payment provisions calling for a downpayment prior to the commencement of work with the balance being due upon full completion constitutes an extension of credit under CPLR §105(f)... Such an arrangement lacks any material attribute of an extension of credit such as loan interest, periodic payment provisions, or late charges. The subject payment arrangement is no more an extension of credit than any other circumstance where payment simple awaits the final delivery of goods and/or services."

In Jack Mailman & Leonard Flug DDS, P.C. v. Prince Inniss Not Reported in N.Y.S.2d, 2003 WL 21382471 (N.Y.Sup.App.Term,2003.), the Court stated, "the record fails to contain any evidence which establishes that the dental services performed by the plaintiff were in the nature of a consumer credit transaction... Thus, the summons did not need to set forth the notice requirements applicable to consumer credit transactions..."

In Jacobs v. Smith Boys Marine Sales, Inc. 23 A.D.3d 877, 804 N.Y.S.2d 842 (N.Y.A.D. 3 Dept.,2005.), the Court held that, "payment for the new boat was due in full at the time of purchase and Jacobs made that payment with cash and the trade-in value of his old boat. There is no indication in the record that Smith Boys of Rochester intended to permit Jacobs to incur further debt or defer payment. The fact that Smith Boys of Rochester permitted Jacobs time to complete the repairs and then took steps to protect its rights after Jacobs refused to do so did not serve to transform the cash-basis transaction at issue into a consumer credit transaction..."

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

Moreover, a landlord seeking unpaid rent after eviction should not be a consumer credit transaction. Rent is paid in advance. When a tenant becomes delinquent in paying rent, and is evicted, the landlord is not extending credit. The landlord is seeking to become whole for what has been lost.

Additionally, a school at any stage of education that is seeking unpaid tuition, should not be a consumer credit transaction. The school, whether it is a university, private grade school, or kindergarten, is seeking not to recover an unpaid loan, but unpaid tuition, which was to be paid contemporaneously with attending the school. In the interest of not ejecting the child and impairing their education, the school allows the child to continue attending, despite the parents failure to timely pay. However, at no time is the school extending credit.

Finally, a commercial transaction between two businesses where the debtor is not incorporated, but is doing business as an individual, or a commercial transaction between two businesses where the indebtedness is secured by a personal guarantee should not be construed as a consumer credit transaction.

Yet every day, the Courts apply rules and regulations that are designed to apply solely to consumer credit transactions, to matters such as the above.

Applying the consumer credit transaction regulations to matters to which they are not applicable places an unfair burden on creditors who need to avail themselves of the court system to enforce their own rights as creditors. Unlike large financial institutions, many of these types of creditors have limited resources. Some are not-for-profit hospitals, some are small family run business, and others are educational institutions.

In the adoption of any regulation, it is imperative that these reforms specifically itemize and list what types of cases are to be construed as "consumer credit transactions" so there are no unintended applications and unintended consequences.

To that end, we posit that the application of these proposed reforms needs to be defined by itemizing and listing exactly to what kind of cases these regulations and to be applied.

For example, "*The proposed Court Rules §208.14-a, §210.14-a, §212.14-a, and all other Court Rules related to consumer credit transactions shall apply to transactions wherein credit is extended to an individual and the money, property, or service which is the subject of the transaction is primarily for personal, family or household purpose. Characteristics of consumer credit transactions are loan interest, periodic payment provisions, or late charges. This includes transactions involving credit cards, retail installment contracts, or mortgages and equity lines. This does not include transactions for health care providers, hospital services, unpaid back rent, home improvement contractors or service people, nor commercial business transactions that involve individuals. Those consumer transactions in the latter category are not consumer credit transactions.* "

I earnestly hope that the Office of Court Administration strongly examines my proposal herein, to ensure that those creditors who are not engaged in consumer credit collection, are not inadvertently damaged and affected by the proposed reforms.

Very truly yours,

Smith Carroad Levy & Wan, P.C.

TIMOTHY WAN, ESQ.

JAFFE & ASHER LLP
ATTORNEYS AT LAW

NEW YORK OFFICE
600 THIRD AVENUE
NEW YORK, NY 10016-1901

ESTABLISHED 1974
WWW.JAFFEANDASHER.COM

TEL 212-687-3000
TOLL FREE 888-625-9895
FAX 212-687-9639

May 30, 2014

Via Email and U.S. Mail
rulecomments@nycourts.gov
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 undersigned is a partner with the law firm Jaffe & Asher LLP, and I am writing to provide my firm's comments on the proposed rule changes relating to default judgment applications in consumer credit cases as outlined in your Memorandum of April 30, 2014.

By way of background, for more than 40 years Jaffe & Asher LLP has been handling a wide variety of litigation matters in New York courts. Over the past 15 years, we have developed a significant consumer debt collection practice, focusing on credit card collections for original creditors, all of whom are banking institutions. We certainly support the goal outlined in your Memorandum to prevent unwarranted default judgments and to ensure a fair legal process. However, at least in respect to the institutional banking clients that we represent in credit card collection matters, the proposed rules contain a few documentation requirements that are unnecessary and unduly burdensome, and that will unfairly prejudice the rights of creditors to obtain justly due judgments against defaulting debtors.

We support the desire to ensure that default judgments are entered in the proper amount against a properly served debtor. However, a balance must be struck to prevent unnecessary and unintended documentation obstacles from causing debt collection attorneys and their creditor clients to be unable to have default judgments efficiently entered. We believe that affidavit testimony of a competent witness with personal knowledge of the creditor's billing system, combined with the credit card agreement as of the date of account cancellation and documentary proof of the balance due in the form of the billing statement supporting the balance sought, is sufficient documentation to strike this fair balance.

I have briefly outlined my comments below, but would suggest an in person

CONNECTICUT OFFICE
1100 KINGS HIGHWAY EAST, SUITE 3C
FAIRFIELD, CT 06825
TEL 203-583-3414

NEW JERSEY OFFICE
80 E RIDGEWOOD AVENUE
PARAMUS, NJ 07652
TEL 201-977-4329

PENNSYLVANIA OFFICE
11 EAST MARKET STREET, SUITE 102
YORK, PA 17401
TEL 717-801-1523

meeting to fully report to you on our issues and concerns. My comments are as follows:

1. The Original Agreement Requirement. For my banking clients, the original account relationship typically commenced many years, even decades, in the past. The initial agreements have, in most cases, been superseded and replaced by subsequent versions, such as happened in connection with the wholesale change in the governing agreements that occurred following the implementation of the Federal Credit Card Accountability Responsibility and Disclosure Act ("CARD" Act) in 2010. In many cases, the original agreement (sometimes decades old) is not readily available, if available at all, and would be confusing and misleading to deliver in evidence in support of a default judgment. To submit an outdated version of an agreement could even be deemed deceptive under the Fair Debt Collections Practices Act. Instead, what can be provided, and is most relevant, is the version of the governing agreement that was in place at the time of the cancellation of the account following default, inclusive of all applicable amendments. This agreement can be accompanied by an affidavit of a witness with personal knowledge attesting to its applicability.

It is important to note that the credit card agreements are not signed by the consumer, and case law is clear that it is the use of the card that constitutes consent to the terms of the agreement and supports liability for the charges made on the account. See, e.g. Feder v. Fortunoff, 114 A.D. 2d 399, 494 N.Y.S. 2d 42 (2d Dep't 1985). Thus, the original agreement is not necessary to support liability for use of the credit card, and serves little or no purpose in arriving at the amount of the debt. What does support the amount of the debt is the affidavit of a witness with full knowledge of the debt and access to the electronic billing system, supported by copies of the federally mandated monthly billing statements, all of which will be delivered in support of the application (see paragraph 2 below). To require delivery of an outdated account agreement which may not be available, in lieu of granting the flexibility to offer the agreement as of the time of default and cancellation, which latter agreement, together with the proven use of the credit card, would fully and fairly support the liability for the indebtedness, is an unfair, prejudicial and potentially misleading requirement, which should be changed.

2. The Breakdown of Principal and Interest and Documentation of Interest Changes Requirements. The proposed rules require a breakdown of principal, interest and fees, and copies of documents regarding interest changes. These requirements are unnecessary and unduly burdensome. The data showing the breakdown of the components of the debt is not readily available in the aggregate format requested under the proposed rules, and it would be extremely time consuming to locate and provide every document during the tenure of an account (which could be decades old) reflecting an interest rate change. Credit card accounts, by their nature, can contain hundreds of account statements and thousands or tens of thousands of transactions comprising the delinquent balance. It would be extremely burdensome and impractical to expect court personnel to review this volume of statements and transactions and there is no way for them to apply the interest rate change information, even if they received it, to this volume of transactions. A simpler and reliable alternative is available. The account statements required by federal law to be

sent out monthly for open end payment plans under Regulation Z of the Truth in Lending Act are inherently reliable. The account statements for the most recent billing cycle at the time of cancellation show the full balance of the debt being sought. These bank statements are prepared in the ordinary course of business by federally regulated banks, and have unquestionable reliability from a computational standpoint. Moreover, under Regulation Z, consumers have had an opportunity to review their monthly billing statements and dispute or challenge any alleged billing errors.

There is no reason why a default judgment cannot be based upon the aggregate balance included in the cancellation date account statement. It serves no purpose to break down the various components, or provide the dates or documentation of interest changes during the tenure of an account, since there is no way for a court clerk to check these components for accuracy. These bank statements are so reliable, that other states rely on the last periodic billing statement to support default judgments, and so should New York. For example, in New Jersey, court rule 6:6.3 states as follows:

> "RULE 6:6. Judgment
> 6:6-3. Judgment by Default
> (a) Entry by the Clerk; Judgment for Money.
>
> **********
>
> If plaintiff's records are maintained electronically and the claim is founded on an open-end credit plan, as defined in 15 U.S.C. §1602(i) and 12 C.F.R. §226.2(a)(20), a copy of the periodic statement for the last billing cycle, as prescribed by 15 U.S.C. §1637(b) and 12 C.F.R. §226.7.... if attached to the affidavit, shall be sufficient to support the entry of judgment."

We request that original bank creditors be allowed to submit the final billing statement as of the time of cancellation of the account in support of the application for default judgment. To require more, in the default judgment context, would be unduly burdensome and unnecessary.

3. Account Stated. Clarification is requested regarding the account stated cause of action. In order to state a cause of action for an account stated, the plaintiff must prove that an account was rendered showing a balance and that the receiving party failed within a reasonable time to dispute the account. Morrison Cohen Singer & Weinstein, LLP v. Ackerman, 280 A.D.2d 355, 720 N.Y.S.2d 486 (1st Dep't. 2001) If an original bank creditor seeks default judgment based only on an account stated theory, it should be required only to submit proof by affidavit of the existence of the account, the due mailing of the account statements, absence of a dispute and proof of the amount of the indebtedness by producing the final account statement, without the requirement for

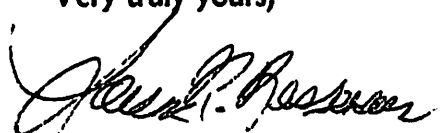
introduction of account agreements, or breakdowns of principal and interest or other documentation. This would be consistent with applicable law. To require more, in the default judgment context, would be unfair, unduly burdensome and unnecessary.

4. Rulemaking Authority. It is respectfully submitted that the imposition of the proposed rules may exceed the rulemaking authority of the Chief Administrative Judge, and could be subject to successful court challenge. In LaSalle Bank N.A. v. Pace, 31 Misc. 3d 627, 919 N.Y.S. 2d 794 (Sup. Ct. Suffolk County 2011), aff'd, 100 A.D. 3d 970, 955 N.Y.S.2d 161 (2d Dep't 2012), an affirmation requirement imposed by rule of the Chief Administrative Judge in connection with mortgage foreclosure actions, was ruled to be void and beyond the rulemaking authority of the Chief Administrative Judge. As the court held in LaSalle, "Since rulemaking authority cannot significantly affect the legal relationship between litigating parties, the imposition of additional matters that impair statutory remedies or enlarge or abridge rights conferred by statute are not the proper subjects of rules promulgated by court administrators." Id.

We therefore suggest that any change in the rules along the lines proposed is best left to the state legislature.

We appreciate your review of this comment letter, and remain available at your convenience should you wish to speak with us on any of the issues raised.

Very truly yours,



Lawrence M. Nessenson

SHARINN & LIPSHIE, P.C.

ATTORNEYS AT LAW

333 EARLE OVINGTON BLVD • SUITE 302 • UNIONDALE, NY 11553
516-873-6600 • FAX 516-873-6880

May 30, 2014

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

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

Dear Mr. McConnell:

Sharinn & Lipshie, P.C. a member of the Commercial Lawyers Conference, ("CLC") recognizes and supports the court's efforts to protect the integrity of the court system. The lack of clear guidance and rules has culminated in a divergence of standards being applied at the individual court level that belies the goal of having a unified court system. The Proposed Reforms seek to correct this shortcoming and to provide the uniformity to which litigants are entitled prior to the commencement of lawsuits.

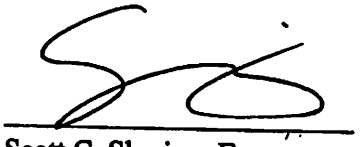
We believe that there is a need and way to incorporate Judge Lippman's stated goals by taking into consideration all stakeholders' points of view so that any reforms adopted are done so in a fair and impartial manner. The integrity of the judicial system requires a fair and impartial rulemaking system, one that is devoid of subjective influences. By listening and taking into consideration the views of all sides, the court can take steps to ensure that reforms address and resolve real issues, and takes into consideration the various concerns of those who are directly affected by the rules. This inclusionary process upholds the integrity and independence of the judicial system, and it is consistent with the spirit of the Rules of the Chief Administrative Judge.

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

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

Additionally if the promulgated rules were to take effect, there would be many economic unforeseen circumstances, such as restricting credit which is bad for consumers and society. The banks may have no alternative but to terminate the existing credit lines and card accounts, which may increase the cost of credit, and decrease the availability of credit. Those without means that rely on credit for the necessities of life, namely the poor and the young, would suffer the most. Credit improves the overall quality of people's lives. The unforeseen effect of this rule may decrease the quality of life, in particular, to low income individuals and families who need credit to manage income flow.

Very truly yours,



Scott C. Sharinn, Esq.
Board of Director: Commercial Lawyers Conference; New York State Creditors Bar Association
Board of Director: National Association of Retail Collection Attorney

RIEHLMAN SHAFER AND SHAFER

ATTORNEYS & COUNSELORS AT LAW*

ROBERT M. SHAFER
AMANDA C. SHAW
MATTHEW R. NEUMAN
LOUISE M. THURLOW
JOEL I. ROSS
JULIE A. VAN ERDEN
ZACHARY M. PRIMROSE

CREDITORS' RIGHTS DEPARTMENT

397 Route 281, P.O. Box 544
Tully, New York 13159-0544
Tel: (315) 696-6347
Tel: (315) 696-8918

TIMOTHY G. RIEHLMAN
CHARLES E. SHAFER
Of Counsel

Vickie M. Flanagan, *Administrator*
Meghan K. Riese, *Senior Legal Asst.*
Newsy A. Chapman, *Legal Asst*
Anne Blampied, *Legal Asst*
Laureen E. Doody, *Legal Asst*
Deborah A. Karam, *Admin. Asst*
Allison Harrison, *Collector*
Andrew Fisher, *Collector*
Frank Swaggart, *Collector*
Deborah White, *Collector*
Carey Marshall, *Collector*
Luke L. Chapman, *Collector*
Anna K. Virgil, *Collector*
Jill R. Williams, *File Coordinator*

May 30, 2014

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

Re: Proposed reforms relating to consumer credit collection cases

Dear Mr. McConnell:

Kindly accept this letter as a response to the proposed adoption of reforms in consumer credit collection cases. Riehlman, Shafer & Shafer is a small law firm of seven attorneys located in Tully, New York. Our creditor's rights division has been representing creditors in consumer collection matters since the late 1970's.

Many defendants who have default judgments entered against them in civil actions of all kinds, not just consumer credit actions, did not receive actual notice of pendency of the suit. For example, service by publication pursuant to CPLR 316, which has been upheld against constitutional scrutiny is not expected to give the defendant *actual* notice of the suit. Actual notice is not a prerequisite for the entry of default judgment, the constitution of the United States and the State of New York require that the plaintiff prove that it has made sufficient efforts to locate and serve the plaintiff to the point where it cannot be said that the defendant was unjustly deprived of notice and an opportunity to be heard before substitute means of service which may or may not give defendants actual notice of the suit are resorted to. It cannot be said that a defendant has been deprived of notice and an opportunity to be heard when they are actively frustrating plaintiffs' efforts to locate them and give them notice of a pending action.

The expansion to courts outside New York City of 22 NYCRR §208.6(h), which requires creditors to submit an additional notice of a consumer credit action to be mailed by the Court to the debtor at the address where process was served presents practical problems. For anyone not familiar with prosecution of consumer collection accounts the requirement of the additional mailing to the place of service is not always practical. Proper service may be effected by delivering a copy of the summons and complaint directly to the defendant pursuant to CPLR §308(1) anywhere within the state. For example, service may properly be effected by delivering

*A Partnership made up of Professional Limited Liability Companies

a copy of the summons and complaint to the defendant at a restaurant, barber shop, place of employment or even street corner. Mailing the additional notice to these locations, if even possible, almost certainly will result in a return of said notice to the court. The proposal also does not take into account those instances where, even if he is served at his residence, a defendant has only a post office box. Mailings to a physical address in these cases are impossible due to the lack of a mail receptacle.

The proposed rule requiring additional notice sent by the court would also render moot a portion of CPLR § 3215(g)(3)(i). While this section provides for an additional notice to be sent to a defendant's residence or place of business before taking a default judgment, it contemplates the possibility that neither location is known to the plaintiff and allows said notice to be mailed to the defendant's last known residence. It is the mailing itself, not whether the notice is returned, which determines whether a default judgment may be entered. It is respectfully submitted that such a mailing in accordance with CPLR § 3215(g)(3)(i) is sufficient to provide additional notice to a defendant. Mailings to the address where process was served is not only impractical but, again, may also be impossible.

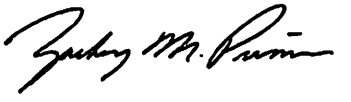
The proposed additional notice requirement will also have the effect of contradicting established case law that developed as a judicial remedy available to plaintiffs when defendants intentionally avoid their summons by secreting their address. The Second and Third Department of the New York State Appellate Division, and dozens of trial level courts throughout New York have held that service of process is conclusive at a defendant's address of record with the New York State Department of Motor Vehicles (hereinafter "DMV"). The courts reason that every licensed driver in New York is obligated by Vehicle and Traffic Law § 505(5) to maintain a current address with the DMV. Pursuant to that statute a licensed driver is also obligated to update their address with the DMV within ten (10) days of moving to a new address. To prevent willful evasion of service of process, courts have held that, if defendants fail to update their address with the DMV within ten days of moving, nail and mail service at their address of record with the DMV is conclusive *even if* the defendant can prove that they no longer lived at that address at the time of service. See New York State Elec. & Gas Corp. v. Allen, 246 A.D.2d 855, 855 (3d Dep't 1998); Hidalgo v Cruiser Taxi Corp., 101 A.D.3d 950, 951 (2d Dep't 2012); Canelas v Flores, 112 A.D.3d 871 (2d Dep't 2013); Kalamadeen v. Singh, 63 A.D.3d 1007, 1009 (N.Y. App. Div. 2d Dep't 2009); Burke v. Zorba Diner, 213 A.D.2d 577, 578 (N.Y. App. Div. 2d Dep't 1995); Gen. Accident Ins. Co. v. Fuat, 192 Misc. 2d 497, 500-501 (N.Y. Civ. Ct. 2002), among many others.

We also respectfully request for clarification as to the term "debt buyer" in the proposed rules. The Court's Summary of Proposed Affidavits lists the various affidavits that will be required to be submitted as part of an application for a default judgment. They are broken down into actions by original creditors and actions by debt buyers. It is unclear, however, where entities that have acquired debt through mergers or buyouts may fall. While such entities are successors to the original creditors, the practices and procedures of the predecessor in interest

may not be known to the current creditor and may also be unobtainable in cases where such predecessor no longer exists. Similarly, if such a creditor is considered a debt buyer, it is unlikely that anyone with knowledge of the "sale" of the account is employed by the new creditor and can attest to the facts thereof. Clarification as to how such successor entities will be view by the Court would be helpful, however we appreciate the Court's recognizing the distinction between original creditors and debt buyers.

Thank you for the opportunity to comment on the Court's proposals.

Very truly yours,



Zachary M. Primrose

ZMP/mkr

From: Steven Giordano <sgiordano@vlocklaw.com>
Sent: Tuesday, May 06, 2014 1:49 PM
To: rulecomments
Cc: Stephen Vlock
Subject: April 30, 2014: Proposed Reforms Relating to Consumer Credit Collection Cases.

To the Office of Court Administration:

This office is very concerned by many of the proposed rules set forth in the April 30, 2014 Memorandum regarding consumer credit collection cases. We are attorneys who practice in the Courts of New York State, and we represent lenders, banks, debt buyers and other creditors who seek to recover on debts duly and legitimately owed. We also teach continuing legal education in the area of debt collection and judgment enforcement for the New York State Bar Association and other legal education providers.

We have never publically commented before on proposed reforms, but feel compelled to comment on these proposals because we believe implementation of these new strict rules will cripple vast numbers of creditors, debt purchasers and attorneys, as well as create opportunities for misuse by debtors who are simply seeking ways to avoid repayment of their debts. For the following reasons, many of the proposed reforms should not be adopted:

A. Affidavit from Original Creditor in Debt Buyer Action

The proposed reforms will require that in an action brought by an assignee of a debt, the creditor must submit an affidavit from the original creditor. This requirement is based on a misunderstanding of the operations of the debt industry. Very often, it is impossible to obtain an affidavit from the original creditor. This may be due to various reasons. For example, thousands of banks have failed and every year there are more banks that fail. The debts held by these defunct banks are sold and/or assigned. The assignee cannot get an affidavit from the original creditor, i.e., the defunct bank. Therefore, the requirement that the creditor submit an affidavit from the original creditor would mean that the Courts have made it impossible for a creditor to recover a legitimate debt. That is unacceptable, and the proposal that the plaintiff submit an affidavit from the original creditor should not be adopted.

Furthermore, it may be years between the time of assignment of the debt from the original creditor, to the time that a lawsuit is brought by an assignee of the debt. The original creditor may no longer exist, or may not be in a position to provide an affidavit due to the passage of time or the circumstances of the sale and transfer. The assignee should not be precluded from recovering on the debt if it is unable to obtain an affidavit from the original creditor.

B. Affidavit from Debt Seller

The proposal that the plaintiff submit an affidavit from the debt seller is also problematic for the same reasons set forth above, with regard to the affidavit from the original creditor. At the time that the lawsuit is commenced, the debt seller may no longer be in existence. Furthermore, since the account was sold and the records were transferred to the assignee, the debt seller may no longer be in a position to provide an affidavit. The Courts need to understand that years may pass between the time an account is sold and the time that an action may be commenced for recovery on the debt. Oftentimes, a debtor makes payments on a debt to a debt buyer for years before defaulting. The debt buyer will then be required by this proposed reform to go back to a debt seller from

years ago, to attempt to obtain an affidavit for purposes of litigation. The problem is compounded further if there are several intermediary debt buyers in the chain of title. As such, this reform presents an unfair obstacle to recovery of a debt.

C. True and Correct Copy of Original Agreement

We have no issue with attaching a true and correct copy of the original agreement to the plaintiff's affidavit where the lawsuit involves a written agreement. However, exceptions should be included for (i) cases not involving written agreements, such as in the case of credit card accounts; and (i) cases in which the original agreement is lost or misplaced, and after diligent search cannot be found.

D. Affidavit of Non-Expiration of Statute of Limitations

The proposed reforms would require an affidavit from the plaintiff or plaintiff's counsel setting forth that the applicable statute of limitations has not expired. However, compliance with the statute of limitations is an affirmative defense, which must be raised and proven by the proponent thereof. In fact, case law holds that failure to raise the statute of limitations waives the defense and it is improper for a Court to raise such a defense sua sponte. Forcing creditors to provide an additional affidavit regarding the Statute of Limitations not only causes additional burdens of costs and time on creditors, but it will also provide yet another avenue for debtors to try to vacate Judgments by alleging it was not done properly. Therefore, the proposed requirement to force creditors to provide an affidavit of non-expiration of statute of limitations is fundamentally unfair and detrimental to the credit enforcement industry.

E. The Form Motions for Pro Se Defendants.

We have reviewed the proposed "form" Answers and motions, by order to show cause, and have seen similar forms in the New York City Court system in practice for some time now. More often than not, defendants frivolously check off every defense because it is there, even though there is absolutely no merit to the defense in the facts and the law. Under most circumstances, if an attorney did the same thing, it would be a violation of Rule 130-1.1 of the Rules of the Chief Administrator. However, the pro se defendants using these form Answers and motions are simply checking off boxes and they have no understanding of the meaning of most, if not all, of the defenses. The only thing that is accomplished by this is unduly burdening creditors and their attorneys who are forced to respond to these frivolous defenses, and the judges who have to spend their valuable time deciding on these defenses which should not have been interposed.

When faced with an Answer or order to show cause, which contains every one of the eighteen (18) or so defenses checked off, the creditor must respond to each allegation, assert the law and apply the facts of the case. This is simply yet another overburdening of creditors and increases the legal costs to enforce a debt obligation eighteen-fold. Furthermore, since these defenses would not have otherwise existed to pro se defendants, especially since most of the time they do not apply, the Courts would be again overburdened with attempting to resolve all of these issues.

In theory, it may seem positive to help pro se Defendants. However, in practice, giving unsophisticated litigants an exhaustive menu to throw every defense imaginable at a creditor and the Court to see which one sticks, is fundamentally unfair. In the end, while creditors must pay attorneys to respond to all of these defenses, the Courts are forced to review all of the arguments and make decisions thereon. Given the fact that the Courts are already overburdened with litigations, this will make it substantially worse.

We respectfully suggest that the form Answer and Motion be corrected to make it much more useful to the parties and the Court. All of the defenses can still be listed on the form. However, the checkboxes (or equivalents) should be deleted. Instead, after each defense, there should be blank lines for the pro se defendant to write in the facts underlying the particular defense. This way, the pro se defendant cannot simply check off every defense on the form, which they often do. To the contrary, the pro se defendant would be required to provide a genuine factual basis for each defense in writing, which is fair and proper to all parties, and would assist the Court in determining the case.

F. Fairness and Justice for All Parties

The Courts should not usurp the authority of the New York legislature. Nor should the Courts be used as pawns by politicians or the political process. The Courts must remain neutral and fair to all parties who seek to resolve their disputes. The legislature has the resources and the constitutionally mandated responsibility of investigating and instituting laws designed to protect the public, and the legislature is well-equipped to handle its responsibility. That is not the responsibility of the Court system. Simply because the Courts have received complaints by consumers does not justify the Court in enacting rules that unfairly treat creditors. Many complaints by consumers are unjustified and clearly many consumers have an economic self-interest in avoiding their debts, even those that are legitimate debts, which most debts are.

The Courts are already well-equipped to handle cases which are meritless or which are improperly brought by those who are unscrupulous. The Courts can dismiss cases that clearly have no merit, and can impose monetary sanctions, including attorneys' fees, against litigants and their attorneys who bring cases that are frivolous. The fact that the Courts can deal individually with wrongdoers is a positive and admirable part of our judicial system. There is no need to impose blanket rules that unfairly impose obstacles to recovery of valid debts upon all creditors. Let's remember that the vast majority of creditors are honest and respectable, and seek only to recover what is genuinely due. The vast majority of creditors should not be punished for the misdeeds of a few.

We need to also remember that consumers have an even greater array of weapons at their disposal to effectively deal with those who use illegal tactics to collect debts. There are statutes such as the Federal Fair Debt Collections Practices Act and the New York Fair Debt Collection Practices Act. There are agencies such as the New York City Department of Consumer Affairs that regulates debt collectors and their practices, as well as the New York Attorney General's office that handles complaints of illegal business practices.

The Courts should also keep in mind that New York is the financial center of the country, if not the entire world. New York is home to banks, lenders, and financial companies in every field. Governor Cuomo has actively sought to make New York a place where businesses are welcome and encouraged to do business. These businesses bring in billions of dollars to the economy, first and foremost to the economy of New York, not to mention tax revenue. The litigation that is an inevitable part of the financial industry makes the legal profession and the Courts in New York the best in the world. If the Courts allow unreasonable hurdles to the recovery of legitimate debt, it cripples New York's efforts to grow and promote our financial sector.

It is already difficult for creditors to recover on debts properly due and owing. Even simple promissory note actions can take years to resolve in litigation. Debtors very often interpose multiple and many times frivolous defenses in an effort to forestall the meritorious determination of an action. Frankly, we have encountered some judges who unfortunately lump all creditors together as being unscrupulous, and pre-judge cases on that basis before they know the facts. These reforms will merely fuel the fires of animosity towards all creditors indiscriminately, instead of directing that animosity towards the small handful of plaintiffs who abuse the system. We respectfully request that the Court seriously consider the reforms from the perspective of both creditors and debtors, so that all parties who come before the Court can be treated with fairness and respect.

Thank you for your consideration.

Sincerely,

Steven Giordano, Esq.
Vlock & Associates, P.C.
630 Third Avenue, 18th Floor
New York, New York 10017
(212) 557-0020 ext. 815 - phone
(212) 574-3365 - fax

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From: Tim Rooney <Trooney@MJRF.com>
Sent: Friday, May 30, 2014 12:50 PM
To: rulecomments
Subject: Response to proposed reforms relating to consumer credit collection cases
Signed By: trooney@mjrf.com

Dear Mr. McConnell;

Thank you for the opportunity to respond to the proposed court rules for consumer credit cases. I am the managing partner in the law firm of Mullooly, Jeffrey .Rooney & Flynn LLP whose members have been practicing creditors rights law for over 45 years under the same name. My background is I started working for MJRF in 1983 as a collection manager /legal assistant thru law school and then as an admitted attorney in 1987 thru today. We employ 75 people in various capacities but we can assure you if the rules are passed as is, we will not be able to support that size workforce. We are members of the Commercial Lawyers Conference /New York Creditors Bar organization as well as other consumer credit groups. We have been involved in the preparation of the response provide to you on behalf of the Commercial Lawyers Conference dated May 29 2014 and signed by Mitchell Selip. We adopt each and every point in that response/comment to the proposed reforms or rule changes.

We would like to point out a few issues which we feel are extremely important. The need for an advisory board to examine and create a fair set of rules in this area of law is crucial for our practices to survive. I have to tell you that our clients over the last 4 years have put in place compliance directives that really answer all the concerns being raised in terms of reforms. Our process servers are required to have tracking capabilities for their employees and every default judgment requires the production of the charge off statement for an affidavit to be executed by the client. We are already strained to the limit in terms of the processes required by our clients to handle debt collection work. In an advisory board setting, these best practices could be shared with the consumer groups to reach a common ground for rules which balance the interest of the consumers with the creditors seeking to use the courts.

The implementation of these rules as is retroactively will have a drastic effect on the thousands of pending claims in the civil, district and city courts. It is extremely important that the creditors be given a chance to adjust their process to comply with the final approved rules. To do otherwise would unfairly penalize the creditors from enforcing valid obligations. Finally we urge the OCA to adopt the definition and document requirements outlined in the Commercial Lawyers Conference response/comments.

Thank you for your time and attention to this matter.

Mullooly Jeffrey,Rooney& Flynn LLP
Timothy F Rooney Esq.
6851 Jericho Turnpike Suite 220
PO Box 9036
Syosset,New York 11791-9036
Phone (516) 656-5334
Fax (516) 921-2131

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CHIARI & ILECKI, LLP

ATTORNEYS AND COUNSELORS AT LAW

wilecki@chiari-ilecki.com

GERALD CHIARI
WILLIAM ILECKI
BARBARA RIDALL
KEITH ROSEBORO
MELISSA OVERBECK
SARAH BLARR
GIOVANNI GENOVESE, OF COUNSEL
ROBERT DUBIN, OF COUNSEL

14 LAFAYETTE SQ STE 1440
BUFFALO, NEW YORK 14203
TELEPHONES:
(716) 838-4300
Fax: (716) 204-9728

May 30, 2014

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

E-mal Address- rulecomments@nycourts.gov

Facsimile- 212-428-2155

RE: Comment to Proposed Default Judgment Rule

Dear Mr. McConnell:

Please have this letter constitute my comment and analysis related to the proposed Rule 22 NYCRR §208.14-a, §210.14-a, and §212.14-a, and accompanying proposed procedural forms.

I am an Attorney who primarily represents credit unions and medical service providers in the collection of consumer debts. I have practiced for 24 years in this area, and have seen tremendous changes in laws, regulations, and perceptions. Without question, these changes have often responded to abuses by debt collectors. However, I remain concerned that we may be failing to properly weigh the need for legitimate collection and enforcement of contractual obligations, as well as the need to support Attorneys that properly litigate consumer collection matters (especially against Debtors that lack respect for the Court system).

I estimate that my firm handles 750 to 1,000 consumer cases per year involving such credit unions or medical service providers. We do not make outgoing telephone calls to debtors. My collection efforts are conducted through litigation. I verify all addresses myself using Lexis Public Records searches; I also have access to credit reports and Westlaw-Clear to confirm questionable addresses. We also monitor our servers, and use the Sheriff whenever practicable. Although nothing can be perfect, my procedures relative to service of process are extremely thorough and effective.

Recently, I have noticed an increase in debtor disputes and service of Answers to Complaints. I estimate that 10% to 15% of my lawsuits now result in disputes. Of these disputes, less than 10% have any plausible basis, and the remaining 90+% of disputes are completely frivolous and solely served to delay entry of Judgment; these cases are ultimately settled or resolved by formal summary judgment motion. As to the non-frivolous disputes, most are also settled or resolved via motion practice. I estimate that possibly one or two such disputed cases per

year may result in a legitimate reduction of the claims based upon the merits of the defense. I only recall one credit union or medical service provider case that was "no caused" or dismissed in entirety. I submit that no law or Regulation should be designed to restrict legitimate claims.

I highly doubt that there are many Attorneys with who exceed my combination of integrity, passion, work ethic, and both substantive and practical knowledge of the law in a specific area. I do not presume that there are not exceptional Attorneys, but I suggest that you ask one of these Attorneys to work in my office for 1 month, and then report to you as to the facts of the collection's process. Given the disdain of society as a whole, including some in the Judiciary, I doubt that many other quality Attorneys would now consider practicing in consumer collections. (It is difficult to try to keep up the spirits of my young, quality Associates). I also note that it is highly surprising that quality Creditor's Attorneys were not consulted in advance relative to the proposed Rule and forms.

Proposed Court Rules

The following are my comments relative to the proposal:

Court Rules

Section (a)- Can the paragraphs in the Affidavits be added to a Verified Complaint, as now permitted under CPLR 3215? Section (a) seems to require the proposed Affidavits, but should permit the paragraphs to be contained in a Verified Complaint.

Section (b)- Original Creditor should be defined to include any subsequent entity/person acquiring title to the debt prior to the default giving rise to the cause of action. There should also be a reference to the forms in the Rule- e.g., reference to Exhibts or forms annexed thereto.

Section (c)- should be modified to confirm that the "plaintiff has purchased the debt *after the default giving rise to the cause of action*". There should also be a reference to the forms in the Rule- e.g., reference to Exhibts or forms annexed thereto.

Proposed Affidavit of Facts By Original Creditor

Paragraph 2- The form presumes a credit card agreement. The form will need to be modified for other transactions (e.g., promissory notes, medical services, overdrafts/bad checks). Paragraph 2 should contain some directive permitting modification as appropriate for the cause of action.

Paragraph 4- A copy of the Agreement is to be provided. For medical services, the Agreement often would contain private health information. In other cases, the Agreement is oral, or lost. There should also be some direction permitting explanation if an Agreement is not provided.

Affidavit of Non-Expiration of Statute of Limitations

Can the paragraph be added to the Affidavit of Facts?

Allegation where cause of action accrued- Please clarify whether you mean a State.

Debt Buyer Actions

In FDCPA litigation, as well as State Consumer Protection Statutes, a debt buyer is subject

to the additional regulations if the buyer purchased the debt after default. This would not apply to lenders assigned a debt in retail installment contracts (immediately upon purchase from a vendor). There should be a definition of Debt Buyer to include any person or entity obtaining title or rights to the debt while said debt is in default.

Exhibit B

Proposed Rule Relating to Additional Notice of Consumer Credit Action

Why must the notice include the Spanish language, and why would the Court not provide a translation? This form should be printed by the Court, especially if the Spanish translation is required- to ensure accuracy.

In the paragraph after the insertion of the Spanish Translation, the address for the mailing is "the address at which process was served in the summons and complaint". This is confusing and incorrect, as the address in the summons is not always the same as the place of actual service. The Chief Judge referenced the address where service occurred as applicable to this Notice.

Exhibit C

Answer

Par 19- UCCA §213 is not jurisdictional.
Par 21- Military service is not usually a defense to liability.
Par 22- Exempt income is never a defense.
Why would the Court promote frivolous Answers?

Order to Show Cause

The proposed Affidavit is insufficient as a matter of law to vacate a Judgment.

Implementation date

Why are you so quick to implement? There must be some time to permit compliance, and to assess comments. The law should not be based upon the passion or emotion of the moment; knee-jerk reactions are not well thought. Did you really expect that your proposal was beyond review, especially when you had yet to receive input from the Creditor's Bar?

Comments Related to Press Release

My remaining comments relate to the troubling rhetoric of the Press Release, which includes comments by the Chief Judge. The attacks upon the Creditor's bar, without any qualification or reservation, evinces a disrespect for Attorneys. This, in turn, will provide justification for disdain and disrespect from Debtors, Debtors' Attorneys, Judges and Court personnel. The Press Release consistently employed language that indicates a universal contempt for collection actions, as if no collection action resulting in a default Judgment has merit.

Consider the use of terms such as "most", "routinely", "typically", "many", "in practice", "frequently". There is no effort made to provide actual statistics as to the percentages of claimed errors in collection actions. How many Judgments are taken against the wrong Defendants, or for

the wrong amount (and upon what proof)? As to the percentage of default Judgments, you ignore the obvious fact that there are actually many Debtors that have some integrity, and will not submit a frivolous Answer to a legitimate collection action. The Debtors currently have the ability, resources, knowledge and/or incentive to serve an Answer if there is a dispute. We must overcome the bigotry of perception and low expectations.

The claim that many Debtors first learn of a Judgment upon a restraint on a bank account is odd given the fact that it is extremely difficult to restrain accounts since the amendments relative to bank account restraints and exemptions became effective on January 1, 2009. The amendments were specifically passed with the express purpose of protecting a Debtor's ability to pay for food, rent and medicine. (Of course, the self-righteous hypocrisy of the State of New York became evident effective May 1, 2009, when the State excluded debts to the government from any statute protecting bank accounts).

The fact that Debtors may claim that they first learned of debts when an enforcement device actually works is not odd given the fact that most Debtors intentionally ignore legal notices, and do not tell the truth on notice issues in the hope that they can get relief from the Judgment enforcement. It is the naïve person with no experience in collections who will simply believe the Debtors on this issue. Typically, such Debtors lie or are disingenuous.

The Press Release contains other disingenuous comments. For example, the criticism of hearsay allegations is misleading. Admission of hearsay is normal and appropriate as a business record, even in criminal actions. The concern with the integrity of the system fails to address why there is no concern with Supreme Court actions, which are not subject to the proposed Rules.

The Press Release seems better suited for a prior time period (2008 or earlier). The Press Release notes 100,000 collection lawsuits annually. I am very confident that the statistics will show that collection actions have decreased by more than one-half, yet there is silence as to the reason for the decrease. Actions under the Fair Debt Collection Practices Act against debt collectors quadrupled from 2004, yet there is no mention of this. The Press Release appears to be a marketing strategy that ignores the fact that there are more protections and remedies available for Debtors, and fewer remedies and protections available for Creditors (causing reduced incentive for Creditors to pursue their legitimate rights).

To the extent that there were many abuses by some unscrupulous law offices (which I do not dispute), the Press Release seems to presume that the Courts and legislature were otherwise powerless to prevent same. Their apathy caused the pressure and fear that apparently fuels the present perceived need for reckless haste in dubious Rule-making, especially given the fact that our legislature has considered legislation relative to proof in consumer lawsuits over many years.

Further proof of base marketing in the Press Release is found in the use of "ordinary consumers", "low-income or working people, including many elderly and disadvantaged", and "zombie debts", clearly intended to garner attention or inflame passions. The law should not be determined by the passion of the moment. Many Judges ignore the law due to "feeling sorry" for a litigant; feeling good is not a basis for decision-making, especially when you feel good with other people's money. Integrity does not always cause immediate gratification. Also, is it really surprising

that less wealthy people are less likely to pay the obligations? Denying enforcement of obligations may seem like a warped wealth re-distribution utopia, but it fails to fulfill the function of the law. Perhaps, when the Courts finally recognize the extreme measures taken on behalf of Defendants, they will stop feeling sorry and advocating for them.

The Press Release wishes to "ensure a fair legal process for all debtors". What is being done to ensure a fair process for Creditors, and respect for their Attorneys? The legitimacy of our legal system requires orderly resolution of disputes, with respect for the participants. We have heard of Judges who steal, suborn perjury, engage in unethical conduct, and commit other crimes; a former Chief Judge is included in such improper actions. However, the majority of Judges have high standards of skill and ethics. Imagine constant rhetoric attacking Judges relative to the crimes of a few without acknowledging the legitimate efforts of most Judges. Would you be happy to constantly hear that "too many Chief Judges have abused their position and commit crimes in pursuit of their greed and self interest"- after all, even one former Chief Judge was too many? You should be able to argue your proposed changes with due regard and respect for the legal system, and without marketing tactics, disingenuous propaganda, or hyperbole. If Judges and Attorneys do not respect their profession, and do not respect the legal system, why should anyone else?

I will conclude by providing examples of the struggles faced by Creditor's Attorneys, including personal attacks, as well as disrespect and lack of integrity by Debtors. Said attacks would be inspired by an official attitude of hostility to justify a Debtor's departure from integrity and basic manners (beyond simply making false defenses). Among other attacks this year, I have been told by different Debtors that I am not going to heaven; that I better hope that I do not need medical services at a hospital where a Defendant-doctor is employed; that I am a f-en "white cracker"; and that I have various negative (with expletives) qualities of a person of Jewish descent- with a swastika painted on my front sidewalk 2 days after these comments were made (the Debtor did not know that I am not even Jewish).

I also attach relevant exhibits:

1- Justice Kennedy's dissent in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573 (U.S. 2010) relative to Fair Debt Collection Practices Act litigation against Attorneys. I ask that you read the entire dissent, but not the following passage at page 622:

> "After today's ruling, attorneys can be punished for advocacy reasonably deemed to be in compliance with the law or even required by it. This distorts the legal process. Henceforth, creditors' attorneys of the highest ethical standing are encouraged to adopt a debtor-friendly interpretation of every question, lest the Attorneys themselves incur personal financial risk. It is most disturbing that this Court now adopts a statutory interpretation that will interject an attorney's personal financial interests into the professional and ethical dynamics of the attorney-client relationship. These consequences demonstrate how untenable the Court's statutory interpretation is and counsel in favor of a different reading."

Why is nothing being done to protect the integrity of our judicial process by advocating for Congress to amend the FDCPA to effectively overturn the majority Decision in *Jerman* that provided no bona fide error defense for Attorneys from personal economic liability for reasonable interpretations of FDCPA law? Does the Judiciary expect Creditor's Attorneys to be perfect? I recently read an article in our Buffalo News on May 25, 2014 titled "High Court's Practice of Revising its Rulings Quietly Alters Federal Law" (with the article written by a New York Times writer). A quote in the article relative to the Court's correction of errors notes: "Of course the justices make mistakes, and, of course, they can correct them." Evidently, I am held to a higher standard than Supreme Court Justices despite their greater time, staff, and resources (and presumed competence).

2- CLARO Order to Show Cause- bad service. Note the frivolous and misleading allegations that lack integrity, but also exhibit a lack of fear of any consequence to a Debtor or Debtor's counsel. However, I must note that a different CLARO Attorney who appeared on the return date of the Motion did agree that the Motion was poorly prepared, and did agree to withdraw the Motion without condition.

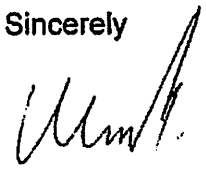
3- CLARO Order to Show Cause with Transcript of prior Motion- excusable default. Note the highlighted Debtor's claim that the Court's Decision was never received in the Transcript, but admission that the Decision was received in the OTSC Affidavit. I must also note that, although the Debtor has clearly lied, CLARO did not appear at the first Motion, and I do not know whether they were aware of the prior denial of receipt of the Decision. In any event, I doubt that the Debtor will face any consequence, and I will need to do additional work defending against the OTSC.

4- Exchange of letters relative to non-compliance with a Subpoena. Note the complete disrespect by the Debtor for the judicial process, including the Court's Order. I estimate that 90% of Subpoenas are ignored, and 50% of Court Orders directing compliance are ignored. Is this attitude acceptable to the Chief Judge? I see no proposal to fix this problem.

Perhaps, I need to do a better job of marketing and whining, but I actually presumed that our decision-makers were more realistic and less ignorant of the facts. I also may have a completely different view of the law than many. People do not agree on "right" and "wrong"; in most cases, the disagreement involves a different ideology, observation, and/or myopic versus panoramic view. The law and the judicial system exist to impartially resolve disputes in an orderly manner. Being a lawyer, as well as a Judge, requires handling unsettling issues that do not provide for knee-jerk, short-term universal happiness; decisions and consequences are difficult on the decision-maker and people affected by the result. We should not demonize anyone we consider to be in the "opposition" because we are too weak to act with integrity demanded by our position.

Thank you for your attention. I would welcome the opportunity to further assist in your consideration of any proposed modifications of the law in this area.

Sincerely



WILLIAM ILECKI

From: Matt Blake <mattblake@ariesdata.com>
Sent: Wednesday, May 21, 2014 9:10 AM
To: rulecomments
Cc: ginoa@ariesdata.com; JParrella@toddlaw.com; teh@toddlaw.com
Subject: New Rules for Consumer Credit Debt Cases in New York

The proposed ruling is going to not only hurt the financial and credit markets in NY State but the ability of consumers to obtain credit. It is rulings like this that will make it impossible for financial institutions to comply with the arduous requirements and less likely to lend and provide affordable credit. Once regulations are in place they will be difficult to reverse. Credit and lending is such an important factor in stimulating business in a poor economy. It indirectly provides jobs.

Yet another ruling of many that is overall hurting business in NY. It is also biased towards one class of debt which is unlawful in my opinion. It will negatively impact our court system which relies on index numbers and fees to supplement budgets. It will also overburden the courts with paperwork.

Please understand all the repercussions that go along with this ruling before hurting consumers. I am a consumer myself.

The above is only my opinion and have high respect for our court system. However, I do feel more strongly on a process and decision that should be before the legislature and not an agenda of the court.

Matthew J. Blake
Aries Data Collections
243 Route 100, 2nd Floor
Somers, NY 10589
(914) 666-0991 x100
(914) 666-2823 (direct)
(914) 232-8101 (fax)

Peter J.
Craig
& Associates, P.C.
Attorneys At Law

May 1, 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
Affidavit of Non-Expiration of Statute of Limitations

Dear Mr. McConnell:

I applaud Judge Lippman's efforts to reform certain procedures related to consumer collection cases, particularly insofar as they are directed to the many issues which have arisen out of the burgeoning debt buying industry.

Nevertheless, I am writing to voice my personal concern over the proposed requirement of an attorney Affidavit as to the "non-expiration" of any applicable Statute of Limitations.

Over the past thirty years I have devoted a good deal of my practice to collecting unpaid student accounts and federal Perkins Loans for a local college. These cases pose unique issues.

Student debtors frequently relocate out of the jurisdiction upon leaving school. It is difficult and time-consuming to locate them for service of process. It is also difficult to determine whether under the federal Fair Debt Collection Practices Act an action against them in New York even can be maintained, or whether the matter will have to be referred on to local counsel in a different jurisdiction.

Since the Great Recession, it also is increasingly common for student debtors to initially leave the jurisdiction, only to later return to their family homes here in New York.

Given the tolling and other provisions of the CPLR and at common law, it would be virtually impossible for me to know in a given case whether or not the statute of limitations has run, or to attest to its "non-running". Requiring the attorney to take such a position is neither practical nor fair.

It seems to me that this is precisely the justification for the longstanding requirement of CPLR 3018(b) that in order to avoid waiver, the running of the statute of limitations must be

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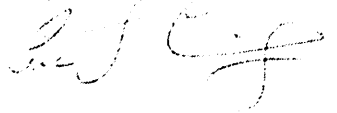
asserted as an affirmative defense – upon which the defendant often has exclusive knowledge of the pertinent facts, and accordingly, the burden of proof.

Moreover, the federal regulations governing the Perkins Loan program specifically preempt otherwise applicable state statutes of limitation.(*See*, 34 C.F.R. §674.46(g)). In suits on those obligations, I could in effect be attesting to the fact that the statute of limitations has indeed run, but that it simply doesn't matter.

Finally, I would point out that although well-intentioned, these proposed reforms (as well as periodic legislative efforts to shorten limitations periods) can have the opposite of their intended effect. Student debtors are unlike most others in that (through no fault of their own) they simultaneously have greater aggregate amounts of debt and less immediate ability to repay that debt. Strict limitations periods force their creditors to seek judgments sooner than might otherwise be appropriate – judgments which then often disproportionately hinder those young adults' future prospects for obtaining credit, often when they need it most.

I offer these brief comments only as an individual attorney with long personal experience tilling these particular fields. My brethren attorneys and various trade associations will undoubtedly offer far more cogent, thorough and well-researched comments, but I hope that my perspective on the proposed reforms will be of some value.

Respectfully submitted,



Peter J. Craig, Esq.

/pjc