FEDERAL TRADE COMMISSION

PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION ROUNDTABLE

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PROOF OF CONSUMER CREDIT INDEBTEDNESS

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1. Introduction

Consumer credit indebtedness occurs when a consumer uses available credit to make purchases, obtain services or take cash advances, and then fails to pay it back. The failure of the consumer to pay back the credit as required by the credit agreement can result in interest, fees and charges being added to the principal or actual amount spent, and creditors can and do sue consumers for unpaid balances and breaches of the credit card agreement.

The purpose of this White Paper is to explore the nature of the evidence of consumer credit indebtedness and how it may be proven in court.

2. The Consumer Credit Transaction Complaint

Creditors have the right to sue consumers to collect debts that are due and owing. Each state has its own standards of pleading, but the basic pleading standard was established by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*. The degree of factual specificity required, if any, to provide the defendant with fair notice of the relief demanded depends on the specific case and the specific cause of action being pled. The issue is not whether a Plaintiff will ultimately prevail but whether the Claimant is entitled to offer evidence to support the claims. Current rules of court and pleading requirements are sufficient to protect consumers as well as permit creditors to collect the debts owed them. The following sections are devoted to the elements and issues of evidence that are often present in consumer credit litigation.

3. Signatures

One of the elements of a contract is the use of a signature to signify the intent of the signor to enter into the agreement. In the middle ages contracts were signed by the inscription of a mark of some kind or an "X". Embossed or formalized signatures came into existence as more people learned to read and write following the invention of the printing press. We have now returned to the use of marks in place of signatures, but these marks exist in the form of electronic data which is submitted on-line or through other electronic or computer-generated means.

Consumer credit card applications and agreements no longer require signatures. Most consumers apply for and fill out their credit applications via telephone or on-line eliminating the need for formal signatures or marks. The contract is created by the issuance of a credit card and contract to a cardholder which the cardholder accepts each time he uses the card. The cardholder's use of the card, not his signature on a contract or application, accesses the credit and creates the obligation to repay the credit used plus contractual interest and fees.

4. The Charge-off Balance – Best Proof of the Debt

Congress has pre-empted the regulation of credit card issuers, believing such regulation to be necessary to insure national financial stability. A credit grantor is not required to provide copies of individual transactions if it is not the entity providing the goods, services or cash advances. The monthly statement need only show the amount and date of the transaction, the name of the entity that provided the goods, services or cash advances, the city and state where the transaction took place, and the credit card issuer must retain evidence of compliance for only two years after the disclosures were made.

Federal Law requires that a lending institution charge-off the outstanding balance due and owing on a consumer's credit account when the consumer is in continuous default for a

period of 180 days for open accounts including credit card accounts, or 120 days for other consumer credit accounts such as retail installment agreements. It is an accounting procedure in which the credit card issuer absorbs the outstanding balance as a loss and takes the amount of the non-performing receivable as a charge against current earnings.

The charged-off balance consists of all sums that are due and owing as of the charge-off date. It includes the amount actually expended by the cardholder for goods and services, all un-reimbursed cash advances or transfers, and all interest, fees and charges as provided in the cardholder agreement. In essence, the charge-off balance is the total of all unpaid activity on the account as of the date of charge-off. Its use simplifies the process of proving the debt by eliminating the need to scrutinize account detail.

5. The Right to Dispute the Debt

Consumers have the right to dispute any entry on their billing statements which they believe was made in error within sixty days following their receipt of each statement. Lenders are allowed the presumption that any entry not disputed is correct and consumers are not relieved of their obligation to pay all undisputed entries. A consumer's failure to make such payments on undisputed bills results in the default of the credit agreement.

6. Account Stated

An account stated is an agreed balance between the parties. It may be defined as an agreement, express or implied, between the parties to an account based upon prior transactions between them, with respect to the correctness of the separate items composing the account, and the balance, if any, in favor of the one or the other. A mere statement of a balance due including a monthly credit card account statement, if accepted, is enough to constitute an account stated. Once accepted, the statement becomes a new contract.

7. Real Party in Interest

A creditor which sues a consumer to collect a debt must be the real party in interest. This means that the creditor is the party to whom the consumer owes the debt. The proof of the real party in interest is straightforward if that party is the original creditor. The modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata.

The issue of the real party in interest is largely a procedural requirement and should never become more important than the purpose which it seeks to accomplish. When a consumer's account is assigned or sold, a transfer of all the interests and rights to the account takes place. The assignee thereafter stands in the shoes of the assignor and may enforce the contract against the consumer.

Documentary proof is not necessary to establish an assignment when the allegations of such assignment in the complaint are not contested. A proper affidavit submitted with the application for a default judgment satisfies legal requirements and copies of the assignments are not required. Asset Buyers take the rights that their predecessors had and have the right to bring actions to collect the debts owed to their predecessors.

8. Electronic Business Records

Business records establishing the claim need to be admitted into evidence to prove a consumer credit case. An original creditor which sues a consumer may enter its own business records into evidence to prove its case and can provide its own employee-witness to testify to its rights to the debt. If the owner of the account purchased that account, it is unlikely that there will be a witness from the original issuer. A representative from the current owner will need to

testify or submit an affidavit of the facts to prove that the current owner is the real party in interest; that the consumer is the person who owed the debt to the original creditor and now to the current owner; and that the amount claimed to be owed is correct.

Most financial business records are maintained on computers in various electronic formats. The maintenance and use of these electronic business records is governed by a plethora of Federal legislation including the Uniform Electronic Transactions Act. The Act applies to electronic records and electronic signatures relating to a transaction and does not require a record or signature to be created or otherwise processed by electronic means or in electronic form. Evidence of a record or signature may not be excluded solely because it is in electronic form.

It is immaterial if a business record is maintained electronically so long as it meets the requirements of Federal Rules of Evidence Rule 803(b)(6). The rationale underlying the hearsay exception is that business records are generally trustworthy and reliable. Businesses are motivated to keep records accurately and are unlikely to falsify records upon which they depend. The party seeking to admit documents into evidence need only establish that the document has sufficient indicia of trustworthiness to be considered reliable. Computer records are held admissible absent a specific objection to their accuracy.

9. Asset Buyers and Electronic Business Records

The buying and selling of defaulted loans is a common business practice and assignees routinely rely on the data previously kept by the assignor in keeping business records as to the amount of the debts owed. Asset Buyers must be able to demonstrate that they are the current owners of the consumer accounts. They produce paper documents from the electronic data provided with the sale of the accounts, both of which are subject to hearsay exceptions to the business records rules.

The business record exception to the hearsay rule "does not require a showing of chain of custody." A plaintiff is required to provide documents establishing transfer leading from the original creditor to the Plaintiff only if the Defendant has challenged the Plaintiff's ownership of the account. If there is no legitimate indication that another party is claiming ownership and thereby is seeking payment on the same debt, there is no basis for the court to demand production of the chain of assignments.

Courts have recognized the increasing number of claims on assigned debts and have allowed assignees to introduce records inherited from their assignors to establish a *prima facie* case. Rule 803(6) has been interpreted to be applicable to the admission of account records initially generated by the original creditor, but later held by the Asset Buyer. The Asset Buyer's business is premised upon the integration of the business records of the original creditor into its own records, and the debt buyer must primarily rely upon the accuracy of those documents in pursuing collection of the account thereby satisfying the first factor for admissibility.

A witness from the entity that originally created the business record is not required. Business records received from an assignor could be introduced by the assignee under the business records exception without bringing in a witness from the assignor entity. To require testimony regarding the chain of custody of such documents, from the time of their creation to their introduction at trial, would create a nearly insurmountable hurdle for successor creditors attempting to collect loans.

10. Conclusion

Laws should not be changed simply to “hurt a group that is a visible target, in order to disfavor the group or to extract further concessions.” We must exercise care because the debt collection industry is that visible target.

While business records, once admitted, have no more probative force than any other evidence admitted pursuant to the hearsay exception, the threshold determination that they are business records, satisfying requirements of statute, is one of law and is not a matter going only to weight of evidence. Courts must be sensitive to innovations and not seize on petty irregularities to exclude otherwise trustworthy business records from evidence. A business record which meets foundational requirements is admissible under the hearsay exception even though the person who prepared it is unavailable to testify to the acts or transactions.

In the rush to change the laws to protect consumers, we often forget that all such changes have consequences that may be more harmful than the wrongs we strive to right. Proof of consumer credit indebtedness needs no new special evidentiary rules to protect consumers. Our current rules of evidence protect the rights of consumers who have defaulted on their consumer credit accounts, and at the same time, provide a foundation and framework for creditors to prove that they are the right party in interest; that the consumer owes the debt to them; and that the amount of the debt claimed to be owed is correct.

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Proof of Consumer Credit Indebtedness

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1. Introduction

Credit is the ability of a person to "borrow money or obtain goods on time, in consequence of the favorable opinion held by the particular lender as to the [person's] solvency and past history of reliability."[2] Consumer credit is based upon a contract between a consumer and lender-creditor, and is the "right granted by a creditor to defer payment of debt or to incur debt and defer its payment."[3]

Consumer credit indebtedness occurs when a consumer uses available credit to make purchases, obtain services or take cash advances, and then fails to pay it back. The failure of the consumer to pay back the credit as required by the credit agreement can result in interest, fees and charges being added to the principal or actual amount spent, and creditors can and do sue consumers for unpaid balances and breaches of the credit card agreement. [4]

The purpose of this White Paper is to explore the nature of the evidence of consumer credit indebtedness and how it may be proven in court.

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[2]*In re Ford*, 14 F.2d 848, 849 (D.C.Wash 1926).

[3]Uniform Consumer Credit Code § 1.301(7).

[4]*First Nat. Bank of Commerce v. Seale*, 484 So. 2d 148 (La. Ct. App. 3d Cir. 1986); *Fifth Third Bank/Visa v. Gilbert*, 17 Ohio Misc. 2d 14, 478 N.E.2d 1324 (Mun. Ct. 1984); *Wenk v. City Nat. Bank*, 613 S.W.2d 345 (Tex. Civ. App. Tyler 1981); *Citibank (S.D.) N.A. v. Roberts*, 304 A.D.2d 901, 757 N.Y.S.2d 365 (3d Dep't 2003); *Citibank (S.D.) N.A. v. Roberts*, 304 A.D.2d 901, 757 N.Y.S.2d 365 (3d Dep't 2003).

2. The Consumer Credit Transaction Complaint

Creditors have the right to sue consumers to collect debts that are due and owing. Each state has its own standards of pleading, but the basic pleading standard was established by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*.[5] Complaints must contain enough "[f]actual allegations ... to raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."[6] "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'"[7] The degree of factual specificity required, if any, to provide the defendant with fair notice of the relief demanded depends on the specific case and the specific cause of action being pled. The issue is not whether a Plaintiff will ultimately prevail but whether the Claimant is entitled to offer evidence to support the claims." [8]

There is no one size fits all, but most jurisdictions accept a summons (or notice) and complaint that contains the name and address of the Plaintiff and Defendant, the basis of the action (violation of contract, account stated) and the amount owed. Some jurisdictions require that the original account number (usually in a redacted format) be included. Interest is generally computed from the date of default. The name of the originator of the debt is required in some states if the Plaintiff is an assignee of the original creditor. This information more than satisfies the Supreme Court standard.

The form and content of consumer credit transaction complaints has undergone a great

[5]550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

[6]*Id.* 127 S.Ct. at 1965.

[7]*Erickson v. Pardus*, ---U.S. ----, ----, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007) (*quoting Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

[8]*Scheur v Rhodes*, 416 U.S. 232, 236 (1974).

deal of scrutiny in the last few years as the economy declined. Some jurisdictions have attempted to tighten the requirements beyond the Supreme Court mandates, demanding attachments of signed contracts, numerous statements of accounts and documents proving the chain of title in assignment cases. Such changes are not necessary. Current rules of court and pleading requirements are sufficient to protect consumers as well as permit creditors to collect the debts owed them.

The following sections are devoted to the elements and issues of evidence that are often present in consumer credit litigation.

3. Signatures

One of the elements of a contract is the use of a signature to signify the intent of the signor to enter into the agreement. In the middle ages contracts were signed by the inscription of a mark of some kind or an "X". Embossed or formalized signatures came into existence as more people learned to read and write following the invention of the printing press. We have now returned to the use of marks in place of signatures, but these marks exist in the form of electronic data which is submitted on-line or through other electronic or computer-generated means.

It is frequently (and astutely) stated that the law has not kept pace with technology.[9] Authentication or proof of the legitimacy and the accuracy of the documents and records called into evidence has troubled judges and scholars through the ages. Oliver Wendell Holmes wrote that:

> [a]s few could write, most people had to authenticate a document in some other way, for instance, by making their mark. This was, in fact, the universal practice in England until the introduction of Norman customs. With them seals came in. But as late as Henry II they were said by the Chief Justice of England to belong

[9]Michael S. Baum, *Linking Security and the Law of Computer-based Commerce*, VeriSign, 1 (1993).

> only to kings and to very great men. I know no ground for thinking that an authentic charter had any less effect at that time when not under seal then when it was sealed. . . . Its conclusive effect was due to the satisfactory nature of the evidence, not to the seal. . . . But when seals came into use they obviously made the evidence of the charter better, in so far as the seal was more difficult to forge than a stroke of the pen. [10]

In 1851, the Supreme Court stated that:

> [f]ormerly wax was the most convenient, and the only material used to receive and retain the impression of a seal. . . . We cannot perceive why paper, if it have that capacity, would not as well be included in the category. The simple and powerful machine, now used to impress public seals, does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident, or intention than that made on wax. It is the seal which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it. [11]

The identity of the person that the mark or signature represents remains more important than the material or format in which it is placed. The discussion now focuses, not on wax or paper, but on digital media.

> "Records" are in practice accepted as accurate upon the faith of the routine itself, and of the self consistency of their contents. Unless they can be used in court without the task of calling those who at all stages had a part in the transactions recorded, nobody need ever pay a debt. [12]

Consumer credit card applications and agreements no longer require signatures. Most consumers apply for and fill out their credit applications via telephone or on-line eliminating the need for formal signatures or marks. The contract is created by the issuance of a credit card and contract to a cardholder (the offer) which the cardholder accepts each time he uses the card

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[10]Oliver Wendell Holmes, *The Common Law*, 272-273 (1881), cited in Baum, *supra*.

[11]*Pillow v. Roberts*, 54 U.S. (13 How.) 472, 473-74 (1851), cited in Baum, *supra*.

[12]*Great Seneca Financial v. Felty,* 2006 WL 3690688 (Ohio App 1 Dist. 2006), *citing Massachusetts Bonding & Ins Co. v. Norwich Pharmacal Co.,* 18 F.2d 937 (2nd Cir 1927).

(acceptance). The cardholder's use of the card, not his signature on a contract or application, accesses the credit and creates the obligation to repay the credit used plus contractual interest and fees.

> Because it is the use of the credit card, and not the issuance, that creates an enforceable contract, each time a cardholder uses his credit card, he accepts the offer by tendering his promise to perform (i.e. to repay the debt upon the terms set forth in the credit card agreement). [3]1

In *Duke v. Sears, Roebuck and Co.,*[14] the cardholder argued that his failure to sign the card exempted him from liability. The Court held that "[the cardholder's] undisputed use of one of the cards sent to him . . . constituted an acceptance of the cards and an assent to the agreement underlying their issuance. . ."

> Even accepting defendant's position that plaintiff has failed to provide a signed original agreement and assuming that defendant did not sign the agreement, "the absence of an underlying agreement, if established, would not relieve defendant of her obligation to pay for goods and services received on credit."[15]

The use of a credit card and the lack of need of the consumer's signature on an application or agreement was discussed extensively in *Discover Bank v. Vangorder*.[16] Though a

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[13] *Bank of America v. Jarczyk*, 268 B.R. 17 (W.D.N.Y. 2001). *See also Read v. Gulf Oil Corporation*, 114 Ga. App. 21, 150 S.E.2d 319, 320 (1966). "When the customer uses the card a contract is created and he agrees to be bound by the terms and conditions of the cardholder agreement."; *Grasso v. First USA Bank*, 713 A.2d 304 (Del. 1998). A cardholder's use of a card constituted acceptance of the card and assent to the agreement underlying their issuance; *Chase Manhattan Bank (Nat. Ass'n), Bank Americard Division v. Hobbs*, 405 N.Y.S.2d 967 (1978). "The defendant's use of the credit card in and as of itself constituted proof of an underlying agreement between the account holder and account issuer. The acceptance of a paper which purports to be a contract may be indicated by conduct or acquiescence."

[14] 433 S.W.2d 919, 926 (Tex.Civ.App. 1968).

[15] *Citibank v Roberts*, 304 A.D.2d 901, 757 N.Y.S.2d 365 (3rd Dep't 2003); *see also Bank One, Columbus, NA v. Palmer*, 63 Ohio App.3d 491, 493 (1989). "Credit card agreements are contracts whereby the issuance and use of a credit card creates a legally binding agreement."; *Calvary SPV I, L.L.C. v. Furtado*, 2005 WL 3528848 (Ohio App. 10 Dist. 2005). Although that cardholder agreement does not bear defendant's signature, the bank's issuance of the card and defendant's use of the card create a binding contract; *City Stores Co. v. Henderson*, 116 Ga. App. 114, 156 S.E.2d 818 (App. Ct. 1967). "[T]he issuance of a credit card is but an offer to extend a line of open account credit . . .. use of the card by the offeree makes a contract between the parties according to its terms; *Anastas v. American Sav. Bank (In re Anastas)*, 94 F.3d 1280, 1285 (9th Cir. 1996). "[E]ach card use forms a unilateral contract: the holder promises to repay the debt . . . and the . . . issuer performs by reimbursing the merchant who . . . accepted the . . . card in payment."

[16] 2006-9331 (NY Sup. Ct. Erie Cnty. 2007).

New York case, its application crosses state lines.

> Defendant further asserts that she is not a signatory to any contract which created the credit card relationship between the parties. . . [and that] Plaintiff cannot set out a prima facie case. For Plaintiff to prevail on its claim under New York law, it is not required to submit an executed agreement with the Defendant.
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> The Retail Installment Sales Act of the Personal Property Law, Article 10, § 413-11(c) recites:
>
> A single credit agreement entered into pursuant to either paragraph (a) or paragraph (b) of this subdivision may provide for the financing agency to acquire indebtedness of a retail buyer under a sales slip or memorandum evidencing a purchase pursuant to the other of said paragraphs. Where a financing agency enters into a credit agreement with a retail buyer for its own account, the credit agreement may consist of an agreement complying in all other respects with the provisions of this section, *but executed only by the financing agency, together with a credit card issued by it to the retail buyer.* [emphasis added] The credit agreement, however, must then provide that it shall not become effective unless and until the retail buyer or a person authorized by him signs a sales slip or memorandum evidencing a purchase or lease of property or services by use of the credit card and that prior thereto the retail buyer shall not be responsible for any purchase or lease of property or services by use of the credit card after its loss or theft.
>
> Under New York Personal Property Law, it is not necessary for the Plaintiff to obtain a credit agreement signed by the Defendant. An agreement that does not contain the retail buyer's signature, together with credit issued to the retail buyer is sufficient pursuant to Personal Property Law § 413-11(c) provided the agreement states that the agreement shall not become effective until the first authorized use of the credit. As reflected in the record, the credit agreement made available by Plaintiff to the Defendant clearly states that the agreement becomes effective with the first use of the credit. Once the Defendant actually used the credit card, the agreement became effective despite the fact that no written credit agreement was executed by the Defendant. That the Defendant used the credit card is more than adequately documented in Plaintiff's motion papers.
>
> The Court takes judicial notice of the fact that, routinely in the ordinary course of business, a consumer can apply for credit by mail, telephone, in person, orally or in writing. The consumer then awaits approval of his or her application. If approved, the consumer is then sent the notice of approval of credit by mail without having to sign any agreement. It is the ordinary course of business that the initial authorized use of the credit triggers the consumer's liability. New York Personal Property Law clearly supports this common business practice. By reason of the foregoing, it is clear that, pursuant to the Personal Property Law, **an**

agreement signed by the Defendant is not necessary to support Plaintiff's claims or establish Defendant's liability. [emphasis added]

4. The Charge-off Balance – Best Proof of the Debt

Congress has pre-empted the regulation of credit card issuers, believing such regulation to be necessary to insure national financial stability.[17] Each billing statement sent to the credit card user to disclose the following: [8]1

a. The outstanding balance at the beginning of the statement period.

b. The amount and date of each extension of credit during the statement period and a brief identification of each extension of credit sufficient to permit the credit card user to identify the transaction..

c. The total amount credited to the account during the statement period.

d. The amount of any finance charge added to the account during the statement period itemized to show the amounts, if any, due to the application of the percentage rates and the amounts, if any, imposed as a minimum or fixed charge.

e. Where one or more periodic rates are used, each such rate, the balances to which it is applied and the nominal annual percentage rate for each rate applied.

f. The balance on which the finance charge was computed and a statement of how the balance was determined.

g. The outstanding balance at the end of the statement period.

h. The date by which payment must be made to avoid additional finance charges.

i. The address to which payments should be sent.

A credit grantor is not required to provide copies of individual transactions if it is not the entity providing the goods, services or cash advances. The monthly statement need only show the amount and date of the transaction, the name of the entity that provided the goods, services

[17]Consumer Credit Protection Act, 15 U.S.C. §1601-I(A)(a).

[18]Federal Regulation of Credit Transactions, 15 U.S.C. §1637 (b).

or cash advances, the city and state where the transaction took place,[19] and the credit card issuer must retain evidence of compliance for only two years after the disclosures were made.[20] Requiring the production of statements for the entire history of the account, even if still available, would not result in meaningful disclosure of relevant information, and would place an undue and unreasonable burden on the creditor.

Federal Law also requires that a lending institution charge-off the outstanding balance due and owing on a consumer's credit account when the consumer is in continuous default for a period of 180 days for open accounts including credit card accounts, or 120 days for other consumer credit accounts such as retail installment agreements.[21] It is an accounting procedure in which the credit card issuer absorbs the outstanding balance as a loss and takes the amount of the non-performing receivable as a charge against current earnings.

Under the charge-off method, a bank's debt is conclusively presumed to be worthless, as follows:

1. The charge-off is made under specific orders of federal or state supervisory authorities. To the extent the debts are charged off during a tax year, they're conclusively presumed to have become worthless during that year. Treas. Reg. § 1.166-2(d)(1)(I).

2. The charge-off is made in conformance with established policies of federal or state supervisory authorities. The debt is conclusively presumed to be worthless if (a) the authorities, on their first audit of the bank after its charge-off, confirm in writing that the charge-off would have been subject to their specific orders if the audit had been made on the date of the charge-off, and (b) the bank claims a deduction for the amount charged off on its return for the tax year in which the

[19] 12 C.F.R. §226.8 (a)(3).

[20] 12 C.F.R. 226.25.

[21] *See* 65 Fed. Reg. 36,903 at 36904. The Office of the Comptroller of the Currency ("OCC") adopted this policy for all national banks and their operating subsidiaries on June 20, 2000 in OCC Bulletin 2000-20 which revised the "Uniform Retail Credit Classification and Account Management Policy," originally published in the *Federal Register* on February 10, 1999.

charge-off took place. Treas. Reg. § 1.166-2(d)(1)(ii). [22]

The charged-off balance consists of all sums that are due and owing as of the charge-off date. It includes the amount actually expended by the cardholder for goods and services, all un-reimbursed cash advances or transfers, and all interest, fees and charges as provided in the cardholder agreement.[23] In essence, the charge-off balance is the total of all unpaid activity on the account as of the date of charge-off. Its use simplifies the process of proving the debt by eliminating the need to scrutinize account detail.[24]

Charge-off does not mean the debt is extinguished or forgiven and no longer owed by the account holder. Some delinquent account holders have argued that "credit card holders who are unable to pay their debt need merely stop payment for 180 days, at which point . . . such debts will automatically become taxable income and be extinguished. [However, the Court held that] this theory is as ridiculous on its face as it is incoherent in its explanation." [25]

The Connecticut Small Claims Bench-Bar Committee has recommended to the Judicial Rules Committee that the Conn. Practice Book Section 24-24, *Judgments in Small Claims; When Presence of the Plaintiff or Representative is Not Required for Entry of Judgment*, be revised to read: "For debts with a charge-off balance, the affidavits shall include the amount of the original charge-off balance and an itemization of any damages, i.e., interest, attorney fees

[22] 34 Am. Jur. 2d ¶ 20435.

[23] *Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735, 739, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). "The Comptroller of the Currency has reasonably interpreted the term "interest" in § 85 to include late-payment fees, see 12 CFR § 7.4001(a), and petitioner has failed to establish that the Court should not accord its customary deference to the Comptroller's interpretation of an ambiguous provision of the National Bank Act."

[24] Consumers have the right to dispute every entry on every statement of account sent them. If the entries are not disputed, they are deemed to be correct. The consumers' right to dispute entries on billing statements is discussed in Part 4 The Right to Dispute the Debt. Creditors report the charge-off balance to Consumer Credit Reporting Agencies such as Experian, Equifax and/or TransUnion, when they report that the account has been charged-off. This information can also be used to verify the charge-off balance, but only if is accessed under an authorized use as provided in the Fair Credit Reporting Act (15 U.S.C. §§ 1681-1681t (2003)).

[25] *Kelly v. Wolpoff & Abramson, L.L.P.*, 2008 U.S. Dist. LEXIS 45345, 45360 (D.Colo. 2008).

etc., claimed in addition to that balance." The Committee's recommendation acknowledges that the charge-off balance is the best proof of the underlying debt.

5. The Right to Dispute the Debt

Consumers have the right to dispute any entry on their billing statements which they believe was made in error within sixty days following their receipt of each statement.[26] Lenders are allowed the presumption that any entry not disputed is correct[27] and consumers are not relieved of their obligation to pay all undisputed entries.[28] A consumer's failure to make such payments results in the default of the credit agreement.

The consumer's acceptance of the charges can also be inferred from the fact that the consumer continued to use the credit card, made partial payments, and never attempted to cancel the agreement during the period despite having received the statements for several months. Acquiescence to the contract by the party to be charged may be implied from his affirmative actions, such as when he continues to order and accept goods with the knowledge that a service charge is being imposed and pays the charge without timely objection,[29] and consent may be implied from acceptance of payments. [0][3]

Once a cardholder has established a credit card account, and provided that the

[26]Fair Credit Billing Act, 15 U.S.C. § 1666 *et seq.* (2003).

[27]*Rodkinson v. Haecker*, 248 N.Y. 480 (1928); *see also Chisholm-Ryder Co., Inc. v. Sommer and Sommer*, 70 A.D.2d 429, 421 N.Y.S.2d 455 (N.Y. A.D. 1979). "An agreement may be implied if the party receiving a statement of account keeps it without objecting to it within a reasonable time."; *Toth v. Mansell*, 207 Ill. App. 3d 665, 152 Ill. Dec. 853, 566 N.E.2d 730, 14 U.C.C. Rep. Serv. 2d 70 (1st Dist. 1990). "[A]n objection to particular items of an account is an admission of the correctness of the rest of the items, and the account becomes stated as to those items."; Woodruff v. Shuford, 73 N.C. App. 627, 327 S.E.2d 14 (1985).

[28]15 U.S.C. § 1666 and Regulation Z Subsection 226-13(b)(1)-1. "If the defendants fail to object in writing pursuant to their rights to dispute the bill, the debtor has waived the right to dispute the balance."

[29]*Tubelite v. Risica & Sons, Inc.,* 819 S.W.2d 801, 805 (Tex. 1991).

[30]*Western State Bank v. Grumman Credit Corporation*, 564 F.Supp. 9, 14 (D. Montana 1982).

> card issuer is in compliance with the billing statement disclosure requirements of 15 U.S.C. 1637, the cardholder is in a superior position to determine whether the charges reflected on his regular billing statements are legitimate. A cardholder's failure to examine credit card statements that would reveal fraudulent use of the card, constitutes a negligent omission that creates apparent authority for charges that would otherwise be considered unauthorized under TILA. [1]3

Consumers get a second opportunity to dispute or demand validation of the debt when they are served with an initial collection letter from a third party collection agency or law firm.[32] The collector must stop all collection activity until the debt is validated.[33] If the account remains undisputed, the statement of account is transformed into an account stated.

6. Account Stated

An account stated is an agreed balance between the parties.[34] It may be "defined, broadly, as an agreement, express or implied, between the parties to an account based upon prior transactions between them, with respect to the correctness of the separate items composing the account, and the balance, if any, in favor of the one or the other." [5]3

> As a general rule where an account is made up and rendered, he who receives it is bound to examine the same or to procure someone to examine it for him. If he admits it to be correct it becomes a stated account and is binding on both parties. If instead of an express admission of the correctness of the account, the party receiving it keeps the same by him and makes no objection within a reasonable time, his silence will be construed into an acquiescence in its justness, and he will be bound by it as if it were a stated account. An account stated is conclusive upon the parties unless fraud, mistake, or other equitable considerations are shown

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[31] *Minskoff v. American Express Travel Related Servs. Co.,* 98 F.3d 703 (2d Cir. 1996); *see also Transamerica Ins. Co. v. Standard Oil Co. (Indiana)*, 325 N.W.2d 210, 215 (N.D. 1982).

[32] 15 U.S.C. § 1692g.

[33] 15 U.S.C. § 1692g (b). The validation notice will be discussed in detail in another White Paper in the NARCA White Paper Series on Consumer Debt.

[34] *Holt v. Western Farm Services, Inc*., 19 Ariz.App. 355, 507 P.2d 674, 677 (Ariz.App. 1973).

[35] *R.A. Associates v Lerner*, 265 A.D.2d 541, 697 N.Y.S.2d 161 (2nd Dep't 1999).

which make it improper to be enforced.[36]

A mere statement of a balance due including a monthly credit card account statement, if accepted, is enough to constitute an account stated.[37] An account stated arose "between the issuer of a credit card and cardholders when the issuer sent monthly statements of account transactions to cardholders and no objections were made."[38] Once accepted, the statement becomes a new contract.

> It is well settled that a claim for an account stated is independent of the original obligation. By its submission of unrefuted evidence of having mailed statements of account to defendant, which statements were retained without objection for a reasonable period of time, plaintiff established its entitlement to summary judgment on its claim for an account stated. [39]

Causes of action based upon accounts stated may be entered as default judgments in the Civil Court of the City of New York so long as they satisfy the following:[40]

> A summons and complaint which qualifies for entry following CPLR § 3215, where the cause of action is for an account stated, may be entered by the clerk under the following conditions:
>
> 1. The affidavit of facts or verified complaint includes a statement indicating that an accounting was delivered or mailed to the creditor and the date of the delivery or mailing.
>
> 2. The affidavit of facts or verified complaint also includes a statement that the accounting has been retained and that no objection to it has been made.

In cases in which the defendant opposed a motion for summary judgment by alleging in a conclusory fashion that payments were not properly credited or that he questioned certain

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[36] *Rodkinson v. Haecker*, 248 N.Y. 480, 485 (1928). *See also, Philips v. Belden*, 2 Edw.Ch.Rep. 1, 13-14 (1833).

[37] *Citibank (South Dakota), N.A. v. Runfola,* 283 A.D.2d 1016, 725 N.Y.S.2d 246 (4 Dep't, 2001), *See also Citibank (South Dakota), N.A. v, Currea,* 2006 WL 1229919 (Conn. Super 2006).

[38] *Citibank (South Dakota) N.A. v. Poynton*, 187 Misc. 2d 397, 723 N.Y.S.2d 327 (App. Term 2000).

[39] *Discover Bank v. Anderson,* No. 2007-178 QC (NY App. Term 2008). [internal citations omitted]

[40] *See Directive and Procedures 158, Entry of Judgment - Account Stated*, Hon. Fern Fisher-Brandveen, Administrative Judge of the Civil Court of the City of New York, July 27, 2001.

charges, plaintiffs' applications were granted.

> The evidence, fairly interpreted, supports plaintiff's recovery of the credit card debt under the theory of account stated, since defendant did not object within a reasonable time to the itemized credit card statements. (*internal citations omitted*) Defendant's argument that plaintiff was required to submit a signed credit card application in order to establish its claim based on an account stated is without merit. [41]

"Defendant's opposition merely asserts he questioned several charges without giving details. His silence is an admission."[42] If the consumer fails to object within a reasonable time do so, an account stated may be found.[43]

7. Real Party in Interest

A creditor which sues a consumer to collect a debt must be the real party in interest. This means that the creditor is the party to whom the consumer owes the debt. The proof of the real party in interest is straightforward if that party is the original creditor. It is sometimes disputed in cases in which a third party purchased the consumer's account and then seeks to collect it.

The Federal Rules of Civil Procedure ("Fed.R.Evid.") Rule 17(a) states that "every action shall be prosecuted in the name of the real party in interest." The effect of this passage is that the action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right.[44] One for whose benefit a contract between other parties has been made is a real party in interest and may sue the obligated contracting party. [5][4]

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[41] *Citibank (S.D.), N.A. v Leon* , 2009 NY Slip Op 52642(U) (App.Term. 1st Dept. December 29, 2009).

[42] *National Westminster Bank USA v. Seidler,* 1984-6547 (Dist. Ct. Nassau Cnty. 1984).

[43] *Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc.,* 371 N.Y.S.2d 675, 332 N.E.2d 859 (1975).

[44] *See Richards v. Reed*, 611 F.2d 545 (5th Cir. 1980); *Simpson v. Providence Washington Ins. Group*, 608 F.2d 1171, 1173 n.2 (9th Cir. 1979).

[45] *State Secs. Co. v. Federated Mut. Implement & Hardware Ins. Co.*, 204 F.Supp. 207 (D.C.Neb.1960), affirmed *per curiam*, 308 F.2d 452 (8th Cir. 1962).

The basis for the real party in interest rule was stated in the Advisory Committee's Note to the 1966 Amendment to Rule 17(a):

> [T]he modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata.

The issue of the real party in interest is largely a procedural requirement and should never become more important than the purpose which it seeks to accomplish.[46] An assignment is a transfer of all the interests and rights to the thing assigned; the assignee thereafter stands in the shoes of the assignor and may enforce the contract against the original obligor in his own name.[47] An assignee for collection may bring suit in his own name as the real party in interest to recover on the claim,[48] and is ". . . entitled to control and to receive the benefits of the original contract between the original debtor and the assignor".[49] "An assignee's rights are the same as those of the assignor at the time of the assignment". [50]

"Where the defendant seeks to impugn the plaintiff's capacity to sue, the burden of proof is placed upon him to establish such defense with appropriate proof."[51] The plaintiff could not produce an assignment document specifically listing the defendant's promissory note as an asset of the sale when the defendant challenged the plaintiff's ownership of a promissory note it purchased from the assignee of the original creditor. The Court accepted an Affidavit of a records custodian for

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[46] *Eisinger v. Stern*, 57 Misc.2d 16, 290 N.Y.S.2d 979 (Sup. Ct. Oneida Cnty. 1968).

[47] *Price v. RLI Ins. Co.*, 914 So.2d 1010 (Fla.App.5.Dist. 2005); *see also Citizens Fed. Bank, F.S.B. v. Brickler*, 683 N.E.2d 358 (Ohio.App.2 1996).

[48] *In re Thomas*, 387 B.R. 808 (D.Colo. 2008).

[49] *In the Matter of the Liquidation of Home Insurance Company*, 2008 NH 0728.164, 953 A.2d 443, 448 (2008).

[50] *Stateline Steel Erectores, Inc. v. Shields,* 150 N.H. 332, 336 (2003).

[51] *Dixie Dinettes, Inc. v. Schaller's Furniture*, 71 Misc. 2d 102, 103, 335 N.Y.S.2d 632 (Sup. Ct. Kings Co. 1972).

a prior owner to establish the transfer of the note and plaintiff's right to summary judgment on the ownership issue.[52] An affidavit regarding the transfer of a lost promissory note sufficed to permit the claimant to enforce a loan debt against the maker of the note. The Court held that, Plaintiff's "failure to produce the original note does not prevent [Plaintiff] from presenting other evidence in proof of the debt."[53]

Affidavits of record custodians are sufficient if original documents are unavailable. Plaintiff, which was the second assignee debt buyer, sued to collect on a credit card debt. In its motion for summary judgment, the Plaintiff provided the trial court with seven credit card statements issued by the original creditor and a bill of sale evidencing the transfer of the accounts from the original creditor to the first assignee. The bill of sale did not specifically list the accounts which were sold, but the court held that the "remaining evidence," an Affidavit and Assignment, clearly demonstrated the chain of title. The Court ruled that ". . .such evidence demonstrates the absence of any genuine issue of fact or material element of [Defendant's] claim that [Plaintiff] lacks ownership of their account."[54] Documents falling short of being "direct evidence" of the chain of transfers sufficed to establish the plaintiff's ownership of the promissory note and the loan indebtedness. Those documents included peripheral documents in the debt transfer transactions other than the actual bills of sale. The Court endorsed the use of such documents to establish ownership even though no document evidencing the assignment of the account from the original owner to its assignee was provided. [55]

[52] *NCNB Tex Nat'l Bank v Johnson*, 11 F3d 1260, 1265 (5th Cir 1994).

[53] *Miller v MIF Realty LP (In re Perrysburg Marketplace Co)*, 208 BR 148, 159 (Bankr. N.D. Ohio 1997), *citing New England Savings Bank v Bedford Realty*, 238 Conn 745, 680 A2d 301,309 (Conn 1996).

[54] *National Check Bureau, Inc. v. Cody*, 2005 WL 174762 (Ohio App. 8 Dist. 2005).

[55] *New Haven Savings Bank v Follins*, 431 F Supp 2d 183, 195-197 (D.Mass. 2006).

> There is an innocent reason that creditors assign collection to other firms rather than doing it themselves. It is the same reason that most manufacturers sell to consumers through independent distributors and dealers rather than doing their own distribution. Outsourcing phases of the total production process facilitates specialization, with resulting economies. Specialists in debt collection are likely to be better at it than specialists in creating credit card debt in the first place. [6][5]

Documentary proof is not necessary to establish an assignment when the allegations of such assignment in the complaint are not contested. A proper affidavit submitted with the application for a default judgment satisfies legal requirements. Copies of the assignments are not required.

In *Centurion Capital Corporation, Assignee of Aspire v. Bendickson,*[57] the Court noted that the original account had been purchased by the Plaintiff and that the Defendant failed to answer or appear. The Court also commented that Centurion had not filed a copy of the assignment with the Court. Centurion challenged the necessity of filing any assignment of debt when filing for a default judgment and further claimed that it was unnecessary due to Centurion's status as a valid assignee. The Court held that since Bendickson had failed to answer the Complaint, she had admitted all allegations contained in the Complaint, including the assignment of debt. Since it is undisputed, it is deemed admitted and the factual basis for entry of judgment was accepted by this Court. Based upon the above reasons, the Court granted the Plaintiff's Motion for Default Judgment and did not require any additional proof of debt assignment.

Requiring the production of documents evidencing the assignment of a debt may have

[56] *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 288 (7th Cir. 2005).

[57] *Centurion Capital Corporation Assignee of Aspire v. Bendickson*, CV 06-12091 (4th J.D. Dist. Minn 2007).

other ramifications for the debt buyer including liability under the FDCPA and the GLBA.[58] A debt buyer may not reveal information about a consumer debtor to third parties and cannot produce a Bill of Sale which contains information about non-party consumer debtors. Though non-party information can be redacted from a Bill of Sale, a mistake or insufficient redaction would violate third party disclosure rights.

Asset Buyers take the rights that their predecessors had and have the right to bring actions to collect the debts owed to their predecessors. Asset Buyers are the real parties in interest when they purchase a debt and seek to collect it.

8. Electronic Business Records

Business records establishing the claim need to be admitted into evidence to prove a consumer credit case. An original creditor which sues a consumer may enter its own business records into evidence to prove its case and can provide its own employee-witness to testify to its rights to the debt. If the owner of the account purchased that account, it is unlikely that there will be a witness from the original issuer. A representative from the current owner will need to testify or submit an affidavit of the facts to prove that the current owner is the real party in interest; that the consumer is the person who owed the debt to the original creditor and now to the current owner; and that the amount claimed to be owed is correct.

The business records which a current owner seeks to put into evidence are governed by the Business Records Exception to the Hearsay Rule found at Fed.R.Evid. Rule 803 and/or in the rules of evidence of the State in which the collection lawsuit is being brought.

[58] *See Dunmire v. Morgan Stanley Dean Witter, Inc.*, 475 F 3d 956 (8th Cir 2007), in which a violation of the GLBA was alleged where an attorney's demand letter was served upon the estranged wife of a stockbroker's client.

a. Business Records

i. General Rule - Business Records Exception to the Hearsay Rule:

To qualify as business records under Rule 803(6),

(1) The document must be prepared in the normal course of business;

(2) It must be made at or near the time of the events it records; and

(3) It must be based on the personal knowledge of the entrant or on the personal knowledge of an informant having a business duty to transmit the information to the entrant. [9][5]

Most financial business records are maintained on computers in various electronic formats. The maintenance and use of these electronic business records is governed by a plethora of Federal legislation[60] including the Uniform Electronic Transactions Act ("UETA") which has been adopted in most jurisdictions.[61] The purposes of the UETA are:

> to facilitate and promote commerce and governmental transactions by validating and authorizing the use of electronic records and electronic signatures; to eliminate barriers to electronic commerce and governmental transactions resulting from uncertainties relating to writing and signature requirements; to simplify, clarify, and modernize the law governing commerce and governmental transactions through the use of electronic means; to permit the continued expansion of commercial and governmental electronic practices through custom, usage, and agreement of the parties; to promote uniformity of the law among the states (and worldwide) relating to the use of electronic and similar technological means of effecting and performing commercial and governmental transactions; to promote public confidence in the validity, integrity, and reliability of electronic

[59] *See DatamaticServs.,Inc. v. United States*, 909 F.2d 1029 (7th Cir. 1990) "The admissibility of business records is entrusted to the broad discretion of the trial court."

[60] Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001-7006 ("ESign Law"); Secure and Fair Enforcement for Mortgage Licensing Act of 2008, P. L. 110-289, Title V §§ 1501-1507 ("S.A.F.E Act"); Financial Recordkeeping, 12 U.S.C. § 1953 (2003) (allowing uninsured bank or financial institution to retain or maintain records in an electronic or automated form); Fair Credit Billing Act, 15 U.S.C. § 1666 *et seq*.; Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (2003); Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809 (2003); Home Mortgage Disclosure Act, 12 U.S.C. §§2801-10 (2003); Truth in Lending Act (TILA), 15 U.S.C. § 1601- 1667e (2003); See generally, Federal Reserve Board Regulations, at http://www.federalreserve.gov/regulations/default.htm.

[61] Forty-six States have enacted the UETA. Four states, Georgia, Illinois, New York and Washington, have not adopted the uniform act, but have statutes pertaining to electronic transactions. Georgia: Ga. Code Ann., § 10-12-1; Illinois: 5 ILCS 175/1-101; New York: NY CLS State Technology § 301 et seq.; Washington: http://apps.leg.wa.gov/RCW/default.aspx?cite=19.34.

commerce and governmental transactions; and to promote the development of the legal and business infrastructure necessary to implement electronic commerce and governmental transactions. [2]6

The Act applies to electronic records and electronic signatures relating to a transaction [3]6 and does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.[64] In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form. [5]6

New York Technology Law § 302 provides:

§ 302. Definitions

1. "Electronic" shall mean of or relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

2. "Electronic record" shall mean information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities. . .

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

[62]Uniform Electronic Transactions Act § 6 Comment 1.

[63]Uniform Electronic Transactions Act § 2(a).

[64]Uniform Electronic Transactions Act § 5(a).

[65]Uniform Electronic Transactions Act § 13. *See Amjur Compintnet* § 39.

> for State and federal law to work in tandem to promote the use of electronic technology in the everyday lives and transactions of such individuals and entities. . . Legislative History, Technology Law § 302.

Fed.R.Evid. 803 governs the use of business records as evidence including paper documents as well as the electronic data from which they are produced. It is immaterial if a business record is maintained electronically so long as it meets the requirements of Rule 803(b)(6).[66] The rationale underlying the exception is that business records are generally trustworthy and reliable.[67] Businesses are motivated to keep records accurately and are unlikely to falsify records upon which they depend.[68] "These records are the customary reflections of the day to day operations of a business. These records must be truthful and accurate in order to conduct the business enterprise."[69] The party seeking to admit documents into evidence need only establish that the document has sufficient indicia of trustworthiness to be considered reliable.[70] "Because a business depends on the accuracy of its recordkeeping, its records, although of course not sworn, are likely to be at least reasonably accurate, or at least not contrived for the purpose of making the business look better if it is sued.[71] Where routine factual documents made by one business are transmitted and delivered to a second business and there entered in the regular course of business of the receiving business, such documents are admissible. Any lack of personal knowledge by the affiants would go to the weight of the

[66] *Sea-Land Serv. v. Lozen Int'l, LLC*, 285 F.3d 808, 819 (9th Cir. 2002); *Brown v. Town of Chapel Hill*, 1996 U.S. App. LEXIS 4849 (4th Cir. 1996).

[67] *See* Alexander, Practice Commentaries, McKinney's Cons Laws of NYC, Book 7B, CPLR C4518:1; *see generally Pencom Systems, Inc. v. Shapiro*, 237 A.D.2d 144 (1st Dept 1997).

[68] *City of Chicago v. Old Colony Partners LP*, 364 111 App.3d 806 (1st Dist 2006).

[69] *Williams v. Alexander*, 309 N.Y. 283 (1955).

[70] *Thanongsinh v. Board of Education*, 462 F.3d 762, 778 (7th Cir. 2006).

[71] *Lust v. Sealy, Inc.*, 383 F.3d 580, 588 (7th Cir.2004).

evidence not its admissibility.[72] Absent a timely objection at trial, hearsay will be admissible and an alleged error regarding its admissibility will not be preserved for appeal.[73] "[T]he final test is whether the documents sought to be introduced are the type of records which are relied upon by those who prepare them or for whom they are prepared."It is immaterial if a business record is maintained electronically so long as it meets the requirements of Rule 803(b)(6).[74] The rationale underlying the exception is that business records are generally trustworthy and reliable.[75] Businesses are motivated to keep records accurately and are unlikely to falsify records upon which they depend.[76] "These records are the customary reflections of the day to day operations of a business. These records must be truthful and accurate in order to conduct the business enterprise."[77] The party seeking to admit documents into evidence need only establish that the document has sufficient indicia of trustworthiness to be considered reliable.[78] "[P]rovided a proper foundation is laid, computer generated evidence is no less reliable than original entry books and should be admitted under the exception."[79] "There is no reason to believe that a computerized business record is not trustworthy unless the opposing party comes forward with some evidence to question its reliability.[80] Computer records are held admissible absent a

[72]*Boyd v. Calvary Portfolio Services, Inc*,. 285 Ga. App. 390 (2007).

[73]New York Evidence Handbook, §81.1 (Second Edition 2003).

[74]*Sea-Land Serv. v. Lozen Int'l, LLC*, 285 F.3d 808, 819 (9th Cir. 2002); *Brown v. Town of Chapel Hill*, 1996 U.S. App. LEXIS 4849 (4th Cir. 1996).

[75]*See* Alexander, Practice Commentaries, McKinney's Cons Laws of NYC, Book 7B, CPLR C4518:1; *see generally Pencom Systems, Inc. v. Shapiro*, 237 A.D.2d 144 (1st Dept 1997).

[76]*City of Chicago v. Old Colony Partners LP*, 364 111 App.3d 806 (1st Dist 2006).

[77]*Williams v. Alexander*, 309 N.Y. 283 (1955).

[78]*Thanongsinh v. Board of Education*, 462 F.3d 762, 778 (7th Cir. 2006).

[79]*McCormick on Evidence* § 294 (Fourth Edition 1992).

[80]*Hahnemann Univ. Hosp. v. Dudnick,* 292 N.J. Super. 11, 18 (App. Div. 1996).

specific objection to their accuracy. [18]

> A foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in the case of bank and similar statements. The court held that "the records admitted were the type of records maintained by banks in the ordinary course of business. The custodian testified that the records were of a type normally maintained in the ordinary course of the bank's business and that the records would be made in close proximity the time of their origin." Records are in practice accepted as accurate upon the faith of the routine itself, and of the self consistency of their contents. [28]

The admission of the business record is not precluded by the foundation witness having not been involved in the preparation of the printed computer record and not knowing who prepared them.[83] The "custodian [of the records] need not have personal knowledge of the actual creation of the document to lay a proper foundation. . ."[84] "Nor is there any requirement under Rule 803(6) that the records be prepared by the party who has custody of the documents and seeks to introduce them into evidence."[85] So long as a business record meets these requirements, and it is ". . . inherent to understanding that the business of the litigants is not to provide testimony but to conduct business outside of the courtroom," [a business record] is admissible

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[81] *Rosenberg v. Collins*, 624 F.2d 659, 665 (5th Cir.1980).

[82] *Federal Deposit Insurance Corporation v. Staudinger*, 797 F.2d 908 (10th Cir. 1986). [internal citations omitted]

[83] *Dyno Constr. Co. v. McWane, Inc.*, 198 F.3d 567 (6th Cir. 1999).

[84] *Am. Equities Group, Inc. v. Ahava Dairy Prods. Corp.*, 2004 U.S. Dist. LEXIS 6970 (S.D.N.Y. 2004).

[85] *Phoenix Associates III v. Stone*, 60 F.3d 95, 101 (2d Cir. 1995) (quoting 4 *Weinstein's Evidence*, at 803-201-04). *See also Unifund CCR Partners v. Mendel,* 2007 WL 1098640 (Mass App Div). Unifund testified that the assignor bank's files were downloaded into Unifund's system which then created their own file. "The evidence established that the records were made in good faith in the regular course of business, before the beginning of the proceedings, and that it was the regular course of that business to make such records at the time of the event or within a reasonable time thereafter."; *Saks International Inc. v. M/V Export Champion*, 817 F.2d 1011 (2d Cir. 1987). Documents may be admitted under the business records exception to the hearsay rule even though they are records of a business entity other than one of the parties and even though the foundation for their receipt is laid by a witness who is not an employee of the entity that owns and prepared them. There is no requirement that the person whose first-hand knowledge was the basis the entry be identified, so long as it was the business entity's regular practice to get information from such person.

"even though the person who prepared it is unavailable to testify to the acts or transactions." [68]

> While it is true that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter," Fed. R. Evid. 602, there is no requirement that the party offering a business record produce the author of the item. Instead, a foundation for the business record hearsay exception may be established by anyone who demonstrates sufficient knowledge of the record keeping system that produced the document. [87]

The custodian of records need not be in control of or have individual knowledge of the particular corporate records, but need only be familiar with the company's record keeping practices. In response to defendant's argument that "the custodian of appellee bank's records is incompetent to testify about the predecessor bank's records. . .", the Court held that "once appellee bank purchased the predecessor bank's accounts, it took possession of the former's business records. It is not necessary that loan account records be verified by the custodian of the original holder's records."[88]

> Ordinarily, the custodian or other qualified witness will testify in court that it was the "regular practice" of the business to make and keep the business record. Alternatively, the plaintiff can certify the document under Rule 902(11) or 902(12), both of which require the plaintiff to introduce at trial a "written declaration" by the custodian or other qualified person that the record:
>
> (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
>
> (B) was kept in the course of the regularly conducted activity; and
>
> (C) was made by the regularly conducted activity as a regular practice.

Fed.R.Evid. 902(11), 902(12).

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[86] *Medical Expertise, P.C. v Trumbell Ins.*, 196 Misc.2d 389 (Civ. Queens 2003).

[87] *Hardison v. Balboa Ins. Co.*, 4 Fed. Appx. 663, 670 (10th Cir. 2001). [internal citations omitted]

[88] *Block v. Providian National Bank*, 2004 WL 1551485 at *3 (Tex.App. Dallas 2004).

Several Circuit Courts of Appeal have held that that exhibits can be admitted as business records of an entity, even when that entity was not the maker of those records, provided that the other requirements of Fed.Evid.R. 803(6) are met, and the circumstances indicate that the records are trustworthy.[89] The custodian need not be the individual who "personally gather[ed] . . . in a business record. . . [and] need not be in control of or have individual knowledge of the particular corporate records, but need only be familiar with the company's recordkeeping practices." [0][9]

Financial institutions are not required to repeatedly print every transaction that took place throughout the history of the account on every monthly statement of account. Neither are they required to provide Asset Buyers with a list of every transaction in the account. Once the account is charged-off, they provide the charge-off balance and any additional interest and fees. This summary of the account is exactly the same information provided to consumers in their charge-off statements and is admissible evidence.[91] Courts have admitted summaries into evidence when the originals or duplicates of voluminous writings, recordings or photographs are

[89]See *United States v. Childs* (C.A.9, 1993), 5 F.3d 1328, 1333, *certiorari denied sub nom. Childs v. United States* (1994), 511 U.S. 1011, 114 S.Ct. 1385; *see also United States v. Travers* (C.A.9, 2004), 92 Fed.Appx. 489, 494, *citing Childs*, supra ("Records need not actually be prepared by the business to constitute business records, so long as they are received, maintained, and relied upon in the ordinary course of business."); *United States v. Jakobetz* (C.A.2, 1992), 955 F.2d 786, 801 ("Even if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity.").

[90]*Thanongsinh v. Board of Education*, 462 F.3d 762, 778 (7th Cir. 2006), *citing United States v. Jenkins*, 345 F.3d 928, 935 (6th Cir.2003) (internal quotation marks and citations omitted).

[91]*Moore's Federal Rules Pamphlet, 2007, Part 2: Federal Rules of Evidence*, § 1006.5, Lexis-Nexis, 2007. "Fed.R.Evid. 1006 permits witnesses to give summary testimony of their review of voluminous writings, recordings, or photographs."; *Id.* (citing *United States v. Caballero*, 277 F.3d 1235, 1247 (10th Cir. 2002). Witness' testimony summarizing voluminous business records was clearly permissible under Rule 1006.; *AMPAT/Midwest, Inc. v. Ill. Tool Works, Inc*., 896 F.2d 1035, 1045 (7th Cir. 1990). Summarized data has been admitted into evidence even though the data was summarized for litigation purposes.; *United States v. Weaver,* 281 F.3d 228, 232 (D.C. Cir. 2002). Summary of payroll records was, itself, evidence, admitted in lieu of payroll records.

made available for examination or copying at a reasonable time or place. [29]

So long as the electronic transmission incorporates a current summary of each account, it should be treated no differently than a printed statement of account. The process of review is no different from reading a printed statement of account except that the same information, formerly spread out over a one or two page paper document, now appears in a row on an electronic spreadsheet. An Asset Buyer would be in no better position to make an independent decision concerning the validity of an alleged delinquency if given a paper statement of account to review. If the information is incorrectly maintained, the paper documents will contain the same mistakes as the transmitted files.

9. Asset Buyers and Electronic Business Records

The buying and selling of defaulted loans is a common business practice and assignees routinely rely on the data previously kept by the assignor in keeping business records as to the amount of the debts owed.[93] Asset Buyers must be able to demonstrate that they are the current owners of the consumer accounts. They produce paper documents from the electronic data provided with the sale of the accounts, both of which are subject to hearsay exceptions to the business records rules.

The business record exception to the hearsay rule "does not require a showing of chain of custody."[94] A plaintiff is required to provide documents establishing transfer leading from the

[92] *Moore, supra,* note 155, § 1006.5 (*citing Air Safety v. Roman Catholic Archbishop*, 94 F.3d 1, 7-8 (1st Cir. 1996)). *See also Potemkin Cadillac Corp. v BRI Corp.*, 38 F3d 627, 633 (2d Cir. 1994). Summary Records are admissible; *AFD Fund v. United States*, 61 Fed.Cl. 540, 545 (Ct.Cl. 2004). Business records that do not reflect the entire history are admissible.

[93] *Beal Bank, SSB v Eurich*, 444 Mass 813, 831 N.E.2d 909 (2005).

[94] *Pieters v. B-Right Trucking, Inc.*, 669 F. Supp. 1463, 1465 (N.D. In. 1987).

original creditor to the Plaintiff only if the Defendant has challenged the Plaintiff's ownership of the account. If there is no legitimate indication that another party is claiming ownership and thereby is seeking payment on the same debt, there is no basis for the court to demand production of the chain of assignments.

If both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(b).[95] "Double hearsay in the context of a business record exists when the record is prepared by an employee with information supplied by another person both the source and the recorder of the information . . . are acting in the regular course of business, the multiple hearsay is excused."[96]

Courts have recognized the increasing number of claims on assigned debts and have allowed assignees to introduce records inherited from their assignors to establish a *prima facie* case. Rule 803(6) has been interpreted to be applicable to the admission of account records initially generated by the original creditor, but later held by the Asset Buyer.[97] The Asset Buyer's business is premised upon the integration of the business records of the original creditor into its own records, and the debt buyer must primarily rely upon the accuracy of those documents in pursuing collection of the account thereby satisfying the first factor for admissibility. [8][9]

[95] *United States v Baker*, U.S.App.D.C. 68 (1982).

[96] *Koch Industries Inc. & Subsidiaries v. U.S.*, 564 F. Supp.2d 1276 (D. Kan. 2008).

[97] *Miller v. Javitch*, 397 F. Supp. 2d 991, 997-98 (N.D. Ind. 2005).

[98] *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003).

A witness from the entity that originally created the business record is not required.[99] Business records received from an assignor could be introduced by the assignee under the business records exception without bringing in a witness from the assignor entity. An affidavit from a debt buyer's attorney that included the history of the account assignments and account information furnished by the assignor was acceptable.[100] "[T]o require testimony regarding the chain of custody of such documents, from the time of their creation to their introduction at trial, would create a nearly insurmountable hurdle for successor creditors attempting to collect loans…"[101]

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

10. Conclusion

In his concurring opinion in *William J. Clinton, President of the United States v. City of*

[99]*See also Krawczyk v. Centurion Capital Corp*., 2009 WL 395458 (N.D.Ill. February 18, 2009).

[100]*Miller v. Javitch*, 397 F.Supp.2d 991, 997-98 (N.D. Ind. 2005).

[101]*Kearns v. Michigan Iron & Coke Co.*, 340 Mich. 577, 581-582, 66 N.W.2nd 230 (1954).

New York et al,[102] Associate Supreme Court Justice Anthony Kennedy expressed his concerns that a law should not be changed simply to "hurt a group that is a visible target, in order to disfavor the group or to extract further concessions." We must exercise care because the debt collection industry is that visible target.

While business records, once admitted, have no more probative force than any other evidence admitted pursuant to the hearsay exception, the threshold determination that they are business records, satisfying requirements of statute, is one of law and is not a matter going only to weight of evidence. Courts must be sensitive to innovations and not seize on petty irregularities to exclude otherwise trustworthy business records from evidence.[103] A business record which meets foundational requirements is admissible under the hearsay exception even though the person who prepared it is unavailable to testify to the acts or transactions. Business records from a separate entity used in preparation of documents and not mere filing of papers received from other entities, may be admitted under the hearsay exception; records must, however, be fully incorporated into recipient's records made in the regular course of business.[104]

In the rush to change the laws to protect consumers, we often forget that all such changes have consequences that may be more harmful than the wrongs we strive to right. Proof of consumer credit indebtedness needs no new special evidentiary rules to protect consumers. Our current rules of evidence protect the rights of consumers who have defaulted on their consumer credit accounts, and at the same time, provide a foundation and framework for creditors to prove that they are the right party in interest; that the consumer owes the debt to them; and that the

[102]524 U.S. 417, 449-452 (1998).

[103]*People v Kennedy*, 68 NY2d 569, 578-579, 503 N.E.2d 501, 510 N.Y.S.2d 853 (N.Y. 1986).

[104]*Medical Expertise, P.C. v. Trumbull Ins. Co.*, 196, Misc.2d 389 (Civ. Queens 2003).

amount of the debt claimed to be owed is correct.

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