Trial Practice Tips To Stop “Junk” Debt Collectors

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Speakers

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Session Description

• Collection of state debt is often called Zombie Debt because it is hard to defend against and seemingly never dies.

• Learn to defend your clients in debt collection lawsuits with hands-on practical litigation tips and video demonstrations from actual trials.
ORIGINAL CREDITOR
VS.
DEBT BUYER

• “Debt collector” (original creditor such as a Citi, Chase, BOA, HSBC, hospital, retail store)
• “Debt buyer” – a business whose sole activity is purchasing charged off debt from the original creditor, and then suing in its own name (Unifund, Midland, Aarow Financial, etc.)
A.R.M. DEFINITION OF DEBT BUYER:

“A debt buyer is a firm that purchases debt from another company, usually a creditor or bank, at a deeply discounted rate. The debt purchaser then attempts to collect the debt through its own operations or through the use of a third-party debt collection agency. Some debt buyers may sell all or part of the debt to another party at a profit.”
FOLLOW THE MONEY:

The 10-K filing for Encore Capital Group, Inc., parent of various Midland entities:
"From our inception through December 31, 2008, we have invested approximately $1.2 billion to acquire 25.5 million consumer accounts with a face value of approximately $39.3 billion," or 3.05 % of face value.
TO THE BANK

They then try to enforce them against the consumer at 100 cents on the dollar.

Cost: $0.03

Benefit: Up to $1.00 PLUS Attorneys Fees.

DEFINITION OF “MEDIA”

• FROM A.R.M. WEBSITE:
• “Media in the ARM industry refers to the files procured from the original creditor that validate the debt as belonging to a consumer.”
COMMON FATAL FLAWS

• Creditor can’t prove the debt
• Statute of limitations
• Debt buyer can’t prove the debt
• Debt buyer can’t prove the assignment
• Fraudulent affidavit
• Sewer service
• Inadmissible evidence
• Illegal attorneys fees
What the Courts Are Saying:

“The commencement of litigation to collect consumer debt is neither ‘brain surgery’ nor ‘rocket science.’ But it does require some attention to the rules of civil procedure, which based on this court's experience, apparently is not part of the equation for a significant number of members of the debt collection fraternity.”

JUNK DEBT IS:

- Assigned debts purchased for **pennies on the dollar** with little or no documentation of the contract, the payments or the chain of assignment.
- Many times, the people don’t owe the money, or owe less than claimed.
- More frequently, sued twice on same debt.
A TRUE STORY:

A quote from an actual conversation Peter had with a junk debt buyer attorney about one year ago:

“I sued you and you didn’t file and answer, and you didn’t come to court. What more do I need to prove?”
ACTUAL DEPO TESTIMONY:

Q: “What’s your job there?
A: I execute affidavits”

......

Q: How many are you expected to execute?
A: At least 2,000

Q: 2,000 over what period of time?
A: Per day
Q: Okay. Do you actually prepare the affidavit?
A: No.

Q: Who prepares the affidavits?
A: I don’t know”

P. 10 L. 10-21
WHAT CAN THE DEFENSE DO?

• Demand proof that a contract exists
• Demand proof of all assignments
• Demand proof consumer’s account is included in any assignment
• Demand proof that the claim is not barred by the statute of limitations
• Demand proof that the plaintiff is licensed and has standing to sue
• Demand proof that a qualified records custodian appear to offer competent evidence
Debt Buyers: It’s All About Hearsay

“I am the Assignee of Your Account, and My Records State That You Owe Me Money.”

Question: Aren’t “Your Records” Comprised Entirely of Records From Several Other Businesses?
Hearsay Within Hearsay

• My Company’s Records Indicate That I Own Your Account. (Hearsay).

• My Company’s Records Include Records That I Purchased From My Assignor. (Hearsay Within Hearsay).

• The Records From My Assignor Included Records From Chase Bank (Hearsay Within Hearsay Within Hearsay).

• The Chase Bank Records Say That You Owed Chase $2,301.45. (Hearsay Within Hearsay Within Hearsay Within Hearsay).
Some Thoughts About Hearsay:

– Every debt buyer case contains a minimum of 3\textsuperscript{rd} level hearsay. (DB’s own records are 1\textsuperscript{st} level; bank’s records are 2\textsuperscript{nd} level; statements offered for TOMA are 3\textsuperscript{rd} level)

– Every debt buyer affidavit is based on a minimum of 3\textsuperscript{rd} level hearsay.

– Second Generation Buyer (i.e. Bank to DB Broker to DB #1) = 4\textsuperscript{th} level

– Third Generation Buyer = 5\textsuperscript{th} level hearsay

– Fourth Generation = 6\textsuperscript{th} level hearsay
5-902: Easy to (Mis)Understand

• Rule 5-902 – Documents *Can* Be “Self Authenticating” *only if* Documents Are:
  – “of regularly conducted business activity,”
  – “within the scope of 5-803(b)(6) **AND**
  – “Certified pursuant to (b)(2) of this rule”
  – Notification >10 Days Prior to Trial
  – Copies made available to adverse party **AND**
  – Def., w/in 5 days, did not file “written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.”
Objection!

Plaintiff: “They waived their right to object, because when she was pro se, their client didn’t file an objection within 5 days of when we sent it to her. Therefore, the documents automatically come into evidence.”

Defense Counsel: “I am not objecting on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness. Rather, I am objecting on the ground that they are not even business records within the scope of 5-803(b)(6) to begin with.”
Hearsay Business Records – Easy!

“The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of regularly conducted business activity.”
5 Elements of 5-803(b)(6)
Element #1:

“A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses”

Is it a recording “of acts, events, conditions, opinions or diagnoses”?

- is the balance on a credit card statement an act, event, condition or opinion? (probably yes).
5 Elements of 5-803(b)(6)

Element #2:

“if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis,”

Question: How Could a Fourth Generation Purchaser Possibly Know *When* the Documents From Third Party Entities Were *MADE*? The dates on the bank statements are themselves hearsay.
Element #3:

“(B) it was made by a person with knowledge or from information transmitted by a person with knowledge,”

Question: How Could a Fourth Generation Purchaser Know Who Made or Transmitted the Records of Third Party Entities?
5-803(b)(6)
Element #4:

“(C) it was made and kept in the course of a regularly conducted business activity, and”

How Could a Fourth Generation Purchaser Know Whether it was Made and Kept “In the Course of a Regularly Conducted Business Activity”?

- “in the course of”?
- “regularly conducted”?
- “business activity”? 
5-803(b)(6)

Element #5:

“(D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation.”

On What Basis is a Fourth Generation Purchaser Competent to Testify About the “Regular Practice” of Each Prior Third Party Entity?
Overarching Questions:

• If it is the Debt Buyers’ Regular Practice to “Make and Keep” Business Records of Prior Assignors, Then Why are They Always Missing so Many Documents?
• Why do They Not Already Have “the Media”?
• Why do They Have to Pay for Bank Statements, if Their Prior Assignors Made and Kept Them?
TOP 5 EMERGING TRENDS

• Secretly Securitized Accounts
• More and More People Getting Sued Twice on Same Debt
• Robo Signing Paradigm Shift from “deadbeat consumer” to “assault on the integrity of the court.”
• Emerging jurisprudence on junk debt buyers’ lack of evidence
• High Profile Enforcement Actions by Regulators
Closing Argument

1. They have no proof.
2. Until recent years, courts have been justified in relying on debt buyer affidavits, but no more. Things are not like they used to be.
3. Similar to robo-signing in foreclosures, many of these cases constitute a full-scale assault on the integrity of the courts.
4. Always, always, always “Trust, But Verify.”
5. You can no longer count on Opposing Counsel to do #4 for you or the court.
LIST OF CONSUMER LAWYERS:

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES:  WWW.NACA.NET

CIVIL JUSTICE NETWORK, INC.
WWW.CIVILJUSTICENETWORK.ORG

UNIVERSITY OF MARYLAND LAW SCHOOL CLINIC:
PHOLLAND@LAW.UMARYLAND.EDU
RESOURCES

NCLC MANUALS:
FAIR DEBT COLLECTION PRACTICES ACT

COLLECTIONS

UNFAIR AND DECEPTIVE ACTS AND PRACTICES

REPOSSESSIONS
QUESTIONS / COMMENTS

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UNDERSTANDING FORWARD FLOW AGREEMENTS IN DEBT BUYER CASES
by
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To understand an important aspect of the debt buyer problem, read the following sections from this Forward Flow agreement, which is the industry's term for the contract of sale of accounts from the original bank to the original debt buyer. This document is never shown to the court, for obvious reasons:

https://www.documentcloud.org/documents/329733-fia-to-cach-forward-flow.html

Section 1.8 -- the "current balance" may not reflect payments made by or on behalf of the debtor

Section 1.10 (read the capitalized and bold passages)

Section 1.19 -- the purchase price is 1.79 cents on the dollar

Section 1.22 -- there is apparently "revenue sharing" suggesting that this may not in fact be an outright sale, and raises some serious questions

Sections 8.1 and 9.4 -- the accounts could have been discharged in bankruptcy, could be barred by limitations, could be of dead people, could be the result of fraud or forgery, and other very explicit disclaimers of validity

Schedule 1 (page 26 of 39) -- the "current balance" is specifically listed as being only "approximate" and no other information is required to be transferred other than seller name, asset number, and debtor's last name.

Exhibit C (page 29 of 36) -- this is the standard "Bill of Sale" which the debt buyer files in court, while withholding the previous 28 pages. Then, the debt buyer argues to the judge that "bank records are inherently reliable" even though in this specific instance, the debt buyer has explicitly acknowledged that they are NOT inherently reliable.

Exhibit E (page 31 of 36, last sentence) -- "Buyer expressly acknowledges that...documentation may not exist with respect to the Loans purchased by Buyer."
Abstract
Recent years have seen the rise of a new industry which has clogged the dockets of small claims courts throughout the country. It is known as the “debt buyer” industry. Members of this $100 billion per year industry exist for no reason other than to purchase consumer debt which others have already deemed uncollectable, and then try to succeed in collecting where others have failed. Debt buyers pay pennies on the dollar for this charged off debt, and then seek to collect, through hundreds of thousands of lawsuits, the full face value of the debt. The emergence and vitality of this industry presents several legal, ethical and economic issues which merit exploration, study and scholarly debate.

This article focuses on the problem of robo-signing and the lack of proof in debt buyer cases. Although this problem has received limited attention from the media and from regulators, there is a paucity of legal scholarship about debt buyers in general, and this problem in particular. This article demonstrates that robo-signing and fraud are rampant in this industry, and that the debt buyers who pursue these claims often lack proof necessary to show that they own the debt, and often lack proof even that a debt was ever owed in the first place. The fact that this lack of proof has led to consumers being sued twice on the same debt demonstrates the due process concerns which are implicated when courts enter judgments against consumers based on robo-signing and insufficient proof.

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* Visiting Assistant Professor, University of Maryland School of Law. This piece grew out of the work my students and I have done over the past two years in litigating debt buyer cases in the law school’s Consumer Protection Clinic. Special thanks go to clinic students Max Brauer, Ted Reilly and Dillon Yeung, each of whom helped develop this piece through their work on cases in our clinic. Special thanks also go to Amy Caiazza, Ph.D., J.D. for her excellent research and editorial assistance. Finally, thanks to my colleagues at the University of Maryland School of Law.
THE ONE HUNDRED BILLION DOLLAR PROBLEM

This article calls on courts to hold plaintiffs in debt buyer cases to the same standards required of other litigants. Courts must require a demonstration of personal knowledge of the matter at issue before any affidavit is accepted, before any person testifies, and before any documents are admitted into evidence.

I. Introduction

A victim of identity theft receives a credit card bill for $4,000 on a fraudulent account about which she has no knowledge. Although the bank holding the account acknowledges the identity theft and closes the account, the bank later sells the account to a debt buyer, which makes harassing phone calls and threatens to sue the victim.

A widowed senior citizen files for bankruptcy, and obtains a full discharge of all credit card debt. Despite this, two of her credit card accounts are sold to a debt buyer, and she gets sued on an account which the bankruptcy court has already discharged.

A veteran settles a debt with his credit card company and obtains a full release from any further liability. Nevertheless, the credit card company sells this account to a debt buyer and he gets sued, even though the debt has already been satisfied.

Some version of each of the above scenarios is replicated every day in states across the country.

One common thread in the consumers’ stories above is the fact that their adversaries never actually extended credit to these consumers. Rather, these adversaries are purchasers of defaulted debt. The goal of the debt buyer is to purchase—for pennies on the dollar—debts that have already been deemed uncollectable by the original creditor, and then collect all, most or some of the debt and thereby make a handsome profit. Once deemed uncollectable, these debts are bought and sold, often several times over, sometimes for just a fraction of a penny on the dollar. It is not uncommon for a debt buyer to pay as little as $30.00 for an old credit card debt

1. See Laura Gunderson, Take Good Sniff Before ‘Settling’ Old Bills, THE OREGONIAN, Oct. 4, 2009 (“[A] zombie or scavenger debt collector . . . buy[s] up old, typically charged-off accounts for a fraction of the original amount and tr[j]ies to track down the debt—often after it has or is about to expire and sometimes, even after it’s already been paid.”)

2. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-748, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY, 28-29 (2009) (Estimating cost of as little as one to two cents per dollar depending on its age and other qualities; noting that “resale of debt has increased in recent years . . . and debt can be resold multiple times. One debt buyer estimated that almost half of all credit card accounts purchased directly from original creditors eventually are resold.”)
on which the payday could be more than $1,000.00. When collection proves unfruitful, the debt is sold again. Debts which seemingly die and then come to life again are known as “zombie debts.”

Debt buyers shy away from large-value cases, which would require formal proof that complies with the forum state’s rules of evidence. Instead, debt buyers rely on overburdened “small claims courts,” where the state court formal rules of evidence typically do not apply. There, debt buyers argue that the court need not apply evidentiary standards such as hearsay, authenticity of documents, proof of chain of assignment, or certainty as to the amount of damages. Rather, the debt buyers argue that informal proof of the debt, such as affidavits by a debt buyer’s own employee,

See http://www.ag.state.mn.us/consumer/pressrelease/110328debtbuyers.asp

4. See CLAUDIA WILNER & NASOAN SHEFTEL-GOMES, NEIGHBORHOOD ECON. DEV. ADVOCACY PROJECT, ET AL., DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 13 (2010), available at http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf (discussing an aspect of the debt buying process where debt is sold again after collection efforts have proven unsuccessful or futile).

5. See, e.g., Liz Pulliam Weston, Zombie Debt is Hard to Kill, MSN MONEY, July 24, 2006, available at http://articles.moneycentral.msn.com/SavingandDebt/ManageDebt/ZombieDebtCollectorsDigUpYourOld-Mistakes.aspx; Henry Woodward, Beware the Return of the Undead Debt, ROANOKE TIMES, Nov. 7, 2010, at 1 (“Zombie debt is mostly credit card accounts come back from the dead—so long overdue that the credit card issuers had given up on collecting it.”).

6. See, e.g., MD. R. EVID. 5-101, which states that, except for the rules relating to competency of witnesses, the Maryland rules of evidence do not apply to small claim actions. See also, Lauren Goldberg, Dealing in Debt: The High-Stakes World of Debt-Collection After FDCPA, 79 S. CAL. L. REV. 711, 729, 741–45 (2006) (“The minimal procedural formalities, relaxed rules of evidence, and less onerous pleading requirements of small-claims courts offer collection lawyers a swift sword of judgment against debtors and give lawyers leeway to file cases that would not survive in general civil court.”). Black’s Law Dictionary defines "small-claims court" as "a court that informally and expeditiously adjudicates claims that seek damages below a specified monetary amount, usu. claims to collect small accounts or debts." BLACK’S LAW DICTIONARY (9th ed. 2009).

7. Id.
THE ONE HUNDRED BILLION DOLLAR PROBLEM

should be sufficient to prove standing to sue (i.e. chain of assignment uninterrupted from original creditor to the current debt buyer), liability and damages.8

According to one debt buyer industry group known as the Association of Credit and Collection Professionals, (commonly referred to as “ACA International”), there is a “challenge to obtain original documentation” of purchased debt, including the “contract underlying the debt at issue.” 9 According to ACA International, documentation “establishing proof [that] the consumer debt at issue existed” is often lacking.10 In the words of ACA International, the documentation “is often unattainable for a variety of reasons, the most important of which is that the original creditor no longer has the information or did not have it when selling an account or turning an account over for collection.”11

Rather than a true adversary system, the debt buyer litigation model is characterized by a sophisticated business represented by a skilled lawyer suing an unsophisticated, unrepresented consumer in which no formal rules of evidence are applied, and rank hearsay is rampant.12

This article examines the debt buying industry as it functions within the small claims courts system, from the standpoint of consumer protection, where the amount in controversy in any given case is, for example in Maryland, less than $5,000.00.13 The author concurs with the conclusion reached by the Federal Trade Commission that “the current system is broken” and that substantial reforms are needed.14 This article argues that access to justice is currently under attack by the purveyors of shoddy evidence because of lax—and often unenforced—procedural

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10. Id. at 2.
11. Id.
12. See WILNER & SHEFTEL-GOMES, supra note 4, at 1; Jurgens & Hobbs, supra note 8, at 5. Wilner and Sheftel-Gomes discussed the legal issues implicated in lawsuits arising from unethical debt buying practices and noted that the due process doctrine is implicated when the defendants do not receive notice of the lawsuits or knowledge of their legal defenses. See WILNER & SHEFTEL-GOMES, supra note 4, at 1. Standing issues and laws of Evidence, Contracts and Torts are implicated when debt buyers fail to obtain documentation of original lending contracts, which subsequently lead to dismissal of cases that lack evidence of contractual rights to receive the underlying debt. See id. at 5–7 (discussing debt buyers’ deceptive collection methods, lack of documentation of debts, lack of contractual right to documentation of debts, and lack of admissible evidence of the debt); Jurgens & Hobbs, supra note 8, at 5 (describing debt collectors’ various methods of harassing debtors).
13. See infra notes 38–44 and accompanying text (discussing the underlying perspectives of the consumer debt buying industry and the inadequate protective services for consumers).
14. See infra notes 42–43 and accompanying text.
rules, and that greater enforcement of existing procedural safeguards is needed. Like the robo-signing crisis which is now infamous in the foreclosure context, similar issues of robo-signing and other shortcuts have led to a de facto system of robo-justice, which all too often wrongly enters judgment against unrepresented consumers, despite lack of sufficient proof as to liability, standing or damages.

Because the formal rules of evidence generally do not apply in small claims cases, courts may overrule objections based on hearsay and the unreliability of documents alleged to be “business records” submitted as proof of the existence of a debt. As a result, debt buyers are able to admit hearsay into evidence in small claims courts that they would not be able to admit in large claims courts where the formal rules of evidence would preclude the hearsay. As many observers have noted, and as the industry itself has admitted, debt buyers and even original creditors frequently lack sufficient documentation to prove standing, liability and damages. Yet, despite this lack of proof, debt buyers have been successful at winning billions of dollars in default judgments through our court system. It is this author’s view that if courts were more vigilant in requiring (1) basic proof regarding a consumer’s underlying liability on a contract, (2) a debt buyer’s standing to sue by virtue of an uninterrupted chain of title, and (3) accurately calculated damages, the system would relieve overburdened dockets and produce fairer results for all involved.

In Part II, I examine the nature and history of the debt buying industry. I trace its growth, its business model, and the legal strategies it employs to collect consumer debt. In Part III, I argue that courts must demand stricter proof from debt buyers. In doing so, I survey the legal requirements which exist in Maryland and in other states for the admission of the type of documentary evidence which is typical in debt buyer cases. Part III also explains how and why rank hearsay is routinely admitted in small claims actions, and the impact this has on access to justice, and I argue that in debt buyer cases, it is essential to require personal knowledge of affiants and testifying witnesses. In Part IV the article concludes that courts, as the gatekeepers in charge of access to justice, must insist that witnesses have personal knowledge of the matters about which they seek to testify in debt buyer cases.

15. See infra notes 51–56.
16. See infra Part III.
17. See for example Maryland Rule 5-101 which states in pertinent part: “The rules in this Title other than those relating to the competency of witnesses do not apply to the following proceedings: . . . (4) Small claim actions under Rule 3-701 and appeals under Rule 7-112(d)(2). . . .” Md. R. Evid. 5-101.
18. WILNER & SHEFTEL-GOMES, supra note 4, Goldberg, supra note 6, at 745–46. See also, supra note 9.
19. See infra Part II.
II. The Debt Buying Industry

In the midst of the worst financial crisis since the Great Depression, 14.6 percent of the U.S. population have lost their jobs and the unemployment rate remains at a staggering 9.6 percent. While there is some indication of economic recovery, at least one industry—debt collection, has not only survived, but has continued to thrive through recession. From 1990 to 2007, employment in the third-party debt collection industry has more than doubled. In 2007, the debt industry posted annual revenue of $57.9 billion.

A. Scope, Business Model, and Legal Strategies

In 2003, Americans had 1.46 billion credit cards, for an average of five credit cards per person. These credit cards became crucial to many as the cost of living rose and real wages fell, thereby forcing low-income consumers to rely on credit cards to pay for basic living expenses. By 2009, outstanding consumer loans exceeded $2.5 trillion, of which debt from credit cards and other revolving credit debt was nearly $1 trillion at its peak, with subprime credit cards constituting more than a quarter of the credit card market. In short, loans that were easy to obtain initially, eventually became impossible to repay.

Of course, in a difficult economy many consumers cannot repay their debt, and some simply stop doing so. While creditors may initially hope to collect on the debts, after a prolonged period of non-payment, creditors “charge-off” unpaid accounts, bundle them into a portfolio, and then sell them to third-party debt buy-

21. See Catherine Rampell, Hiring is on the Rise, but Jobless Rate Remains at 9.6%, N.Y. TIMES, Nov. 6, 2010, at A0 (reporting that the United States economy added 151,000 jobs in October).
22. See PWC, Value of Third-Party Debt Collection to the U.S. Economy in 2007: Survey and Analysis, ACA IN'TL, 3 (June 12, 2008), available at http://www.acainternational.org/images/12546/pwc2007-final.pdf (finding that employment in the debt collection industry has risen from less than 70,000 people in 1990 to 157,000 in 2007). Based on a survey of third-party debt collectors, employment in the debt collection industry is actually closer to 217,000 in 2007. Id.
23. See id. at 2 (“total debt recovered was reported to be $57.9 billion according to a survey of third-party debt collection agencies, of which $31.9 billion represented gross collections on a commission basis.”).
25. WILNER & SHEFTEL-GOMES, supra note 4, at 3.
27. Id.
28. Id.
29. See Jurgens & Hobbs, supra note 8 (noting the increasing rate at which consumers fall behind on repayment of their loans).
Given that lenders classify these charged-off accounts as worthless, debt buyers are able to purchase portfolios for pennies on the dollar. Once acquiring these unpaid accounts, debt buyers attempt to collect the full outstanding balance, often by directly suing consumers in state court.

Debt buying became a lucrative industry very quickly, ranking among the fastest-growing sectors of all financial services over the past decade. By 2005, debt buyers were purchasing more than $110 billion in debt annually, with charged-off credit card debt accounting for 91% of this amount. The net income at four major debt buying firms increased by more than 700% from 2001 to 2006. By the industry’s own estimate, sales of charged-off consumer debt will have exceeded $86 billion by 2010.

In the majority of debt buyer cases, the courts grant the debt buyer a default judgment because the consumer has failed to appear for trial. In many of these instances, debtors simply do not know they have been sued. Debt buyers often send notices to addresses listed in the underlying credit card accounts; however, these accounts are frequently several years old and contain outdated contact informa-

31. See Victoria J. Haneman, The Ethical Exploitation of the Unrepresented Consumer, 73 Mo. L. Rev. 707, 713–14 (2008). Typically, a creditor will remove unpaid accounts from its balance sheet after 180 days of continued non-payment. Id. Creditors “charge-off” debt in order to obtain a bad-debt deduction under the Internal Revenue Code. Id. at 713. “Charge off” is an accounting term for retail credit loans that have been delinquent or past due for 180 days and which the creditor treats as a loss. Wilner & Sheftel-Gomes, supra note 4, at n. 6.
32. Id. at 714.
33. See Wilner & Sheftel-Gomes, supra note 4, at 3 (discussing the various methods in which a debt buyer can attempt to collect the debts or pass on the debt by reselling the debt portfolio). If a debt buyer decides that collection on a particular account is either futile or unprofitable, it often sells that account to another debt buyer, who in turn may also sell the account, and so on. Id.
34. See Michael Rezendes et al., No Mercy for Consumers: Firms’ Tactics Are One Mark of a System That Penalizes Those Who Owe, Boston Globe, July 30, 2006, at A1 (noting that the debt collection industry has exploded since consumer debt increased due to millions of Americans’ heavy reliance on credit card debt).
35. Wilner & Sheftel-Gomes, supra note 4, at 3.
36. Id.
37. Id.
38. See Haneman, supra note 31, at 715 (highlighting the significance of debt-buyers’ role in the debt collection industry through the projection that sales of charged-off consumer debt will exceed $86 billion by 2010).
39. Wilner & Sheftel-Gomes, supra note 4, at 6. In a sample of 336 debt buyer cases in New York City, researchers found that debt buyers obtained default judgments in four out of five cases (81.4%). Id. at 8. See also Russell Engler, Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons, 85 Calif. L. Rev. 79, 119 (1997) (finding that default judgment occurred in 70% to 90% of consumer cases).
40. Wilner & Sheftel-Gomes, supra note 4, at 6.
The One Hundred Billion Dollar Problem

In addition, many process servers simply fail to serve papers but nonetheless sign false affidavits of service with the court.41 Debtors who do receive notice usually appear without legal representation42 because they either (1) cannot afford an attorney, or (2) cannot find an attorney who will take their case.43 Indeed, an attorney’s decision to represent a low-income client often depends on whether there are funds to pay for the representation.44 The general rule of the American adversarial system states that each party will pay their own attorney’s fees regardless of who is the prevailing party.45 Thus, notwithstanding viable counterclaims, a successful defense in a debt buyer case will not produce any funds to be paid to a defense counsel.46 As a result, consumer debtors, who lack any knowledge of their legal rights, must resort to appearing pro se and stumble through complex procedural and substantive legal issues that even some trained attorneys do not fully understand.47 Many debt buyers have been known to exploit unrepre-

41. Id.
42. See id. (defining this process as “sewer service,” in which the process servers file false affidavits of service with the courts instead of throwing them in the “sewer”). In Pfau v. Forster & Garbus, the New York Attorney General filed suit against 35 debt collection law firms and two debt collection companies that obtained more than 100,000 default judgments allegedly entered because their process server engaged in “sewer service.” Id. (discussing Order to Show Cause, Pfau v. Forster & Garbus, No. I2009-8236 (N.Y. Sup. Ct. July 21, 2009)); see Velocity Invs., LLC v. McCaffrey, No. 1674/07, 2011 WL 420661, at *2 (N.Y. Dist. Ct., Feb. 2, 2011) (explaining the Pfau action and stating that it has been settled by consent order).
43. WILNER & SHEFTEL-GOMES, supra note 4, at 7. In New York, for example, only 1% of defendants sued by creditors were represented by an attorney. Id.
44. Haneman, supra note 31, at 721–24 (arguing that the typical consumer debtor’s “choice” to appear and defend pro se is involuntary); see WILNER & SHEFTEL-GOMES, supra note 4, at 13 for a discussion of the consumer debtor as pro se defendant.
45. Haneman, supra note 31, at 723 (noting that pro bono representation is also difficult to find because the public lacks sympathy for default debtors).
47. Haneman, supra note 31, at 722. As a result, not only can many consumers not afford lawyers for these cases, but lawyers are hesitant to take them, since the cases are unlikely to cover their costs. Stewart Macaulay, Lawyers and Consumer Protection Laws, 14 L. AND SOC. REV 116, 129, 132–33 (1979).
48. See Goldberg, supra note 6, 744–45. As Goldberg notes, “[m]ost critics agree that repeat players, like the debt-buying companies, have the upper hand over first-time users of the legal system, and consequently, have a greater chance of success. Lawsuits are foreign and intimidating for inexperienced debtors. Defendants often default, rather than appear in court, because ‘they fail to understand the complaint or because they concede defeat, unaware of possible defenses. . . .’” Id. Debt-buying companies intentionally target poor and unsophisticated debtors for the very reason that they are unlikely to understand the legal process or know what their rights are. Id.
sented consumers by pressuring them into unreasonable settlements,\textsuperscript{49} by filing claims without having or being able to produce adequate proof,\textsuperscript{50} and by ignoring legal requirements with the knowledge that the untrained consumer will fail to object.\textsuperscript{51}

One indication of the imbalance of power is the rate of judgments against consumers—and particularly default judgments—resulting from those claims. For example, a recent study estimates that 45\% of debt collection cases result in default judgments in Cook County, Illinois; another found that 80\% of those in New York City do.\textsuperscript{52} These high rates result in part because both consumers and courts simply assume that the debt allegedly owed is accurately portrayed as presented by their plaintiff, and so they fail to challenge it.\textsuperscript{53} Debt buyers know this, and as a result, have found the use of courts to be a highly effective component of their business plan.\textsuperscript{54}

\textsuperscript{49} WILNER & SHEFTEL-GOMES, supra note 4, at 7 (noting that debt buyers also wield significant power to freeze debtor accounts and garnish wages).

\textsuperscript{50} Id. at 7, 15 (finding that common practice of debt collection law firms in New York includes "seeking default judgments on the basis of false and/or legally inadequate affidavits").

\textsuperscript{51} See Haneman, supra note 31, at 708–09, 717 (discussing the practice of debt buyers filing claims known to be past the statute of limitations period).

\textsuperscript{52} U.S. GOV'T ACCOUNTABILITY OFFICE, supra note 2, at 41.

\textsuperscript{53} Haneman, supra note 31, at 709 (The debtor sees only this: an attorney (a professional licensed by the state) bringing a claim in a court (an extension of the state tasked to the cause of justice and application of the rule of law) asserting the validity of a debt. The typical consumer debtor would find it difficult to believe that a creditor’s attorney could knowingly, and ethically, bring a lawsuit and obtain a judgment on an out-of-statute debt.”).

\textsuperscript{54} Goldberg, supra note 6, at 741 (noting that debt buyers have recently turned to courts at higher rates in order to increase their rates of return on the debts, and that this strategy has been successful).
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B. Emerging Issues of Documentation

Despite the assumptions of reliable documentation by courts and consumers, creditors’ documentation of debt is often times far from complete and indeed well below the standards demanded by state or federal rules of evidence. Debt buyers often lack original credit card agreements, copies of bills or credit slips, records of payments or disputes, or even evidence that claims have been assigned to them. Instead, they often have only a spreadsheet or database summarizing the hundreds or thousands of accounts they have purchased from an original creditor or intermediate debt buyer. The fact of faulty documentation in the consumer market is real and substantial enough that, according to the Federal Trade Commission, judges themselves have observed repeated confusion by consumers over where a debt comes from. Because of the problems of documentation, debt buyers often drop lawsuits when challenged by a consumer in small-claims court.

The media has reported widely on the extent of “robo-signing” in the context of foreclosure. Robo-signing refers to the practice of signing affidavits and other documents “so quickly that they could not possibly have verified the information in the document under review.” In Maryland, consumers and the courts discovered that lawyers at some foreclosure law firms did not sign affidavits that bore their purported signature, but instead instructed their employees to reproduce their signatures. The Maryland Court of Appeals addressed the problem by approving

56. Id. See also infra, Part III.
57. See supra notes 10-12.
58. Wilner & Sheftel-Gomes, supra note 4, at 22.
60. Goldberg, supra note 6, at 746. The author’s experience as director of the Consumer Law Clinic has been that once our student attorneys get involved, the overwhelming majority of cases are dismissed. Moreover, in the overwhelming majority of cases we have litigated, evidence of standing, liability and damages is woefully lacking.
61. See, e.g. David Streitfeld, JPMorgan Suspending Foreclosures N.Y. Times, Sept. 29, 2010. “Chase and GMAC, in their zeal to process hundreds of thousands of foreclosures as quickly as possible and get those properties on the market, employed people who could sign documents so quickly they popularized a new term for them: “robo-signer.” See also infra note 67.
63. Jamie Smith Hopkins, Court OKs Review of Foreclosures in Maryland, Balt. Sun, Oct. 20, 2010, at 1A.
emergency rules to allow the hiring of examiners to scrutinize the paperwork of for-closure robo-signers.64

Such robo-signing practices exist in the debt collection industry as well.65 In a New York study, researchers found that over the course of a year, one debt buyer’s affiant identified himself as the custodian of records in 47,503 affidavits, thereby claiming to have personal knowledge of the facts of each and every case.66 An employee of debt collection firm Asset Acceptance said he was required to sign hundreds of affidavits a day, and an employee of Asta Funding, another debt buyer, said that she signed an affidavit on average every 13 seconds.67 In one story on the television program 60 Minutes, an admitted robo-signer named Chris Pendley admitted to signing 4,000 documents per day as officer of—on average—5 different banks per day.68 He did so as part of a group of 12 people who sat around a table and did nothing other than sign fraudulent signatures all day long, and was paid $10.00 per hour to do so.69 In reality, he was never an officer of any bank, but rather was always an employee of a company known as “DOCX.”70

A specific example of the depth of the problem is evidenced in reports concerning the sale of charged-off debt by JP Morgan Chase (“Chase”). As the New York Times reported in 2010:

Linda Almonte oversaw a team of advisers, analysts and managers at JP Morgan Chase last year, when the company was preparing the sale of 23,000 delinquent accounts, with a face value of $200 million. With the debt sold at roughly 13 cents on the dollar, the sale was supposed to net $26 million.

As the date of the sale approached, Ms. Almonte and her employees started to notice mistakes and inconsistencies in the accounts.

65. See, e.g., Wilner & Sheftel-Gomes, supra note 4, at 14. Although debt buyers are required to provide proof of personal knowledge of the facts of the case, evidence reflects that this standard has not been enforced. Id.
66. Id.
69. Id.
70. Id.
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“We found that with about 5,000 accounts there were incorrect balances, incorrect addresses,” she said. “There were even cases where a consumer had won a judgment against Chase, but it was still part of the package being sold.”

Ms. Almonte flagged the defects with her manager, but he shrugged them off, she says, and he urged her and her colleagues to complete the deal in time for the company’s coming earnings report. Instead, she contacted senior legal counsel at the company. Within days, she was fired.

The article went on to quote one lawyer’s apt analogy:

“I’ve lost four and I’ve taken about 5,000 cases,” said Jerry Jarzombek, a consumer lawyer in Fort Worth. “If the case goes to trial, I say to the judge, ‘Your honor, imagine if someone came in here to give eyewitness testimony in a traffic accident case and they didn’t actually see the crash. They just read about it somewhere. Well, this is the same thing.’ The debt buyers don’t know anything about the debt. They just read about it.”

C. In Part Because of Documentation Problems, Consumers Face the Real Threat of Being Sued Twice on the Same Debt

Abuses in the debt buyer industry also extend to subjecting consumers to duplicative judgments on a single debt. Such lawsuits are all too common, in Maryland and elsewhere. Indeed, a simple Westlaw search reveals numerous examples of debt collectors attempting to recover debt that had already been paid or settled by the debtor.

71. Segal, supra note 67, at A1.
72. Id. (pointing out that when a consumer is aware of the legal action, he is often successful, but that lack of notification frequently leads to default judgments).
73. See infra note 93.
74. Id.
75. See, e.g., Chase Bank USA, N.A. v. Cardello, 896 N.Y.S.2d 856 (N.Y. Civ. Ct., March 4, 2010) (“[O]n a regular basis this court encounters defendants being sued on the same debt by more than one creditor alleging they are the assignee of the original credit card obligation. Often these consumers have already entered into stipulations to pay off the outstanding balance due the credit card issuer and find themselves filing an order to show cause to vacate a default judgment from an unknown debt purchaser for the same obligation.”); McCammon v. Bibler, Newman & Reynolds, P.A., 493 F. Supp.2d 1166, 1170 (D. Kan. 2007) (finding that a collection agency pursued former debtor for payment and obtained judgment despite knowing that former debtor had paid original creditor); Grimsley v. Messerli & Kramer, P.A., No. 08-548 (JRT/RLE), 2009 WL 928319, at *1 (D. Minn. March 31, 2009) (finding firm collecting on already paid debt); Sweatt v. Sunkidd Venture, Inc., No.
Reported cases from around the nation demonstrate that debtors face multiple collection attempts or lawsuits by competing entities—including many that lack standing. Collection attempts by firms without standing come in many varieties. Most commonly, the debtor pays Debt Buyer A, but then Debt Buyer B later attempts to collect. Sometimes, the debtor pays Debt Buyer A even though Debt Buyer A had already sold the debt to Debt Buyer B without debtor notification. Other times, debtors pay the original creditor prior to a debt buyer’s collection attempts.

There are several other ways that firms may try to collect on old debt that was already paid in full. One debt collector may attempt to collect twice on the same debt. Firms may even sue each other over the right to collect a debt. In any of these cases, if courts allow judgments based on inadmissible or shoddy evidence, consumers face a real threat of being sued twice on the same debt.

Based on problems such as the documentation and multiple lawsuit issues above, the federal government describes the current debt collection system as “broken.” In 2010, the federal government stated:


76. See, e.g., Overcash v. United Abstract Grp., Inc., 549 F.Supp.2d 193, 195 (N.D.N.Y. 2008) (finding that former debtor paid collection agency, but debt was subsequently sold and resold multiple times before another collection firm presented former debtor with bill roughly $40,000 larger than the paid, settled amount); Chiverton v. Fed. Fin. Grp., Inc., 399 F.Supp.2d 96, 99–100 (D. Conn. 2005) (determining that former debtor paid one collection agency, but another firm later claimed that it had bought the debt and made multiple threatening and harassing phone calls to the former debtor); Fontana v. C. Barry & Assoc., LLC, No. 06-CV-359A, 2007 WL 2580490, at *1 (W.D. N.Y. Sept. 4, 2007).

77. See, e.g., Smith v. Mallick, 514 F.3d 48, 50 (D.C. Cir. 2008) (explaining how one debt buyer had another debt buyer reassign a judgment to him after he heard the other debt buyer was no longer trying to collect, without notifying the debtor or the debtor’s counsel of the reassignment).


79. See Capital Credit & Collection Serv., Inc. v. Armani, 206 P.3d 1114, 1116–18 (Or. Ct. App. 2009) (finding that debt collector settled a debt and then instituted litigation on the same debt).

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Based on its extensive analysis, the Federal Trade Commission ("FTC" or "Commission"), the nation’s consumer protection agency, concludes that neither litigation nor arbitration currently provides adequate protection for consumers. The system for resolving disputes about consumer debts is broken... because consumers are not adequately protected in either debt collection litigation or arbitration.  

III. The Need to Demand Stricter Proof

The lack of reliable proof from creditors and debt buyers calls out for a solution. While it is understandable that there are good policy reasons why the rules of evidence should not always apply in small claims cases, it is equally clear that in the debt buyer context, "small claims courts" have in reality become "creditor’s courts," devoid of the hallmark characteristics of an adversary system. In a market economy, when there is no competition, costs rise and quality falls. Similarly, in an adversary system, when there is no competition in the form of an advocate to represent the consumer, the costs to the consumer rise and the quality of justice falls.

A. The Role of the Debt Buyer’s "Business Records" and Maryland’s Jurisprudence on Business Records

In order to prove a proper chain of title, an underlying contract, or the amount of damages owed, the purchaser of charged-off debt needs to consult documents and records that were generated by the original creditor and by each intermediary debt buyer. In order to prove their case, debt buyers usually attempt to introduce these hearsay documents with little or no foundation as to personal knowledge.

In order to prove a valid case, the debt buyer needs to convince the court that there was an underlying debt (typically based on an underlying contract), that there was a default, that there was an amount certain due and owing, and that there is a complete chain of assignment from the original creditor to the current debt buyer. Because each of these elements is hearsay (assuming the rules of evidence apply), the debt buyer attempts to authenticate all documents and the statements made in those documents as if they were the debt buyer’s own business records; as if the debt buyer itself had generated the documents.

Frequently the debt buyer will attempt to offer this hearsay through the Rule 803(b)(6) "Business Records Exception" or

81. FTC, supra note 59, at 1, 71 (emphasis added).
82. There are frequently other problems such as lack of authenticity, lack of completeness, and altered documents, to name a few.
83. See infra note 106.
84. Maryland follows the Federal Rules and most states in its Rule 5-803(b)(6):
its small claims court equivalent: "when we bought the account, we bought the paperwork to prove the account, and they are all a part of our records now, and we know that the information is reliable and accurate."

Although the rules of evidence do not apply in small claims cases, their requirements are instructive, because, like all testimony offered under oath in a court of law, central to the business records exception is the requirement of personal knowledge. And, like witness testimony in general, business records should be excluded "if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness."

Maryland courts have refused to admit business records if the party seeking admission cannot produce a live witness or affiant with personal knowledge to verify the manner in which the documents were made. In *Bernadyn v. State*, the State sought to use a medical bill seized during a search warrant to establish the defendant's address. The defendant objected to admissibility of the bill because of the lack of foundation laid for the business record exception to the hearsay rule. The Court of Appeals granted certiorari on the issue of introduction of evidence without foundation or authentication under any exception to the hearsay rule. In finding

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To include evidence under the business records exception, a party must show that the records meet certain basic requirements: (1) the records must have been made at or near the time of the events that they concern; (2) they must have been made by a person with personal knowledge of the information described; (3) they must have been made in the course of regularly conducted business activity; and (4) the regular practice of the business must be to make and keep the records. Md. R. Evid. 5-803(b)(6).

85. See infra note 106.
86. Id.
87. Md. R. Evid. 5-803(b)(6).
88. See infra notes 77–84 and accompanying text. See also Md. Code Ann., Md. R. Evid. § 5-803(b)(6) (West 2011) (stating that a record of regularly conducted business activity may be admissible as an exception to the hearsay rule if, among other things, "it was made by a person with knowledge or from information transmitted by a person with knowledge" at or near the time of the event, but that such a record "may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness").
89. 887 A.2d 602 (Md. 2005).
90. Id. at 603. The State argued that because the address on the letter was the product of nonassertive conduct it was not a statement, therefore the hearsay rule did not apply. Id. at 606.
91. Id. at 606 ("[Defendant] reasons that the bill is hearsay because it was an out-of-court statement offered for its truth and that the State failed to establish that the statement satisfied any exception to the hearsay rule. He contends that the sender’s conduct of addressing a letter is an implied assertion and is thus hearsay. In the alternative, he argues that even if the bill is admissible under the business record exception, the State failed to lay a proper foundation for that exception.").
92. Id.
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the document inadmissible hearsay, the Court drew parallels to Collins v. Kibort, where the Seventh Circuit found that, although medical bills are admissible as business records under Federal Rule of Evidence 803(6), the proponent of the evidence must establish a proper foundation as to their reliability. Discussing Collins, the Maryland Court of Appeals [the Bernadyn Court] held that:

[A]lthough the [Collins Court] did not doubt that the hospital maintains its bills in the course of its regularly conducted activity and that it was part of the hospital’s regular business practice to create and maintain its bills, “the business record exception does require that the witness have knowledge of the procedure under which the records were created.” Collins was not qualified to testify about the reliability of the medical bills because he knew nothing about the billing practices of the hospital.

As in Collins, the Maryland Court of Appeals in Bernadyn found that the statements contained in the medical bill were inadmissible hearsay because the state failed to establish a foundation for the business records exception to the hearsay rule by presenting evidence regarding the billing practices of the medical provider and the source of the name and address on the medical bill.

93. 143 F.3d 331, 337–38 (7th Cir. 1998) (holding that an employee suing his employer and supervisor under a race discrimination claim could testify about his medical condition but could not testify about his medical bills because he could not establish sufficient foundational evidence to satisfy the hearsay exception for business records when he did not have knowledge of the procedures under which the records were created).

94. Id. at 337. The Collins Court explained,

"[a] proper foundation is established if the party attempting to admit the evidence demonstrates that the business records ‘are kept in the course of regularly conducted business activity, and [that it] was the regular practice of that business activity to make records, as shown by the testimony of the custodian or otherwise qualified witness.’" Id. (citation omitted).

95. Bernadyn, 887 A.2d at 615 (emphasis added) (citing and quoting Collins, 143 F.3d at 338).

96. Id. Maryland courts have also required personal knowledge in affidavits outside the context of the business records exception to the hearsay rule. See, e.g., Mercier v. O’Neill Assocs., Inc., 239 A.2d 564, 564–65 n.1 (Md. 1968) (finding affidavit lacking personal knowledge insufficient under Rule 2-501 to sustain the trial court’s granting of summary judgment in contract payment dispute); White v. Friel, 123 A.2d 303, 305 (Md. 1965) (finding affidavits lacking personal knowledge deficient under Summary Judgment Rule 2 in the case of a creditor seeking to recover on debtor’s open account, and so summary judgment was improper based on the uncertainties of the case); Fletcher v. Flournoy, 81 A.2d 232, 234 (Md. 1951) (disregarding affidavit filed by defendant, “made by himself, ‘to the best of his knowledge, information and belief’ in the case of a property owner seeking for possession and damages from defendant property possessors (citing State of Wash. v. Maricopa Cnty., 143 F.2d 871, 872 (9th Cir. 1944))).
B. Other States’ Jurisprudence on Business Records

Other states have also held that business records may only be authenticated by a witness with personal knowledge of the record keeping practices of the business that created and maintained the document.

New York courts have repeatedly pointed to the importance of holding businesses to the standards of Rule 803(6), including in its recent credit card debt collection cases involving Chase Bank. In *Chase Bank USA, N.A. v. Hershkovits*, a lower court noted that “[w]ith respect to the foundation testimony . . . someone with personal knowledge of the business’s record making practices and procedures must lay the requisite foundation” and “the sponsoring witness should display some familiarity with the record at issue before the item is admitted into evidence.” Again, in *Chase Bank USA, N.A. v. Cardello*, the court emphasized the importance of this standard given problems in the industry:

> [O]n a regular basis this court encounters defendants being sued on the same debt by more than one creditor alleging they are the assignee of the original credit card obligation. Often these consumers have already entered into stipulations to pay off the outstanding balance due the credit card issuer and find themselves filing an order to show cause to vacate a default judgment from an unknown debt purchaser for the same obligation.

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98. Id. at 3–4.
100. Id. at 857; see also DNS Equity Group Inc. v. Lavallee, Civ. 12388/09 (S.D.N.Y Feb. 22, 2010) (where Plaintiff’s agent based her affidavit upon documentation provided by the original creditor and did not have personal knowledge of the original creditor’s business practices, finding proof insufficient to establish a proper foundation for the account agreement and account statements; “Submission of the underlying statements, in proper evidentiary form, is required in assigned debt cases, like this one.”); Palisades Collection, LLC v. Kedik, 890 N.Y.S.2d 230, 230 (N.Y. App. Div. 2009) (“Here, plaintiff submitted an affidavit from its agent with exhibits, including a printed copy of several pages from an electronic spreadsheet listing defendant’s Discover account as one of the accounts sold to plaintiff. Contrary to the contention of plaintiff, the court properly determined that it failed to establish a proper foundation for the admission of the spreadsheet under the business record exception to the hearsay rule.”); see also PRA III, LLC v. Gonzalez, 864 N.Y.S.2d 140 (N.Y. App. Div. 2008) (“Overruling summary judgment based on inconsistent documents concerning defendant’s debt and reinstating counterclaim for filing of false affidavits by plaintiff creditor); West Valley Fire District No. 1 v. Village of Springville, 743 N.Y.S.2d 215, 216 (N.Y. App. Div. 2002) (“A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker’s business practices and procedures.”).
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Along these lines, courts in New York and elsewhere have noted particular problems where debts are assigned from an original owner to a buyer. In Rushmore Recoveries X, LLC v. Skolnick, a lower court found that a plaintiff’s witness’ familiarity with the business records derived only from “the documents and records ostensibly created by Citibank, and/or assignees who have preceded the Plaintiff,” and because he “merely obtained the records from another entity that actually generated them.” Therefore his statements were “an insufficient foundation for [the business records’] introduction into evidence.”

The repetitive statements of . . . the Plaintiff’s custodian of records, to the effect that he collects and maintains the records and documents of [the original creditor] and/or any other prior assignees, ‘in the regular course of plaintiff’s business,’ as if they were magic words, does not satisfy the business records exception to the hearsay rule. That phrase, standing alone, does not establish that the records upon which the Plaintiff relies were made in the regular course of the Plaintiff’s business, that it was part of the regular course of the Plaintiff’s business to make such records, or that the records were made at or about the time of the transactions recorded.

In Missouri, an intermediate appellate court has, on at least three occasions, rejected a debt buyer’s custodian of records’ attempt to attest to the identity and mode of preparation of documents created by an assignor. In Asset Acceptance v. Lodge, the court noted that “Asset did not prepare the documents in question, but rather only received the documents from HSBC and held them in their files. [The witness] was not qualified to testify regarding documents not prepared by Asset. Thus, the documents do not fall under the business records exception.”

102. Id. at 1–2 (N.Y. Dist. Ct. May 24, 2007).
103. Id. at 2 (citations omitted).
104. Id. (citations omitted). See also Insurance Company of North America v. Gottlieb, 588 N.Y.S.2d 571 (N.Y. App. Div. 1992) (“Testimony of plaintiff’s agent who merely obtained records from another entity that generated them was insufficient foundation for admitting the records under the business records exception to the hearsay rule”); Standard Textile Co. v. National Equipment Rental, Ltd., 80 A.D.2d 911, 911 (N.Y. App. Div. 1981) (“[T]he mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records,” and so plaintiff’s employee “was not a qualified witness to testify as to the record keeping of another entity”); PRA III, LLC v. MacDowell, 841 N.Y.S.2d 822, 822 (N.Y. Civ. Ct. 2007) (finding that debt collector’s affiant is “not an employee of the original creditor (Sears) and cannot authenticate documents from another business”).
106. Id. at 529.
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in C & W Asset Acquisition, LLC v. Somogyi,\(^{107}\) the court emphasized the need for personal knowledge: “[W]e fail to see how [the witness] can attest to the identity and the mode of preparation of these particular documents given that they were created by MBNA, a company that [the witness] neither works for, nor mentions in her affidavit.”\(^{108}\) And in Zundel v. Bommarito,\(^{109}\) the court stressed the need for business records to actually follow reliable practices: “Where the status of the evidence indicates it was prepared elsewhere and was merely received and held in a file but was not made in the ordinary course of the holder’s business it is inadmissible and not within a business record exception to the hearsay rule.”\(^{110}\)

Other states have taken a similar approach. In Vermont, a trial court found in Unifund CCR Partners v. Bonfigli\(^{111}\) that the plaintiff’s custodian of records was not qualified to testify about the original creditor’s business practices because “there was no evidence that he was ever employed by Chase [the original creditor] or that he had personal knowledge of Chase’s internal business practices.”\(^{112}\) The court stated that “Unifund itself cannot satisfy the requirements of the business record rule” because “[w]hile the current records are a part of Unifund’s business records, and therefore meet the business records exception to the hearsay rule, the Chase data incorporated in those records is itself hearsay.”\(^{113}\) The court did not find the testimony reliable or credible because the affiant “did not explain how he was so familiar with Chase’s business practices, whether he had ever worked at Chase, whether he has ever sat down with Chase to watch how they entered the data, whether he had ever checked the reliability of the entries, and so forth.”\(^{114}\) The court concluded: “something more is required than merely by saying ‘we got it from them, so it must be true.’ There must be some assurance that the underlying records were reliable to begin with.”\(^{115}\)

\(^{107}\) 136 S.W.3d 134 (Mo. Ct. App. 2004) (debt collection action by credit card assignee against cardholder).
\(^{108}\) Id. at 139. The assignee attempted to admit into evidence an affidavit by an employee, a copy of a letter the Defendant received from the assignee, and a copy of the Defendant’s signed credit agreement with the original credit card holder, among else. Id. at 136 n.2.
\(^{109}\) 778 S.W. 2d 954 (Mo. Ct. App. 1989) (action against defendant’s estate to collect in quantum meruit upon claim of oral partnership).
\(^{110}\) Id. at 958.
\(^{112}\) Id. at *4.
\(^{113}\) Id. at *6 (emphasis in original).
\(^{114}\) Id. at *7–8.
\(^{115}\) Id. at *12.
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Similarly, in *Palisades Collection, LLC v. Kalal*, a Wisconsin intermediate appellate court determined that

“[t]he only reasonable reading of [the statutory business records evidence] language is that a testifying custodian must be qualified to testify that the records (1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity.” Therefore, “[i]n order to be qualified to testify on these two points, [the witness] must have personal knowledge of how the account statements were prepared and that they were prepared in the ordinary course of [the original creditor’s] business.”

In Texas, courts have asserted the same principle. In *Riddle v. Unifund CCR Partners*, an intermediate appellate court stated that “[a]lthough Rule 803(6) does not require the predicate witness to be the record’s creator or have personal knowledge of the content of the record; however, the witness must have personal knowledge of the manner in which the records were prepared.” And in *Martinez v. Midland Credit Management, Inc.*, an appellate court held that the debt buyer’s records were inadmissible as business records because its “affiant does not provide any information that would indicate that he (or she) is qualified to testify as to the

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117. Similar to Maryland, Wisconsin law requires that a “custodian of record or other qualified witness” testify to the business records before admission into evidence. Compare WIS. STAT. § 908.03(6) (2011) with MD. RULE 5-803(b)(6) (2011).
118. Kalal, 781 N.W.2d at 509.
119. See also *Berg-Zimmer & Assocs., Inc. v. Central Mfg. Corp.,* 434 N.W.2d 834, 838 (Wis. Ct. App. 1988) (finding that although a witness may be qualified to testify that the records were created in the course of regularly conducted activity, the witness must have personal knowledge about the record’s creation and may not testify about documents given to him by a third party under the business records exception to the hearsay rule).
120. 298 S.W.3d 780 (Tex. App. 2009) (debt purchaser’s credit card debt collection action based on original creditor’s documentation).
121. Id. at 782–83 (citing *In re K.C.P.,* 142 S.W.3d 574, 578 (Tex. App. 2004)). But see Simien v. Unifund CCR Partners, 321 S.W.3d 235, 240–44 (Tex. App. 2010) (holding credit card issuer’s documents admissible under business records exception to state hearsay rule based on debt purchaser employee’s testimony that he had reviewed and was the agent for the documents and had personal knowledge of the books and records concerning the claim, despite his inability to confirm the accuracy of the balance due, based on three-factor analysis).
122. 250 S.W.3d 481 (Tex. App. 2008) (subsequent debt holder’s debt collection action based on original creditor’s computer-generated documentation).
record-keeping practices of the ‘predecessor.’” 123 This does not apply where a debt buyer’s employee testifies about practices of another company with whose practices he or she is unfamiliar.124

Finally, in Pennsylvania a state appellate court recently upheld a trial court’s finding that a debt buyer’s employee did not have sufficient knowledge of the original owner’s practices to testify as to their reliability and thus enter them into evidence. Quoting the trial court, an intermediate appellate court in Commonwealth Financial Systems v. Smith125 noted that:

[t]he limits of Mr. Venditti’s knowledge were vast. He could offer no clear response as to whether the 1996-1997 Citibank Card Agreement . . . applied to [Ms. Smith’s account]. . . . Mr. Venditti could not say for certain whether [industry] requirements had actually been followed in the preparation and maintenance of those records because, simply put, he was never in a position to know.126

Again, then, in a large claim, personal knowledge is needed to prove the basic elements of a debt buyer case. It is suggested that the same standard should apply in a small claim where the formal rules of evidence do not apply, but where the rules of relevance, prejudice, veracity and reliability always apply.

It is worth noting that in Illinois, a state appellate court took a slightly different but related approach in Unifund v. Shah127 to find that an affidavit stating that a debt had been assigned from one collector to another was not enough to prove the right to pursue a claim under state law.128 In addition, the court emphasized the overarching goal of the statute of protecting consumers:

The possibility that debtors might be sued by a party who does not have a legal interest in their debt is a real danger, and the legislature has chosen to address this problem by demanding strict proof of an account’s chain of title before an action may commence to collect on that account.129

123. Id. at 485.
124. Id.
126. Id. at *6.
128. Id. at 7.
129. Id. (citations omitted).
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Overall, these cases show that, the fact that a debt buyer’s employee purports to be the custodian of records does not mean he or she is “qualified” to certify the business records if there is no demonstrated familiarity with how these types of records are prepared or maintained. A debt buyer’s employee is not an employee of the businesses that purportedly created the documents. As the mere recipient of documents, she acquires no personal knowledge of the business records of any other entity. Additionally, “the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records.” Indeed, one authoritative treatise has described the law as follows: “[a] debt buyer’s affidavit has no probative value when the affiant’s claimed familiarity with the assignor’s business records is derived solely from the affiant’s review of those records after they came into the debt buyer’s possession.”

C. Despite the Importance of the Business Records Exception, Courts Do Not Enforce It in Small Claims Court

The Business Records Exception to the hearsay rule provides a rigorous way to establish the reliability of hearsay records introduced as evidence. But because the formal rules of evidence do not apply in small claims courts, rank hearsay is often admitted into evidence. As noted above, debt buyers know and take advantage of this fact. Given the already-disadvantaged position of unrepresented litigants relative to debt buyers, the pursuit of poorly documented debt without regard evidentiary standards in small claims courts has been nothing short of catastrophic for the consumers, and nothing short of overwhelming for the court system.

The cases outlined above show that many courts outside the small claims context have indeed applied the rules of evidence to debt cases, particularly in recent years, as the abuses and problems of documentation among the debt collection and

130. See supra notes 106–181 and accompanying text.
131. See, e.g., Palisades Collection, LLC v. Kalal, 781 N.W.2d 503, 510 (Wis. Ct. App. 2010) (concluding that debt buyer’s employee lacks personal knowledge of how documents, bank account statements, were prepared in the ordinary course of original debt holder’s business).
132. See id.
135. As one court recently noted, “The possibility that debtors might be sued by a party who does not have a legal interest in their debt is a real danger.” See, e.g., Randolph v. Crown Asset Management, LLC, 254 F.R.D. 513 (N.D.Ill.2008) (certifying a class of at least 341 potential plaintiffs in a class action lawsuit against a defendant who attempted to collect debts that it allegedly did not own).”
136. See supra notes 98 through 134 and accompanying text.
buying industries have come to light. However, there is also evidence that in many cases these rules are not applied. For example, in the mortgage context, where debt is frequently sold to or serviced by banks other than the originator of the mortgage, a study by Katherine Porter found that over 40 percent of all claims for mortgage debt in bankruptcy proceedings were not substantiated by the most basic of all documentation: the note establishing that debt is owed. Another 16 percent of all claims had no documentation at all. Nonetheless, despite the lack of documentation, Professor Porter found that of a total of 17,333 bankruptcy proceedings she examined, only 4 percent included a challenge to the creditor’s claims. Moreover, this occurred in the context of an accompanying finding that in over 95 percent of cases, there were discrepancies between the amount of debt asserted by the debtor and the creditor, with the creditor usually asserting a larger debt.

Consumers are even less well-protected in small claims courts where the rules of evidence don’t apply. But small claims courts are where the vast majority of debt collection cases are litigated, and in light of the shoddy documentation typically offered by debt buyers, this now-established system for pursuing consumer debt collections is, in the words of the Federal Trade Commission, “broken.” If compliance with the formal rules of evidence is not required in small claims cases, then what standard should apply, when all the data is telling us that the companies pursuing those claims have very little proof and often even less concern about the legitimacy of their claims against consumers? It is suggested that a more stringent application by judges of the personal knowledge requirement is likely enough to solve the problem. If one has no personal knowledge of the facts and figures underlying the claim, then proof of that claim is difficult if not impossible.

D. Access to Justice

As many scholars have observed, the lax procedures in small claims courts implicate questions of power and access to justice. These questions are especially acute in
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debt buyer cases. Over thirty-five years ago, Marc Galanter argued that courts in general favor “repeat players” in the legal system, such as debt collectors, because they have additional experience with the judicial process, access to experts at relatively low additional costs, informal relationships with court players, “credibility as a combatant,” and the ability to play the odds in the long-term in order to maximize the chances of winning over time. In addition, repeat players can influence the adoption of rules through legislative change and through repeat arguments to the courts. As a result, the rules tend to favor repeat players. The small claims context seems to bear out Galanter’s argument, in that the lack of rules regarding evidence very much favors creditors, who, until very recently, have enjoyed the trust of the courts and thus have been able to steamroll debtors. The long term impact of the robo-signing scandals on this established trust and credibility remains to be seen. And, because debtors rarely have the experience or knowledge necessary to challenge creditors in court effectively, they often lose when they do challenge the debt buyer in court. Without lawyers to represent them, consumers are unlikely to tap into the knowledge and power necessary to change that dynamic.

More recently, Russell Engler found that prohibitions against giving advice to unrepresented litigants are routinely violated, particularly in consumer contexts such as landlord/tenant or debtor/creditor disputes. Instead, lawyers representing debt collectors induce debtors to agree to settlements that run roughshod over their rights, including to default judgments because an attorney advised them not to appear in court.

The ultimate consequences of not enforcing the requirements of the business records exception are evident in recent litigation concerning debt buyer Palisades, which used affidavits to collect debt through small-claims courts. A recent deposition shows the sloppiness with which those affidavits were created:

Lawyer: What’s your job there (at Palisades)?
Witness: I execute affidavits. . .
Lawyer: . . . is there any quota or performance goal for the number of affidavits you have to execute?
Witness: No, there’s no quota.

146. Id.
147. Id.
150. Id. at 119–20.
Peter A. Holland

Lawyer: How many are you expected to execute?
Witness: At least 2,000.
Lawyer: 2,000 over what period of time?
Witness: Per day.
Lawyer: So you personally execute roughly 2,000 affidavits a day?
Witness: Well, not every day, but most of the time that’s what our quota is.

Lawyer: Okay. Do you actually prepare the affidavit?
Witness: No.
Lawyer: Who prepares the affidavits?
Witness: I don’t know.
Lawyer: Do you have any knowledge as to where that information actually came from that got into the computer system?—Omit objection—
Witness: No.

E. In Light of the Fact That the Debt Collection System is “Broken,” It Is Essential to Require Personal Knowledge of Affiants or Testifying Witnesses

Approaching debt collection cases by enforcing a strict requirement of personal knowledge of the debts being collected and the business records which underlie those debts would solve many of the problems outlined in Part II. It would require the debt collection and debt buying industries to adopt more reliable practices, keep debt buyers and other collectors from exploiting the courts to bully consumers, eliminate many of the suspicious debts currently in court, and address the problem of multiple and competing attempts to collect the same debt.

First, requiring debt buyers to provide sufficiently documented proof of a consumer’s debt would quickly incentivize those buying the debt to insist on better documentation from original creditors and others from whom they purchase the debt. As the FTC and others have observed, documentation practices are poor, and debt buyers themselves have acknowledged as much. Currently, however, debt buyers do not have any reason to improve their practices. Debt buyers purchase debts for pennies on the dollar and therefore do not have the financial incentive to invest funds into verifying the validity of these debts. Additionally, as noted above, veri-

153. See supra Part II.
154. See supra notes 10-12 and accompanying text.
155. See supra Part II.A.
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fication of these documents is economically unnecessary because debt buyers obtain default judgments in the vast majority of their cases.156

If courts were to insist on requiring adequate documentation of a debt in order to enforce it, consumers would be better protected, court dockets would be less crowded, and our quality of justice would improve. For example, if courts began using a simple checklist as a screening device, they could quickly weed out cases which lacked sufficient proof of standing. In this context, debt buyers would likely improve their practices quickly and insist on more reliable documentation from those who sell them debt. The cost would likely rise.

Enforcing stricter standards for verifying purchased debt would also mitigate the problem of duplicative collection efforts. Again, if a debt buyer were unable to successfully collect from a consumer based on untrustworthy documents, he or she would be less likely to file a claim against a debtor in the first place, thus keeping “bad” claims out of court. Moreover, even if a debt buyer did attempt to collect, if courts were better able to sort out proven claims from those without documentation, they would be able to keep pseudo-creditors from asserting debts that they do not actually own. Thus, consumers would be better protected unless and until a true owner of the debt sought to collect from the consumer at a later point in time.157 As indicated above, duplicative lawsuits on a single debt are common in the debt collection industry. Allowing debt buyers to sue and introduce documents without laying the proper foundation of personal knowledge only increases the risk of such duplicative judgments. Without indicia of trustworthiness and reliability of an original creditor’s and each intervening debt buyer’s record keeping practices, it is impossible for a court to tell whether a debt buyer’s records contain potential or actual errors. Insisting on such proof, though, would give consumers and courts a powerful tool for avoiding error.

Of course, enforcing existing standards for personal knowledge would require more preparation and due diligence on the part of debt buyers, but it would not be requiring of them any more than is required of other individuals and industries. Put simply, people are not supposed to be allowed to testify about things they have no knowledge of. This is true whether the rules of evidence apply, or not, because even in small claims actions, witnesses are sworn to tell the truth. Further, given the well-documented problems in the debt buyer industry,158 meeting the minimal standards of personal knowledge and documentation based on personal knowledge

156. See supra Part II.A.
157. “It has long been recognized in [Maryland] that when a maker of a note pays the debt to someone who does not have possession of the note, such payment is no defense to an action by the holder of the note.” Jackson, PR of the Estate of Saunders v. 2109 Brandywine LLC, 952 A.2d 304, 320 (Md. Ct. Spec. App. 2008).
158. See supra Parts I and II.
hardly seems unwarranted. It is past time to make the debt buyer industry play by the same rules that all other litigants are forced to play by.

F. Due Process

The current “broken” system denies access to justice for some of our citizens. In addition, however, this broken system threatens core issues of due process for all. As the Supreme Court found thirty years ago in *Mathews v. Eldridge*,\(^{159}\) “[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”\(^{160}\) Courts may not affirmatively deprive consumers of their property without providing due process of law. It is proposed that neither may they do so by failing to uphold basic principles of due process: the entity that allegedly purchased a consumer’s debt must be able to prove ownership, liability and damages, based on reliable, relevant personal knowledge.

As it stands, the general dictate of “informality” in small claims proceedings does not provide much guidance as to what thresholds apply to evidence in small claims courts—but certainly taking an oath to tell the truth, as all witnesses do, means that one can only offer evidence that is based on personal knowledge. If small claims courts are to regain control over their dockets, protect the public and continue to ensure the integrity of our system, then they must restore one of the basic tenets of due process: a witness should not be allowed to swear to the truth of facts when the witness has no personal knowledge of those facts.

IV. Conclusion

To protect consumer debtors and ensure that small claims courts are not used by debt buyers to obtain bogus judgments, courts must redouble their efforts to make sure that the proponent has personal knowledge of the matter at issue before any person testifies, before any affidavit is accepted, and before any documents are admitted into evidence. Relaxed evidentiary standards do not mean no standards. The fact that the formal rules of evidence do not apply does not mean that no rules of evidence apply. To protect the integrity of our courts, to restore faith in due process, and to fix the system which the Federal Trade Commission describes as “broken,” judges around the country need to reestablish order in the court by enforcing the basic touchstone of all adversarial proceedings: the requirement that the evidence offered be based on personal knowledge. Absent this personal knowledge

\(^{159}\) 424 U.S. 319 (1976).
\(^{160}\) Id. at 332.
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requirement, consumers, courts and society are vulnerable to the continuing barrage of shoddy debt buyer lawsuits and uneven justice.
Hunger and Food Insecurity in the Land of Plenty

Is the special subject of the September–October 2012 CLEARINGHOUSE REVIEW

When Junk-Debt Buyers Sue
What’s Best for Individuals in Psychiatric Institutions
Medicaid Preemption Remedy Survives Supreme Court
Randomized Studies of Legal Aid Results
Social Security Administration’s Noncompliance with Regulations and Constitution
Children’s SSI Disability Benefits at Risk
Raising Illinois Taxes

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

DEFENDING
Junk-Debt-Buyer Lawsuits

By Peter A. Holland

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

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

C onsumer advocates are well aware of the rise in bogus lawsuits filed by junk-debt buyers. The sheer volume of these cases is astronomical. For example, in Maryland, Midland Funding Limited Liability Company filed more than 7,000 lawsuits in the months of November and December 2011. On March 9, 2011, one lawyer in Maryland filed 130 lawsuits on behalf of LVNV Funding Limited Liability Company. Does anybody expect that Midland Funding or the lawyer mentioned above intend to appear in court and prosecute these cases? Of course not. They are filing these lawsuits based on two historically accurate assumptions: (1) the vast majority of consumers will not show up or contest the lawsuits, and (2) a majority of judges will award a default judgment in the vast majority of cases, based on documents, often inaccurately described as affidavits, submitted by the plaintiff.
All across the United States, junk-debt-buyer lawsuits have overwhelmed the courts and wrought untold havoc on the lives of consumers. These cases have resulted in homelessness, needless bankruptcies, job loss, marital stress, divorce, depression, hopelessness, and illegal garnishments. That judgments against consumers are part of a zero-sum game is often overlooked. In these cases every hodgepodge judgment deprives a legitimate creditor of the chance to get paid from scarce resources. A Chapter 7 bankruptcy discharge does not discriminate between legitimate and illegitimate unsecured creditors; with very few exceptions, it discharges any debt which is unsecured. Thus the legitimate creditor to whom money is owed is materially harmed by the junk-debt buyer, who extracts money based on an illegitimate claim and forces people into bankruptcy. In short, a broad effort to defend these cases not only will help individual consumers but also could improve the entire U.S. economy by preserving precious resources to pay what is legitimately owed and avoiding paying for what is not. Here I survey the landscape of the junk-debt-buyer industry and advise consumer advocates engaged in the battle against unscrupulous junk-debt buyers.

A Brief Overview of the Junk-Debt-Buyer Industry

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

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

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

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8See infra notes 30–32.
Sales of accounts to junk-debt buyers occur only after the original creditor makes the business decision not to outsource the collection or pursue the collection itself. In fact, plaintiff’s debt-buyer status indicates that the original creditor made a business decision to sell off the account for a few cents on the dollar rather than outsource collection of the account or collect the account in-house. In light of this, every time a junk-debt buyer intones that people should pay the debts it is trying to collect, bear in mind that the original creditor has already decided that the account is not worth pursuing. Therefore the original creditor is not asserting a claim and will receive no benefit if the case is won and no detriment if the case is lost.

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

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

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

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

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

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

11See infra note 46.

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

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

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

Tips for Defending Consumers in Junk-Debt-Buyer Lawsuits

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

1. Read the Complaint and Supporting Documentation Carefully

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

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

Fourth, the debt buyer is usually unable to prove a complete and unbroken chain of title. Without a valid chain of title, the debt buyer does not have standing to sue.
Attached to the complaint may be one or more bills of sale that purport to transfer ownership of unspecified accounts, for unspecified consideration, pursuant to unspecified representations and warranties. The lack of account details makes tying in the assignments to the account claimed against the person sued impossible. Closer inspection often reveals discrepancies in the corporations doing the alleged assigning, in the dates of assignment, and other falsehoods and omissions.

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

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

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

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

2. Know the Elements of an “Account Stated” Cause of Action

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

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

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

3. Scrutinize the Supporting Affidavit

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

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

4. Master the Relevant Rules of Evidence

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

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

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

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1Id. § 29.
3Fed. R. Ev. 106.
4Id. 401.
5Id. 601, 602, 603.
These rules can be used to demonstrate that evidence is admissible only if there is a witness who can testify on the basis of personal knowledge. Debt buyers literally offer affidavits as testimony at contested trials, and some judges accept them. But remember that, even in an affidavit, competency, personal knowledge, and an oath or affirmation must be affirmatively demonstrated to the courts, pursuant to Federal Rule of Civil Procedure 56(e). Fifth, remember that all documents must be properly authenticated. Tattered, illegible, robo-signed photocopies of the purported business records of third-party entities are not self-authenticating.25

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

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

Junk-debt buyers sometimes argue that they are the good guys. They claim that, by holding people accountable for their irresponsible financial behavior, they help keep down the cost of credit for everybody. Again, this is the time to emphasize that your plaintiff is an investor in the equivalent of penny stocks. The fantasy that the debt-buyer system is keeping the cost of credit down evaporated when the bank decided to sell off the debt at a fraction of its face value. For example, in the third quarter of 2011, Asset Acceptance Capital Corporation paid three cents on the dollar for junk debt.30 Encore Capital Group paid four cents on the dollar in the fourth quarter of 2011.31 And Portfolio Recovery Associates Incorporated paid seven cents on the dollar in the fourth quarter of 2011.32

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

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

27Id. 803(b)(6).
28Id. 803.
29Id. 201.
Defending Junk-Debt-Buyer Lawsuits

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

The “anything goes in small-claims court” trap is easily avoided by pointing out to the judge that, even in a small claim, documents can only come into evidence through a witness who is competent to testify to the matters asserted, and whose testimony is based on personal knowledge. For example, in Maryland, Rule 5-101 states that the rules of evidence do not apply in small-claims actions except for those rules relating to the competency of witnesses. Use your state analogue to Federal Rules of Evidence 601, 602, and 603. Witnesses must be competent to testify to the matters at issue, have personal knowledge, and take an oath, even in small claims where the rules of evidence might not otherwise apply. Further, axiomatic to most (but not all) judges is that documents can be introduced only through a sponsoring witness, who is subject to cross-examination (except cross-examination is not required in summary judgment of affidavit judgment cases).

6. Emphasize the Plaintiff’s Lack of Standing

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

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

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

8. Develop a Strategy for Each Case

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

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


Fed. R. Evid. 601, 602, 603.

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

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

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

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

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

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

10. Communicate with Opposing Counsel

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

11. Master the Most Common Defenses

Issues such as securitization (who is the real party in interest?), standing to sue (do you really own this debt?), and injury in fact (they invested 2 cents on the dollar but are suing for the full 100 cents on...
the dollar; how have they been injured 100 cents on the dollar?) can raise profound and fascinating jurisdictional issues that should not be overlooked. But these cases are easily won by reading the documents carefully, employing common sense, understanding some basic legal principles, and maintaining a determination to turn around a train that sometimes seems to have already left the station. Here are the common defenses that you need to master:

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

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

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

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

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

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

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


43“A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt” (15 U.S.C. § 1692e(1)); see, e.g., Kimber v. Federal Financial Corporation, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) (“a debt collector’s filing of a lawsuit on a debt “that appears to be time-barred, without the debt collector having first determined after a reasonable inquiry that that limitations period has been or should be tolled, is an unfair and unconscionable means of collecting the debt”).
Defending Junk-Debt-Buyer Lawsuits

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

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

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

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

12. Screen Every Case for Affirmative Claims

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

46A national bank may export the home state's interest rate, regardless of state usury caps, the U.S. Supreme Court held in 1978 (Marquette National Bank of Minneapolis v. First of Omaha Service Corporation, 439 U.S. 299, 308 & n.24 (1978)). For a fascinating look at the predictable consequences of this holding, see Patrick McGeehan, Soaring Interest Compounds Credit Card Pain for Millions, New York Times, Nov. 21, 2004, http://nyti.ms/HBoqQJ, and Secret History of the Credit Card, Frontline (Nov. 23, 2004), http://to.pbs.org/H7B7dv. There is no federal cap on interest rates, nor are there state caps in the following states, which are home to the following credit card companies: South Dakota (Citibank), Utah (American Express), Virginia (Capital One), Delaware (Chase, MBNA, Morgan Stanley, HSBC), or New Hampshire (Providian) (Frontline, Map: Snapshot of the Industry (Nov. 23, 2004), http://to.pbs.org/GyOJ).
49Press Release, Minnesota Department of Commerce, Commerce Department Working to Keep Convicted Felons out of Your Wallet (Feb. 17, 2012), http://bit.ly/He8U0v. According to NCO’s website, the company uses the “NCO Trigger Program” to “help companies recover accounts after all collection efforts have been exhausted and the accounts have been charged off” (NCO, Collection Services (2012), http://bit.ly/HeUBqy).
language, contacting employers, and other blatantly illegal conduct are on the rise. Often the junk-debt buyer takes payments prior to suing and then fails to credit those payments (or even mention them) in the lawsuit. As noted above, these junk-debt buyers are not immune from the Fair Debt Collection Practices Act.

13. Consider Subpoenaing the Forward Flow Agreement

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

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

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

14. Settlements of Affirmative Claims Should Include Certain Terms

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

15. Use Manuals and Listservs

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

Final Thoughts

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

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


54Jonathan Sheldon et al., National Consumer Law Center, Collection Actions (2d ed. 2011); Robert J. Hobbs et al., National Consumer Law Center, Fair Debt Collection (7th ed. 2011).
tract hundreds of millions of dollars from unsophisticated consumers, fewer than 1 percent of whom are represented by a lawyer.\textsuperscript{55} Allowing debt buyers to run roughshod over consumers and the courts is a denial of due process. It enriches junk-debt buyers at the expense of consumers, legitimate creditors, and our judicial system. I hope that the tips offered here will be of some guidance in going out and restoring access to justice for the consumers and families who often are being forced—wrongly—to decide between paying legitimate creditors, paying junk-debt buyers, and filing for bankruptcy. Trying and winning these cases will have the systemic impact of helping restore a sense of justice and fairness which lies trapped beneath the heavy weight of the junk-debt buyer.

\textit{Author’s Acknowledgments}

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

\textsuperscript{55}Wilner & Sheftel-Gomes, supra note 6, at 3, 9. In a study of New York City debt collection cases, researchers found that creditors obtained default judgment in 81.4 percent of cases in their sample. Less than 1 percent of people sued by creditors had legal counsel (id. at 7–8). In my experience, in Maryland less than 1 percent of defendants are represented in debt-buyer cases.
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Sargent Shriver National Center on Poverty Law
50 E. Washington St. Suite 500
Chicago, IL 60602
LOAN SALE AGREEMENT

DATED AND EFFECTIVE AS OF APRIL 14, 2010

BY AND AMONG

SELLER: FIA Card Services, N.A.,

AND

BUYER: CACH, LLC
THIS LOAN SALE AGREEMENT (this "Agreement") is dated and effective as of the
day and year as set forth on the cover page of this Agreement by and among FIA Card Services
N. A. (the "Seller") and CACH, LLC, (the "Buyer").

RECITALS:

Recital 1. FIA Card Services (the "Seller") is a wholly owned subsidiary of Bank of
America Corporation and is successor in interest to MBNA Bank, N.A., Fleet Bank, N.A., and
Bank of America Card Services; and

Recital 2. Seller desires (1) to sell certain loans, representing credit card and credit line
receivables, as identified on the Loan Schedule a copy of which is attached hereto as Schedule 1;

Recital 2. The Seller has reached an agreement to sell the Loans to the Buyer for the
consideration and under the express terms, provisions, conditions and limitations as set forth
herein;

Recital 3. Seller is willing, subject to the express terms, provisions, conditions,
limitations, waivers and disclaimers as set forth herein, to sell, transfer, assign and convey to
Buyer all of Seller’s right, title and interest in, to and under the Loans; and

NOW, THEREFORE, in consideration of the mutual promises herein set forth and other
valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Seller and
Buyer agree as follows:

ARTICLE I

DEFINITIONS AND INTERPRETATION

For purposes of this Agreement, the parties hereto agree to the following terms, which
shall have the meanings indicated:

Section 1.1. "Additional Purchase Price" means the sales proceeds received and shared
by Buyer to Seller described as the Revenue Sharing Plan in Exhibit H.

Section 1.2 "Affiliate" means any affiliate of Buyer.

Section 1.3. "Agreement" means this Loan Sale Agreement, including the cover page
and all Addenda, Exhibits and Schedules hereto.

Section 1.4. "Bill of Sale and Assignment" means the document to be delivered in
accordance with Section 3.1 to Buyer on or before each Transfer Date with respect to the Loans
purchased under this Agreement, substantially in the form attached hereto as Exhibit C, together with the Loan Schedule describing the Loans being sold on such Transfer Date.

Section 1.5. "Business Day" means a day that is not a Saturday, Sunday or legal holiday recognized by the federal government.

Section 1.6 "Buyer" means CACH, LLC.

Section 1.7. "Claim" means any claim, demand, cause of action, judgment, loss, damage, penalty, fines, forfeitures, fees, liability, cost and expense (including attorneys' fees, whether suit is instituted or not), whether known or unknown, liquidated or contingent.

Section 1.8. "Current Balance" means the unpaid balance in United States Dollars for each Loan sold hereunder. The Current Balance for the Loans is as set forth in the Loan Schedule. The Buyer acknowledges that the figure provided as the Current Balance for any Loan may include interest (accrued or unaccrued), costs, fees and expenses and it is possible that the figure provided as the Current Balance for any Loan may not reflect credits for payments made by or on behalf of any Obligor prior to the Cut-Off Date. This figure may also reflect payments made by or on behalf of any Obligor which have been deposited and credited to the Current Balance of such Loan, but that may subsequently be returned to Seller due to insufficient funds to cover such payments. Buyer acknowledges that Seller shall have no liability beyond a price adjustment for errors in calculation of the Current Balance and that the amount listed on the Loan Schedule is correct to Seller's knowledge.

Section 1.9. "Cut-Off Date" means no later than (Date).

Section 1.10. "Evidence of Indebtedness" means with respect to each Loan: (a) each loan agreement, line of credit agreement, or other evidence of indebtedness for such Loan, judgment, deficiency or charge-off; (b) any judgment against any Obligor; (c) any settlement agreements or other evidence of compromise by the creditor relating to the amounts due under any Loan or (d) any other evidence, including, without limitation, any Loan payment history data or computer printouts, creditor notations or any other Loan summary information upon which a creditor could reasonably rely in asserting that the same represents a balance due and owing on a right of collection. THE EXISTENCE OF AN EVIDENCE OF INDEBTEDNESS SHALL EVIDENCE AN UNPAID AND OUTSTANDING CLAIM AGAINST AN OBLIGOR BUT SHALL NOT BE DEEMED TO IMPLY THAT THE DEBT EVIDENCED THEREBY IS ENFORCEABLE. THE EVIDENCE OF INDEBTEDNESS MAY BE SUBJECT TO BANKRUPTCY OR OTHER ENFORCEMENT OR COLLECTION RESTRICTIONS. The Evidence of Indebtedness may include, without limitation, original documents or copies thereof, whether by photocopy, microfiche, microfilm or other reproduction process. Such Evidence of Indebtedness shall be provided to the Buyer on a case-by-case basis where proof of debtor's obligation to pay is required, pursuant to the requirements and restrictions set forth in Section 3.1 to this Agreement. Buyer expressly acknowledges that the sole Evidence of Indebtedness to be delivered to Buyer on any Transfer Date under the terms and provisions of this Agreement for any Loans shall be the information set forth on the Loan Schedule provided to the Buyer on an
Section 1.11. "Forward Flow Term" means the monthly sale and purchase of approximately $60 million to $65 million dollars of Loans sold pursuant to this Agreement for a period of time as defined in Section 2.5.

Section 1.12. "Financial Instruments Trust Account" means the account designated by Seller from time to time into which Buyer shall deposit the Purchase Price.

Section 1.13. "Information" means the confidential information and other information about the Loans supplied by the Seller, from time to time, to the Buyer and any work products or other materials produced from or incorporating such information.

Section 1.14. "Information Share Document" means the terms set forth in Exhibit J.

Section 1.15. "Loan Schedule" means the Loan schedule delivered on an electronic file for any sale of the Loans purchased by Buyer pursuant to the terms and provisions of this Agreement or repurchased by Seller pursuant to the provisions of Article 8, and with respect to the sale of Loans to the Buyer, setting forth the following information concerning each Loan, if available: the loan numbers for Seller (but not necessarily the loan numbers maintained or assigned by Seller), the name, address (including state and zip code), Social Security number and telephone numbers of Obligor, name of any co-maker, the date of charge-off, the last payment date, the interest rate immediately preceding charge off and the Current Balance of each of the Loans as approximated by Seller. A copy of the Loan Schedule shall be attached hereto as Schedule 1.

Section 1.16. "Loans" means (a) the obligations sold from time to time pursuant to this Agreement as identified in each Loan Schedule delivered by the Seller to the Buyer and which obligations represent unsecured credit card and credit line receivables which have been charged off by the Seller; (b) all rights, powers, liens or security interests of the Seller relating to the obligations identified in subsection (a) of this definition; (c) any judgments founded upon an Evidence of Indebtedness, to the extent attributable thereto, and any lien arising therefore; and (d) the proprietary interest of Seller in any Evidence of Indebtedness, forming the subject matter of any litigation (including, without limitation, any foreclosure, judgment, deficiency or charge-off) or bankruptcy to which Seller is a party or claimant. Nothing in this definition shall be deemed to imply that the Loans are enforceable; the Loans may constitute unenforceable Loans. "Loan" refers to an individual Loan and "Loans" refers, collectively, to all of the Loans purchased by Buyer pursuant to this Agreement.

Section 1.17. "Monthly Performance Report" means the report layout as set forth in Exhibit I.

Section 1.18. "Obligor" means with respect to each Loan, the obligor(s) on an Evidence of Indebtedness, including, without limitation, any and all makers, and the guarantors, sureties or other persons or entities liable on the Loan.
Section 1.19. "Purchase Price" means an amount equal to 1.79% multiplied by the aggregate Current Balance of the loans, which Purchase Price is to be paid on the Transfer Date.

Section 1.20. "Retained Claims" means with respect to each Loan, the claims or causes of action retained by Seller pursuant to Article XIV.

Section 1.21. "Retention Price" means that amount calculated in accordance with the provisions of Section 5.2.

Section 1.22. "Revenue Sharing Plan" means the terms set forth in Exhibit H.

Section 1.23. "Transaction Documents" means this Agreement, the Mutual Non-Disclosure Agreement attached hereto as Exhibit F, and, with respect to the parties thereto, each Assignment and Acceptance Agreement entered into pursuant to Section 11.2 hereof, and, with respect to each of such documents, all addenda, exhibits and schedules thereto.

Section 1.24. "Transfer Date" no later than (Date).

Section 1.25. "Transfer Documents" means the Bill of Sale and Assignment in substantially the form of Exhibit C hereto (accompanied by a Loan Schedule), which Bill of Sale and Assignment the Buyer and Seller hereby deem appropriate for the transfer of Seller's right, title and interest in and to the Loans purchased by Buyer pursuant to this Agreement.

Section 1.26. "Wire Transfer Instructions" means the instructions for wire transferring the Purchase Price to Seller as set forth on Exhibit D attached hereto or as set forth in any other written notice from the Seller to the Buyer.

Section 1.27. "Interpretation of Use of the Term "Buyer". Wherever in this Agreement the term "Buyer" is used, such term shall refer to the entity which is then the Buyer hereunder, provided, however, that with respect to obligations incurred and actions taken by an entity while it was the Buyer and with respect to the servicing and other ongoing matters related to Loans purchased by an entity while it was a Buyer hereunder, the term "Buyer" shall include such prior Buyers and assignment of the rights and obligations hereunder from one Buyer to the next shall not relieve any entity from the obligations it incurred while it was the Buyer hereunder or from the ongoing obligations with respect to Loans purchased while such entity was the Buyer hereunder.

ARTICLE II

PURCHASE AND SALE OF THE LOANS

Section 2.1. Agreement to Sell and Purchase Loans. Seller agrees to sell, and Buyer agrees to purchase on the Transfer Date the Loans described on the Loan Schedule, at the Purchase Price and subject to the terms, provisions, conditions, limitations, waivers and disclaimers set forth in this Agreement. The Seller's right, title and interest to the Loans purchased by the Buyer shall be transferred and assigned by delivery of the Transfer Documents
to the Buyer. BUYER EXPRESSLY ACKNOWLEDGES AND AGREES THAT THE ORIGINAL ACCOUNT NUMBER WHICH IDENTIFIED ANY LOAN (PRIOR TO ITS CHARGE OFF BY THE SELLER AND THE ASSIGNMENT OF A NEW ACCOUNT NUMBER) AND THE ACCOUNT RELATING TO THE ORIGINAL ACCOUNT NUMBER, ARE NOT BEING PURCHASED UNDER THIS AGREEMENT AND THAT BUYER WILL NOT ASSERT ANY OWNERSHIP OR OTHER INTEREST OVER THE ORIGINAL ACCOUNT NUMBER OR THE ACCOUNT RELATING THERETO. SELLER AGREES TO PROVIDE THE ORIGINAL ACCOUNT NUMBER TO BUYER SOLELY FOR THE PURPOSE OF ALLOWING BUYER TO USE THE ORIGINAL ACCOUNT NUMBER IN ITS COLLECTION ACTIVITIES RELATED TO THE LOANS.

Section 2.2. Purchase Price. The Purchase Price due on the Transfer Date shall be paid by the Buyer to the Seller prior to the close of business on the Transfer Date. Payment must be made in immediately available funds in United States dollars by wire transfer to the Financial Instruments Trust Account in accordance with the Wire Transfer Instructions.

Section 2.3. Agreement to Assign/Buyer's Right to Act. After Seller has confirmation of the receipt of the Purchase Price due on such date, Seller shall deliver to Buyer a Bill of Sale and Assignment, substantially in the form of Exhibit C hereto, executed by an authorized representative of Seller, which Transfer Documents shall sell, transfer, assign, set-over, quitclaim and convey to Buyer, without recourse, warranty or representation, all right, title and interest of Seller in and to each of the Loans sold on such Transfer Date, and the right to all principal and/or interest and/or other amounts due under the Loans and/or other proceeds of any kind paid thereon after the Cut-Off Date, but excluding any and all payments, proceeds or other consideration received by or on behalf of Seller on or before the Cut-Off Date with respect to such Loans, regardless of whether timely paid or applied, and excluding any amounts due or collected by Seller in connection with any Retained Claims. Upon each sale of Loans, the Loan Schedule relating to such Loans shall be attached to the Transfer Documents, identifying the Loans purchased by Buyer.

Section 2.4. Payments Received. Any payments received by Seller on or after the Effective Date and within eighteen (18) months of the Closing Date, with respect to an Account (except for any Account which has been replaced or repurchased by Seller under the terms of the Agreement), shall be forwarded to Buyer as promptly as possible. For any payments received by Seller after eighteen (18) months of the Closing Date, Seller may elect to charge Buyer a $5.00 fee. After eighteen (18) months of the Closing Date, should Seller have any systemic restrictions in providing direct pay information, it would no longer be required to remit to buyer.

Section 2.5 Forward Flow Term. The Forward Flow Term shall begin April 1st, 2010 and shall terminate on June 30th, 2010 unless both parties agree to extend the term.
ARTICLE III

TRANSFER OF LOANS AND LOAN DOCUMENTS

Section 3.1. Assignment of Loans and Loan Documents/Paid Off Loans. Seller shall, on or before the Transfer Date, deliver the Transfer Documents to Buyer by regular or overnight mail to the address of Buyer set forth on exhibit B to this Agreement. Buyer shall bear the risk of transportation of the Transfer Documents. The Bill of Sale and the Assignment shall have the same effect as an individual and separate bill of sale and assignment of each and every Loan. The Seller agrees to maintain in its files copies of the Loan Schedule. The failure of Seller to execute a separate assignment of the Evidence of Indebtedness and/or endorse any Evidence of Indebtedness shall not constitute a default on the part of the Seller hereunder and Buyer’s sole recourse shall be to request additional documentation pursuant to Section 3.2 below. **ON THE TRANSFER DATE, THE SELLER WILL NOT DELIVER ANY ADDITIONAL DOCUMENTS TO BUYER OTHER THAN THE TRANSFER DOCUMENTS.** Seller reserves the right to retain copies of all or any portion of the documents delivered to the Buyer.

Section 3.2. Delivery of Additional Documents. All requests by Buyer for additional documents after the Transfer Date shall be governed by the delivery and transfer provisions of Exhibit E. Seller shall have no obligation to deliver to the Buyer any documents or information about Buyer’s Loans that may exist but which is not in the Seller’s possession. Buyer further agrees, acknowledges, confirms and understands that in the event that Buyer requests Seller to execute and deliver assignments or other documents in addition to the Transfer Documents, Buyer shall furnish Seller with copies of the proposed additional assignments or other documents for review, analysis, approval or amendment by Seller, in its sole discretion. The responsibility for all costs, fees and expenses of preparing, executing and delivering any such additional assignments or such other documents as well as Seller’s reasonable attorney fees in connection with a review of such additional assignments or other documents shall be the sole responsibility of Buyer and shall be payable upon demand from Seller. Seller shall be under no obligation to execute the requested assignments or other documents. Buyer shall also be responsible for and shall pay the costs, fees, taxes and expenses of the filing and recording, if any, of the originals of such additional assignments or other documentation.
ARTICLE IV

SERVICING OF THE LOANS

Section 4.1. Servicing After Transfer Date. The Loans shall be sold and conveyed to Buyer on a servicing-released basis. As of each Transfer Date, all rights, obligations, liabilities and responsibilities with respect to the servicing of the Loans sold on such Transfer Date shall pass to Buyer, and Seller shall be discharged from all liability therefore, except for any applicable indemnification obligation, as provided in Section 10.2 hereof. Seller shall have no obligation to perform any servicing activities with respect to the Loans from and after the Transfer Date of such Loans.

Section 4.2. Interim Servicing/Buyer Bound. Until the Transfer Date, Seller shall continue to service the Loans to be transferred and in connection therewith, Seller shall have the right, among other things, to postpone any pending litigation or bankruptcy matter until after the Transfer Date for such Loans. Buyer shall be bound by the actions taken by Seller with respect to any Loan prior to the Transfer Date of such Loan. BUYER SHALL TAKE NO ACTION TO COMMUNICATE WITH ANY OBLIGOR OR ITS ACCOUNTANTS OR ATTORNEYS OR ENFORCE OR OTHERWISE SERVICE OR MANAGE ANY SUCH LOAN UNTIL AFTER THE TRANSFER DATE OF SUCH LOAN. In no event shall Seller be deemed a fiduciary for the benefit of Buyer with respect to the Loans, or any Loan.

Section 4.3. Buyer Servicer Requirements/Hold Harmless and Indemnity. Buyer shall be responsible for complying with all state and federal laws, rules, regulations and other statutory requirements, if any, with respect to the ownership and/or servicing and/or collection of any of the Loans from and after the Transfer Date of such Loan including, without limitation, the obligation to notify any Obligor of the transfer of servicing rights from Seller to Buyer.

Section 4.4. Disputes With Obligors Resolved Through Arbitration or Litigation. Buyer acknowledges and agrees that any claim, dispute or action against an Obligor of a Loan shall be resolved by arbitration or litigation pursuant to the terms and conditions of the underlying loan agreement between Seller and such Obligor, which is assigned to and assumed by Buyer, pursuant to the terms of this Agreement. If an arbitration option or class waiver was provided in the original terms and conditions, the enforcement of such arbitration or class waiver clause is not permitted. However, there are exceptions to this prohibition which are outlined below:

a. A consumer arbitration award obtained prior to December 11, 2009 can be enforced:

b. For any consumer credit card arbitration already pending as of December 11, 2009, the Buyer can arbitrate if it (i) offers such customer in writing the choice between continuing in arbitration or having the matter refiled in court; and (ii) the customer opts in writing for the existing arbitration to continue; or

c. If a consumer agreement requires arbitration, it can proceed provided the customer maintains that the dispute cannot proceed in court because the dispute is required to be arbitrated.
ARTICLE V

REPURCHASE OF LOAN AND REFUND OPTION OF SELLER

Section 5.1. Seller's Right to Notification of Claims and Actions. Buyer shall promptly notify Seller of any Claim, threatened Claim or pending or threatened arbitration or other legal proceeding by any Obligor against Seller that arises from or relates to any of the loans purchased hereunder.

Section 5.2. Retention Refund. If Seller determines in its sole discretion that any of the circumstances set forth in Section 5.3 exist with respect to any Loan and Seller elects to retain or repurchase the Loan, Seller shall refund a portion of the Purchase Price relating to such Loan equal to the amount determined according to the following formula: (i) (a) the current outstanding principal balance of the Loan (or if such loan is to be retained prior to transfer to the Buyer the amount set forth on the Loan Schedule containing the Loan being retained); multiplied by 1.79% b) then (ii) the amount determined under the preceding clause (i), shall be decreased by the aggregate amount of other payments, credits or other consideration, if any, attributable to such Loan only to the extent that such credits or other consideration were actually paid over or delivered by the related Obligors or the Seller to the Buyer.

Section 5.3. Seller's Right to Retain and to Repurchase Loan(s). If any of the circumstances described in (a), (b) or (c) of this section exist with respect to any Loan which is charged off by the Seller, the Seller may retain such Loan and not include such Loan in the Loans designated for sale or sold to the Buyer.

In addition, if Seller determines (i) after the designation of Loans for sale and the determination of Purchase Price of the Loans to be sold on any Transfer Date or (ii) after the Transfer Date that any of the following circumstances exist with respect to any of such Loan or Loans, then Seller shall have the right but not the obligation, to refund to Buyer the Retention Price relating to such Loan(s) calculated pursuant to the provisions set forth in Section 5.2 and withdraw such Loan or Loans from the Loan Schedule and from the Transfer Documents and Buyer, upon ten (10) days written notice, agrees to reconvey such Loan or Loans to Seller:

(a) The loan is participated among different financial entities or depository institutions or is otherwise subject to an agreement between Seller and another depository institution or third party, which restricts or otherwise limits the sale, transfer or assignment of the loan or the servicing of the loan without obtaining the prior consent of such third party; or

(b) Seller determines that there is a pending or threatened suit, action, arbitration, bankruptcy proceeding or other legal proceeding or investigation relating to the loan or any Obligor for such loan and naming Seller or otherwise involving Seller's interest therein in a manner unacceptable to Seller, or Seller otherwise determines that such matter cannot be resolved and/or that Seller's interest therein cannot be adequately protected without Seller owning such loan, or for which a settlement agreement was entered into prior to the Cut-off Date for such loan; or
(c) Seller determines that the loan is (i) cross defaulted, (ii) cross collateralized, or (iii) otherwise so inextricably related to any loan, asset, claim, or right of action owned by Seller or any of Seller’s predecessors in interest and not expressly transferred to Buyer pursuant to this Agreement, that Seller determines that it reasonably requires the retention of such loan in order to protect Seller’s interests in such other loan, asset claim or right of action.

ARTICLE VI

NO RIGHT TO REPURCHASE

OTHER THAN SELLER'S RIGHT TO RETAIN OR REPURCHASE A LOAN PURSUANT TO ARTICLE V, OR SELLER'S DUTY TO REPURCHASE A LOAN PURSUANT TO THE TERMS AND PROVISIONS OF ARTICLE VIII, BUYER ACKNOWLEDGES AND AGREES THAT THE LOANS MAY BE UNENFORCEABLE LOANS AND MAY HAVE LITTLE OR NO VALUE AND THAT SELLER SHALL HAVE NO OBLIGATION TO REPURCHASE ANY LOAN SOLD HEREUNDER.

ARTICLE VII

REPRESENTATIONS, WARRANTIES AND COVENANTS OF BUYER

Buyer hereby represents, warrants and covenants, to and with Seller, as of the effective date of this Agreement, as of the Effective Date of each Assignment and Acceptance Agreement entered into as provided in Section 11.2 of this Agreement and as of the Transfer Date that:

Section 7.1. No Collusion. Neither Buyer, its affiliates, nor any of their respective officers, partners, agents, representatives, employees or parties in interest (i) has in any way colluded, conspired, connived or agreed directly or indirectly with any other bidder, firm or person to submit a collusive or sham bid or offer, or any bid other than a bona fide bid, in connection with the selection of the Buyer to purchase the Loans subject to this Agreement, or (ii) has, in any manner, directly or indirectly, sought by agreement or collusion or communication or conference with any other bidder, firm or person to fix the price or prices, or to fix any overhead, profit or cost element of the bid price or terms of the agreement the bid price or terms of the agreement of any other bidder with respect to the selection of the Buyer to purchase the Loans subject to this Agreement, or to secure any advantages against Seller.

Section 7.2. Authorization. Buyer is duly and legally authorized to enter into this Agreement and the other Transaction Documents and has complied with all laws, rules, regulations, charter provisions and bylaws to which it may be subject or by which its assets may be bound and that the undersigned representative is authorized to act on behalf of and bind Buyer to the terms of this Agreement.

Section 7.3. Binding Obligations. Assuming due authorization, execution and delivery by Seller, this Agreement and each of this other Transaction Documents and all of the obligations of Buyer hereunder and there under are the legal, valid and binding obligations of
Buyer, enforceable in accordance with their respective terms, except as such enforcement may be limited by bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights generally and by general equity principles (regardless of whether such enforcement is considered in a proceeding in equity or at law.)

Section 7.4. No Breach or Default. The execution and delivery of this Agreement (or, where applicable, the Assignment and Acceptance Agreement described in Section 11.2 of this Agreement) and the performance of its obligations hereunder by Buyer will not conflict with any provision of any law or regulation to which Buyer is subject or by which any of its assets may be bound or conflict with or result in a breach of or constitute a default under any of the terms, conditions or provisions of any agreement or instrument to which Buyer is a party or by which it or any of its assets may be bound, or any order or decree applicable to Buyer.

Section 7.5. Nondisclosure and Compliance with Transaction Documents. Buyer is in full compliance with its obligations under the terms of the Mutual Non-Disclosure Agreement, attached hereto as Exhibit F and the terms thereof are hereby incorporated herein, subject to Buyer's ownership rights and interests acquired by Buyer hereunder.

Section 7.6. Identity. Buyer is a "United States person" within the meaning of Paragraph 7701(a) (30) of the Internal Revenue Code of 1986, as amended.

Section 7.7. No Affiliation With Seller. Except as may have been previously disclosed to Seller in writing, Buyer is not or has not been affiliated, directly or indirectly, with Seller, or any of its respective agents, affiliates or employees.

Section 7.8. Assistance of Third Parties. Buyer hereby agrees, acknowledges, confirms and understands that Seller shall have no responsibility or liability to Buyer arising out of or related to any third party's failure to assist or cooperate with Buyer. In addition, Buyer is not relying upon the continued actions or efforts of Seller or any third party in connection with its decision to purchase the Loans. The risks attendant to the potential failure or refusal of third parties to assist or cooperate with Buyer and/or Seller in the effective transfer, assignment, and conveyance of the purchased Loans, and/or assigned rights shall be borne by Buyer.

Section 7.9. Enforcement/Legal Actions/Unfair Collection Practices. Buyer covenants, agrees, warrants and represents that Buyer shall not institute any enforcement or legal action or proceeding in the name of Seller or any subsidiary or affiliate thereof. Buyer also represents warrants and covenants not to take any enforcement action against any Obligor that would be commercially unreasonable and Buyer shall not misrepresent, mislead, deceive, or otherwise fail adequately to disclose to any particular Obligor the identity of Buyer as the owner of the Loans. Buyer further represents, warrants and covenants not to use, adopt, exploit, or allude to Seller or any name derived therefrom or confusingly similar therewith or the name of any other local, state or federal agency or association to promote Buyer's sale, enforcement, collection, or management of the Loans. Buyer covenants, agrees, warrants and represents that it will not violate any laws relating to unfair credit collection practices in connection with any of the Loans transferred to Buyer pursuant to this Agreement. Buyer agrees, acknowledges, confirms and understands that there may be no adequate remedy at law for a violation of the terms, provisions,
conditions and limitations set forth in this Section 7.9 and Seller shall have the right to seek the entry of an order by a court of competent jurisdiction enjoining any violation hereof. Buyer agrees to notify Seller within ten (10) business days of notice or knowledge of any Claim or demand.

Section 7.10. **Status of Buyer.** Buyer represents, warrants and certifies to Seller that it is (i) a financial institution, (ii) an institutional purchaser including a sophisticated purchaser that is in the business of buying or originating loans of the type being purchased or that otherwise deals in such loans in the ordinary course of the Buyer's business, or (iii) an entity that is defined as an accredited investor under the federal securities laws. Buyer covenants, agrees, represents and warrants that all information provided to Seller or its agents by or on behalf of Buyer in connection with this Agreement and the transactions contemplated hereby is true and correct in all material respects and does not fail to state any fact required to make the information contained therein not misleading.

Section 7.11. **No Broker's/Finder's Fees.** Buyer has not dealt with any broker, agent or finder in connection with the transaction contemplated by this Agreement that would give rise to a claim for a brokerage commission or finder's fee. Buyer hereby indemnifies and agrees to defend and hold harmless Seller from and against any claims for brokerage fees or commissions of any broker, agent or finder resulting from the transaction contemplated by this Agreement. Buyer acknowledges that Seller shall have no liability for the payment of Buyer's brokerage fees, commissions or finder's fees in connection with the transaction contemplated by this Agreement.

Section 7.12. **Buyer Insurance Requirements.** Buyer shall, at its sole cost and expense, procure and maintain in full force and effect the following insurance coverages with an insurance carrier which is at least "A" rated by Best.

<table>
<thead>
<tr>
<th>Coverage</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>General Liability</strong></td>
<td>$2,000,000 General Aggregate</td>
</tr>
<tr>
<td></td>
<td>$2,000,000 Product Aggregate</td>
</tr>
<tr>
<td></td>
<td>$1,000,000 Each Occurrence</td>
</tr>
<tr>
<td><strong>Excess Liability</strong></td>
<td>$5,000,000 Each Accident</td>
</tr>
<tr>
<td></td>
<td>$5,000,000 Aggregate</td>
</tr>
</tbody>
</table>

Seller must be provided a certificate of insurance evidencing that such coverage is in effect prior to execution of this Agreement and upon each assignment to a subsequent Buyer as provided in Section 11.2 hereof. All certificates of insurance shall be amended to name Seller and its affiliates as additional insured parties, and shall require that Seller be provided with at least 30 days advance written notice of cancellation or material change in the stated coverage of such insurance. Amended certificates of insurance shall be delivered to the attention of the Seller's Corporate Insurance Department at the address provided in Exhibit A, and approved by said department prior to the commencement of any collection efforts by the Buyer on the Loans. Buyer shall furnish to Seller renewal certificates of insurance, on an annual basis, until all collection efforts with respect to the Loans have ceased.

Section 7.13. **No Proceeding.** There is no litigation or administrative proceeding before any court, tribunal or governmental body presently pending or, to the knowledge of Buyer,
threatened against Buyer which would have a material adverse effect on the transactions contemplated by, or Buyer's ability to perform its obligations under, this Agreement, or any of the other Transaction Documents.


ARTICLE VIII

LIMITED REPURCHASE/REPRESENTATIONS AND WARRANTIES OF SELLER

Section 8.1. Limited Repurchase at Buyer's Option. The Buyer may, twice, at any time within one hundred eighty (180) days of the Transfer Date of a specific Loan pool, submit a listing of Loans and require the Seller to repurchase Loans from such pool, in the event that, with respect to any Loan on such list, prior to the Cut-Off Date:

1. All Obligors have filed an active bankruptcy proceeding as of the Cut-Off Date which has not been adjudicated or discharged and the Loan is listed or is reasonably likely to be listed as one of the obligations to be extinguished in such proceeding; or,

2. All Obligors were declared legally dead prior to the Cut-Off Date; or,

3. The Seller, or any of its duly appointed agents, had delivered to all Obligors a release of liability or satisfaction of their obligations to the Seller; or

4. That the Seller, acting alone or in concert with its duly appointed agents, knowingly created a forged, fraudulent or fictitious Loan; or

5. That the Seller, on the Cut-Off Date, did not have good and marketable title to the Loan, (except for any defect in title, lien or encumbrance arising from, related to, or resulting from (i) the expiration of any statute of limitations, or (ii) Seller's inability to produce documentation for such Loan, either of which shall negate Seller's obligation to repurchase the Loan pursuant to the terms of this Section 8.1.5); or
6. That, prior to the Transfer Date, the Seller was not in substantial compliance with any material provisions of state and federal consumer credit laws, including, without limitation, the Truth-in-Lending Act, the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act and the Fair Credit Billing Act, that Seller was required to comply with in its origination (if the Loan was originated by the Seller) or servicing of the Loan; or

7. The debt was incurred fraudulently by an unauthorized user or applicant, which fraud has been verified and confirmed by either a law enforcement agency or Seller; or

8. An allegation of identity theft has been made for which the Obligor has complied with all requirements of the Fair and Credit transactions Act of 2003 ("FACT Act"); or

9. The Obligor disputed the Account in writing before the Transfer Date without pending resolution before the Transfer Date;

10. The Obligor does not reside in the United States of America or its territories; or

11. The Obligor invoked the stay provisions of the Soldiers and Sailors Civil Relief Act prior to the Transfer Date.

Section 8.2. Repurchase of Loans. In the event that Buyer gives Seller written notice of Buyer's election to have Seller repurchase Loans pursuant to the provisions of Section 8.1, and supplies the Seller with evidence satisfactory to Seller that the same constitutes Loans subject to repurchase, on or before one hundred and eighty (180) days after the Transfer Date of such Loan (the "Repurchase Period"), then Seller shall repurchase the Loan(s) identified in such notice for an amount equal to the Retention Price calculated in accordance with the terms of Section 5.2. Buyer and Seller agree that with respect to any individual monthly Loan sale pool, Seller will only be obligated to perform this repurchase and its attendant procedures and operations once, and that Buyer will submit only two notifications, during the 180 day period from the Transfer Date. Seller shall not be responsible for replacing or repurchasing the first three (3%) percent of accounts submitted by Buyer for repurchase or replacement.

Repurchase by the Seller pursuant to the provisions of this Article VIII shall constitute the sole and exclusive remedy of the Buyer. Except for the remedies in this Section 8.2, Buyer hereby waives any and all rights and remedies to sue Seller in law or equity for damages and other relief, including, without limitation, actual, special, consequential or punitive damages. Seller shall have no obligation to repurchase any Loan for which notice and all supporting evidence have not been received by Seller within the one hundred and eighty (180) day period following the Transfer Date of such Loan. Within thirty (30) days of receiving the Retention Price from Seller, Buyer shall reconvey the repurchased Loan to Seller using the same form of Bill of Sale and Assignment Seller used to transfer the Loan to Buyer, along with any amounts due or collected by Buyer in connection with such Loan and release its security interest on any repurchased Loan.
Section 8.3. **Representations and Warranties of Seller.** The Seller hereby represents and warrants to the Buyer, as of the effective date of this Agreement and as of each Transfer Date that:

(a) Seller is a national banking association duly organized, validly existing and in good standing under the laws of the United States with full power and authority to enter into this Agreement to sell the Loans and to carry out the terms and provisions hereof;

(b) The execution and delivery of this Agreement and the performance hereunder have been duly authorized on or prior to the effective date of this Agreement, by all necessary action on the part of the Seller and no provision of applicable law or regulation or the charter or bylaws of Seller or any judgment, injunction, order, decree or other instrument binding upon Seller is or will be contravened by Seller's execution and delivery of this Agreement or Seller's performances hereunder;

(c) Assuming due authorization, execution and delivery by Buyer, this Agreement and all of the obligations of Seller hereunder are the legal, valid and binding obligations of Seller, enforceable in accordance with the terms of this Agreement, except as such enforcement may be limited by bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights generally and by general equity principles (regardless of whether such enforcement is considered in a proceeding in equity or at law);

(d) No authorization, consent, approval, license, qualification or formal exemption from, nor any filing, declaration or registration with, any governmental agency or regulatory authority or any other body is required in connection with the execution, delivery or performance by Seller of this Agreement, which authorization, consent, approval, license, qualification or formal exemption from, or filing, declaration or registration has not been obtained on or prior to the Transfer Date; and

(e) No authorization, consent, approval, license, qualification or formal exemption from, nor any filing, declaration or registration with, any governmental agency or regulatory authority or other body is required in connection with the sale of any or all of the Loans to be sold on the Transfer Date, which authorization, consent, approval, license, qualification or formal exemption, or filing, declaration or registration has not been obtained on or prior to such date.

Section 8.4. **Survival of Representations, Warranties and Covenants.** The representations, warranties and covenants set forth in this Article shall continue notwithstanding the closing on the sale of any Loans.
ARTICLE IX

BUYER'S EVALUATION AND ACCEPTANCE OF RISK OF LOANS SOLD "AS-IS"

Buyer hereby represents, warrants, acknowledges and agrees to the following:

Section 9.1. **Independent Evaluation.** Buyer's decision to enter into this Agreement and to purchase the Loans pursuant to this Agreement is and was based upon Buyer's own independent evaluation of information deemed relevant by Buyer, including, but not limited to, the information made available by Seller to the Buyer, and Buyer's independent evaluation of the Loans and related information. Buyer has relied solely on its own investigation and it has not relied upon any oral or written information provided by Seller or its employees, contractors, officers, representatives, directors or agents.

Section 9.2. **Due Diligence.** Buyer has had the opportunity to conduct such due diligence review and analyses of the Information together with such records as are generally available to the public from local, county, state and federal authorities, record keeping offices and courts (including, without limitation, any bankruptcy courts in which any Obligor(s), if any, may be subject to any pending bankruptcy proceedings), as Buyer deemed necessary, proper or appropriate in order to make a complete informed decision with respect to the purchase and acquisition of the Loans.

Section 9.3. **Economic Risk.** Buyer acknowledges that the Loans may have limited or no liquidity and Buyer has the financial wherewithal to own the Loans for an indefinite period of time and to bear the economic risk of an outright purchase of the Loans and a total loss of the Purchase Price for the Loans. Buyer acknowledges that the Loans may be unenforceable Loans.

Section 9.4. **Loans Sold As Is.** With respect to this paragraph, the term Seller shall include its affiliates, agents, directors, officers, representatives, contractors and employees. THE BUYER ACKNOWLEDGES AND AGREES THAT THE SALE OF ALL LOANS MADE BY SELLER PURSUANT TO THIS AGREEMENT SHALL BE WITHOUT RECOUERC, REPRESENTATION OR WARRANTY, AND THAT SELLER HAS NOT MADE, DID NOT MAKE AND SPECIFICALLY DISCLAIMS (AND BUYER IS NOT RELYING ON SELLER WITH RESPECT TO) ANY REPRESENTATIONS, WARRANTIES, PROMISES, COVENANTS, AGREEMENTS OR GUARANTIES OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, CONCERNING OR WITH RESPECT TO THE FOLLOWING:

(a) THE MARKETABILITY, VALUE, QUALITY OR CONDITION OF ANY LOAN OR LOANS;

(b) THE VALIDITY, ENFORCEABILITY OR COLLECTIBILITY OF THE EVIDENCE OF INDEBTEDNESS;
(c) THE COMPLIANCE OF THE LOANS WITH ANY STATE OR FEDERAL USURY LAWS AND REGULATIONS APPLICABLE THERETO;

(d) THE ACCURACY OR COMPLETENESS OF ANY INFORMATION PROVIDED BY THE SELLER TO THE BUYER, INCLUDING WITHOUT LIMITATION, THE ACCURACY OF ANY SUMS SHOWN AS CURRENT BALANCE OR ACCRUED INTEREST AMOUNTS DUE UNDER THE LOANS; AND

(e) ANY OTHER MATTERS PERTAINING TO THE LOANS.

IN ADDITION, SELLER EXPRESSLY DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. BUYER ACKNOWLEDGES AND AGREES THAT BUYER IS PURCHASING THE LOANS BASED UPON BUYER'S INDEPENDENT EXAMINATION, STUDY, INSPECTION AND KNOWLEDGE OF THE LOANS AND THAT BUYER IS RELYING UPON ITS OWN DETERMINATION OF THE QUALITY, VALUE AND CONDITION OF THE LOANS AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER. BUYER ACKNOWLEDGES AND AGREES THAT ANY INFORMATION PROVIDED OR TO BE PROVIDED WITH RESPECT TO THE LOANS WAS OR WILL BE OBTAINED FROM A VARIETY OF SOURCES AND THAT SELLER HAS NOT MADE OR WILL NOT BE OBLIGATED TO MAKE AN INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION AND SELLER MAKES NO REPRESENTATIONS AS TO THE ACCURACY OR COMPLETENESS OR SUCH INFORMATION. BUYER ACKNOWLEDGES AND AGREES THAT SELLER HAS NOT UNDERTAKEN TO CORRECT ANY MISINFORMATION OR OMISSION OF INFORMATION WHICH MIGHT BE NECESSARY TO MAKE ANY INFORMATION DISCLOSED TO SUCH BUYER NOT MISLEADING IN ANY RESPECT. FINALLY BUYER SHALL BE DEEMED TO UNDERSTAND THAT ANY DOCUMENTS EXCLUDED FROM THE INFORMATION PROVIDED TO BUYER COULD CONTAIN INFORMATION WHICH, IF KNOWN TO BUYER, COULD HAVE A MATERIAL IMPACT ON ITS DETERMINATION OF VALUE OF THE LOANS. EXECUTION OF THIS AGREEMENT SHALL CONSTITUTE AN ACKNOWLEDGMENT BY BUYER THAT THE EXISTING LOANS WERE ACCEPTED WITHOUT REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED OR OTHERWISE IN AN "AS IS", "WHERE IS" AND "WITH ALL FAULTS" CONDITION BASED SOLELY ON BUYER'S OWN INSPECTION. NO EVENT OR CONDITION SHALL ENTITLE BUYER TO REFUSE TO PURCHASE A LOAN OR TO REQUEST SELLER TO REPURCHASE A LOAN, EXCEPT AS SPECIFIED IN THIS AGREEMENT.
ARTICLE X

INDEMNIFICATION

Section 10.1. Buyer's Indemnification. From and after the Transfer Date, Buyer shall defend, indemnify and hold harmless Seller or Seller's agents, affiliates, employees, contractors, officers, directors and representatives against and from any and all liability for, and from and against any and all losses or damages Seller may suffer as a result of any Claim or threatened Claim that Seller shall incur or suffer as a result of (i) any negligent act or omission of Buyer or Buyer's agents, affiliates, employees, contractors, officers, assignees, directors and representatives in connection with the Loans and its purchase of the Loans, pursuant to the Agreement, or (ii) the breach or inaccuracy of any of Buyer's representations or warranties as set forth in this Agreement and in the other documents executed in connection with the selection of the Buyer to enter into this agreement and the sale of the Loans, or (iii) the breach of any of Buyer's covenants as set forth in this Agreement and in the other documents executed in connection with Buyer's purchase of the Loans or in the Mutual Non-Disclosure Agreement attached hereto as Exhibit F or (iv) any Claim or threatened Claim by any Obligor regarding any assignment, enforcement, servicing or administration of the Loans by Buyer or Buyer's agents, affiliates, employees, contractors, officers, directors, assignees and representatives on or after the Transfer Date.

Section 10.2. Seller's Indemnification. From and after the first Transfer Date, Seller shall defend, indemnify and hold harmless Buyer or Buyer's agents, affiliates, employees, contractors, officers, directors and representatives against and from any and all liability for, and from and against any and all losses or damages Buyer may suffer as a result of any Claim or threatened Claim that Buyer shall incur or suffer as a result of (i) any negligent act or omission of Seller or Seller's agents, affiliates, employees, contractors, officers, assignees, directors and representatives in connection with the Loans and its sale of the Loans, pursuant to the Agreement, (ii) the breach or inaccuracy of any of the Seller's representations or warranties as set forth in this Agreement and in the other documents executed by the Seller in connection with the sale of the Loans, or (iii) the breach of any of Seller's covenants as set forth in this Agreement and in the other documents executed in connection with Seller's sale of the Loans, or (iv) any Claim or threatened Claim by any Obligor regarding any assignment, enforcement, servicing or administration of the Loans by Seller or Seller's agents, affiliates, employees, contractors, officers, directors, assignees and representatives arising prior to the Transfer Date.
ARTICLE XI

ASSIGNMENT OF RIGHTS TO THIRD PARTIES

Section 11.1. Assignment of Agreement; Assignment of Loans. Buyer may assign this Agreement to an Affiliate as provided in Section 11.2. of this Agreement and may assign the Loans for purposes of collateralizing financing arrangements as provided in Section 11.3. of this Agreement. Except as provided in Sections 11.2. and 11.3. of this Agreement, Buyer shall not assign, encumber, transfer or convey its rights under this Agreement or any Loan purchased pursuant to the terms of this Agreement, without the prior written consent of Seller, in each instance, which approval shall not be unreasonably withheld. Buyer additionally agrees to submit requests for all subsequent resales for any and all ownership changes for all Loans included in the sale file. ALL REQUESTS TO ASSIGN OR TRANSFER BUYER’S INTEREST IN, TO OR UNDER THIS AGREEMENT MUST BE MADE IN WRITING AND RECEIVED BY SELLER PURSUANT TO THE NOTICE PROVISIONS OF THIS AGREEMENT.

Buyer may not resell or transfer any Account to any third party within the first twelve (12) months from the Closing Date with the exception of the following: (1) Any Account involved in a bankruptcy proceeding; and/or (2) Up to 25% of the Accounts to no more than two (2) national buyers which shall not include individual state purchasers, which buyers are bound by this restriction for the remaining portion of the initial twelve (12) month period. Buyer may request that Seller waive the requirements of the preceding sentence, but Seller shall have the right to decline these requests in the exercise of its reasonable discretion. Buyer agrees that all resale & subsequent resale information is submitted to Seller as indicated in Section 11.1.

Notwithstanding any consent by Seller to any assignment or transfer of this Agreement or any Loan, no assignee or transferee shall, except in compliance with the terms of Section 11.2. or 11.3. below, further assign or transfer this Agreement or any Loan without Seller’s prior written consent in each instance. No assignment or transfer of the Agreement or any Loan shall relieve Buyer of any of its liabilities or obligations under this Agreement. Each transferee of this Agreement shall be bound by all of the terms and provisions of this Agreement and Buyer shall remain liable for all obligations of Buyer to Seller hereunder, notwithstanding such assignment.

Section 11.1.1 Audit. Buyer agrees that FIA Card Services or its regulatory authorities at its own expense shall have the right upon twenty-four (24) hours notice to Buyer to perform audits or engage the services of its auditors to examine Buyer’s performance as it relates to Section 11.1.
Section 11.2. Assignment to Affiliate. Such entity as may from time to time be the Buyer hereunder may assign all of its rights and obligations with respect to the purchase and sale of Loans occurring after such assignment to an Affiliate provided that assignor, assignee and the Seller enter into an Assignment and Acceptance Agreement, substantially in the form of Exhibit G attached hereto and, upon on delivery of such Assignment and Acceptance Agreement to the Seller, the assignee named in such document shall, as of the Effective Date set forth in such Agreement, become the Buyer under the terms of this Agreement and shall be bound by the terms of this Agreement and shall, as of the time of such assignment be deemed to have made all of the representations, warranties and covenants of the Buyer set forth in Article VII of this Agreement. Each such assignment shall be effective only if such assignment is made to an Affiliate.

Section 11.3. Assignment of Loans. The Buyer and any Affiliate may assign its rights under this Agreement and the Loans purchased hereunder to a bank or to or through any other entity as collateral for a loan or other funding arrangement to be made for the purposes of financing the purchase of such Loans and the Buyer or any Affiliate may assign its rights under this Agreement and the Loans into a trust or other special purpose entity for purpose of providing collateral in the context of a securitization of such Loans as a financing vehicle for the Buyer or an Affiliate. Any Loan assigned pursuant this Section 11.3 may not be subsequently sold, assigned or transferred to any person or entity (a 'subsequent assignee') unless Seller grants its prior written consent, which consent may not be unreasonably withheld or delayed. Notwithstanding the transfer of Loans and any of its rights under this Agreement pursuant to the terms of this Section 11.3, the Buyer which transfers such Loans or rights shall remain liable for all obligations of the Buyer hereunder and with respect to such Loans and/or rights.

ARTICLE XII

FILES AND RECORDS

Section 12.1. Conformity to Law. Buyer agrees, at its sole cost and expense, to abide by all applicable state and federal laws, rules and regulations regarding the handling, maintenance, servicing and collection of all Loans and in the maintenance of all documents and records relating to the Loans purchased hereunder, including, but not limited to, the length of time such documents and records are to be retained, and making any disclosures to Obligors as may be required by law.

Section 12.2. Credit Bureau Reporting. Seller agrees to report all Loans as sold or transferred to another lender, as permitted by the Fair Credit Reporting Act.
ARTICLE XIII

INFORMATIONAL TAX REPORTING

Section 13.1. Informational Tax Reporting. Buyer hereby agrees to perform all of its obligations with respect to federal and/or state tax reporting relating to or arising out of the Loans sold and assigned pursuant to this Agreement including, without limitation, the obligations with respect to Form 1099 and backup withholding with respect to the same, if required, for the year 2010 and thereafter. Seller reserves the right to notify Buyer that Seller shall file such reporting forms relating to the period of the year 2007 or any subsequent year for which Seller owned the Loan. Upon reasonable request, each party will provide the requesting party with copies, delivered in a commercially reasonable format, of their respective Form 1099.

ARTICLE XIV

RETAINED CLAIMS

Section 14.1. Retained Claims. Buyer and Seller agree that the sale of the Loans pursuant to this Agreement shall exclude the transfer to Buyer of any and all claims and/or causes of action Seller has or may have (i) against officers, directors, employees, insiders, accountants, attorneys, other persons employed by Seller, underwriters or any other similar person or persons who have caused a loss to Seller in connection with the initiation, origination or administration of any of the Loans, or (ii) against any third parties involved in any alleged fraud or other misconduct relating to the making or servicing of any of the Loans, or (iii) against any other party from whom Seller contracted services in connection with any of the Loans.
ARTICLE XV

NOTICES

Section 15.1. Notices. All notices, waivers, demands, requests and other communications required or permitted by this Agreement (collectively, "Notices") shall be in writing and given as follows by (a) personal delivery, (b) established overnight commercial courier with delivery charges prepaid or duly charged, or (c) registered or certified mail, return receipt requested, first class postage prepaid. All Notices which relate to any of the Loans shall specify the Transfer Date of such Loans. Such Notices shall be addressed to the Buyer, as the case may be, at the address set forth on Exhibit B to this Agreement and incorporated herein or with respect to Buyers subsequent to the initial Buyer to the address provided in the Assignment and Acceptance Agreement. Such Notices shall be sent to Seller at the address set forth on Exhibit A to this Agreement and incorporated herein. Notices so given by personal delivery shall be presumed to have been received upon tender to the applicable natural person designated below to receive notices or, in the absence of such a designation, upon tender to the person signing this Agreement on behalf of the applicable party. Notices so given by overnight courier shall be presumed to have been received the next Business Day after delivery to such overnight commercial courier. Notices so given by mail shall be presumed to have been received on the third (3rd) day after deposit into the United States postal system. All copies to the applicable persons or entity(ies) designated above to receive copies shall be given in the same manner as the original Notice, and such giving shall be a prerequisite to the effectiveness of any Notice.

ARTICLE XVI

WAIVER AND RELEASE

Section 16.1. Waiver and Release. Buyer, its affiliates, officers, directors, successors or assigns thereof, and all subsequent transferees of the Loans, and all others claiming by or through Buyer or subsequent transferees, hereby disclaim and waive any right or cause of action they may now or in the future have against Seller, and any of Seller's respective contractor's officers, directors, employees, attorneys, agents, and predecessors in interest as a result of the purchase of the Loans; provided, however, that this waiver and release shall not extend to any liability of Seller arising from Seller's failure to perform its obligations in accordance with the terms of this Agreement or any liability of Seller to Buyer indemnified pursuant to Section 10.2. In addition, Buyer, its affiliates, officers, directors, successors or assignees thereof, and all subsequent transferees of the Loans, and all others claiming by or through Buyer or subsequent transferees, hereby release Seller, its agents, officers, directors, representatives, contractors, employees, attorneys and their successors and assigns, from any and all Claims arising from or related to the Loans or arising out of the violation of any applicable laws (including, without limitation, state and federal securities laws), except for Claims indemnified pursuant to Section 10.2.
ARTICLE XVII

MISCELLANEOUS PROVISIONS

Section 17.1. **Severability.** If any term, covenant, condition or provision hereof is unlawful, invalid, or unenforceable for any reason whatsoever, and such illegality, invalidity, or unenforceability does not affect the remaining parts of this Agreement, then all such remaining parts hereof shall be valid and enforceable and have full force and effect as if the invalid or unenforceable part had not been included. In addition, the parties hereto agree to amend the Agreement to add a legally valid and enforceable provision, which will provide the same or similar economic benefits or other benefits to the affected party as the deleted, unenforceable or invalid provision.

Section 17.2. **Rights Cumulative; Waivers.** The rights of each of the parties under this Agreement are cumulative and may be exercised as often as any party considers appropriate under the terms and conditions specifically set forth. The rights of each of the parties hereunder shall not be capable of being waived or varied otherwise than by an express waiver or variation in writing. Any failure to exercise or any delay in exercising any of such rights shall not operate as a waiver or variation of that or any other such right. Any defective or partial exercise of any of such rights shall not preclude any other or further exercise of that or any other such right. No act or course of conduct or negotiation on the part of any party shall in any way preclude such party from exercising any such right or constitute a suspension or any variation of any such right.

Section 17.3. **Headings.** The headings of the Articles and Sections contained in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of this Agreement or any provision hereof.

Section 17.4. **Construction.** Unless the context otherwise requires, singular nouns and pronouns, when used herein, shall be deemed to include the plural of such noun or pronoun, and pronouns of one gender shall be deemed to include the equivalent pronoun of the other gender.

Section 17.5. **Assignment.** Subject to the restrictions set forth in Article XI, this Agreement and the terms, covenants, conditions, provisions, obligations, undertakings, rights and benefits hereof, including the Addenda, Exhibits and Schedules hereto, shall be binding upon, and shall inure to the benefit of, the undersigned parties and their respective heirs, executors, administrators, representatives, successors and assigns.

Section 17.6. **Prior Understandings.** This Agreement supersedes any and all prior discussions and agreements among Seller and Buyer with respect to the purchase of the Loans and other matters contained herein, and the Transaction Documents contain the sole and entire understanding between the parties hereto with respect to the transactions contemplated herein.

Section 17.7. **Integrated Agreement.** The Transaction Documents hereto constitute the final complete expression of the intent and understanding of Buyer and Seller. This Agreement shall not be altered or modified except by a subsequent writing, signed by Buyer and Seller.
Section 17.8. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall constitute one and the same instrument, and any party hereto may execute this Agreement by signing any such counterpart. This Agreement shall be deemed to be binding when executed by Buyer and Seller and signature pages have been exchanged by the parties hereto via facsimile. Telecopy signatures shall be deemed valid and binding to the same extent as original signatures.

Section 17.9. Non-Merger/Survival. Each and every covenant made by Buyer or Seller in the Transaction Documents including, without limitation, any representation, warranty, covenant and any indemnity shall survive the execution and delivery of the Transfer Documents and this Agreement and shall not merge into the Transfer Documents, but instead shall be independently enforceable.

Section 17.10. Governing Law/Choice of Forum. This Agreement shall be construed, and the rights and obligations of Seller and Buyer hereunder determined, in accordance with the laws of the State of Delaware.

Section 17.11. No Third-Party Beneficiaries. Each of the provisions of this Agreement is for the sole and exclusive benefit of the parties hereto, and none of the provisions of this Agreement shall be deemed to be for the benefit of any other person or entity.
IN TESTIMONY WHEREOF, the parties hereto have executed this Agreement.

BUYER: CACH, LLC

By: [Signature]
Name: Paul A. Tarkins
Title: Authorized Signer

SELLER: FIA CARD SERVICES, N.A.

By: [Signature]
Name: Jim Novosad
Title: Senior Vice President
**SCHEDULE 1**

**Loan Schedule**

<table>
<thead>
<tr>
<th>Seller Name</th>
<th>Loan Asset No.</th>
<th>Obligor Last Name</th>
<th>Current Balance (approximate)</th>
</tr>
</thead>
<tbody>
<tr>
<td>FIA CARD SERVICES, N.A.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
EXHIBIT A

IDENTITY OF SELLER

Name: FIA CARD SERVICES, N. A.

Address: 655 Papermill Rd Newark, De 19884-1322
City/State/Zip Code

Contact Person: Manager of Sales Support
Attention: Jim Novosad

Telephone No.: (602) 464-0340
Telecopy No.: (602) 597-2385
EXHIBIT B

IDENTITY OF BUYER

Name: CACH, LLC

Address: 4340 S. Monaco, 2nd Floor, Denver, CO 80237

Contact Person: John Curry

Telephone No.: (303) 713-2008

Telecoppy No.: 

Tax I.D. /SS No.: 

Seller will document systematically Buyer's name and telephone number on each Loan purchased in this Agreement. Seller shall maintain these accounts on computer system for 5 years.

Seller will provide Buyer with a support person to handle inquiries related to the sale of the Loans in this Agreement.
EXHIBIT C

BILL OF SALE AND ASSIGNMENT OF LOANS

The undersigned Assignor ("Assignor") on and as of the date hereof hereby absolutely sells, transfers, assigns, sets-over, quitclaims and conveys to CACH, LLC., a Limited Liability Company organized under the laws of Colorado ("Assignee") without recourse and without representations or warranties of any type, kind, character or nature, express or implied, subject to Buyer's repurchase rights as set forth in Sections 8.1 and 8.2, all of Assignor's right, title and interest in and to each of the loans identified in the loan schedule ("Loan Schedule") attached hereto (the "Loans"), together with the right to all principal, interest or other proceeds of any kind with respect to the Loans remaining due and owing as of the Cut-Off Date applicable to such Loans as set forth in the Loan Sale Agreement pursuant to which the Loans are being sold (including but not limited to proceeds derived from the conversion, voluntary or involuntary, of any of the Loans into cash or other liquidated property).


ASSIGNOR: FIA CARD SERVICES, N.A.

Name: ______________________________
Title: ______________________________
EXHIBIT D

WIRE TRANSFER INSTRUCTIONS

Bank Name:  FIA CARD SERVICES, N.A. - NEWARK, DE

ABA Number: 026009593

DDA Code:  000189002173

Reference:  Please indicate that the funds are loan sale proceeds, along with your name.

Attention:  Mike Crowe

In order to assure proper allocation of funds to Buyer's purchase price, this information must be included on all wire transfers.
EXHIBIT E

DELIVERY OF CREDIT APPLICATIONS
AND STATEMENTS

Seller will deliver to Buyer one copy of the credit application (or affidavit if application is not available or if an affidavit is legally required) and statements for three consecutive months for the Loans upon request for 10% of the Loans purchased by Buyer. Seller will deliver to Buyer additional copies of the credit application and statements for the Loans upon receipt of payment of $5.00 per application or statement (or other available information to be provided under the terms of Section 3.1 of this Agreement) requested by Buyer, for up to three (3) years after the Transfer Date of such Loan, if such documents are available. In addition, Seller shall, upon request, provide with respect to any such request, Seller shall have sixty (60) days from the receipt of the Buyers request to deliver the requested documents, provided the number of requests does not exceed two hundred (200) items in any one calendar month. Otherwise, Seller shall have ninety (90) days from the receipt of the Buyer's request to deliver the requested documents. Buyer expressly acknowledges that Seller only retains the credit applications for a period of five (5) years and that documentation may not exist with respect to the Loans purchased by Buyer.
EXHIBIT F

MUTUAL NON-DISCLOSURE AGREEMENT

Agreement Number:
Effective Date: 04/01/2010
Expiration Date: 04/30/2011
Company Name: CACH, LLC
Company Address: 4340 S. Monaco, 2nd Floor
Denver, CO 80237
Company Telephone: 303-713-2008

This MUTUAL NON-DISCLOSURE AGREEMENT ("Agreement") supersedes any existing Non-Disclosure Agreement and reflects the current agreement between the parties and is entered into as of the Effective Date by and between FIA Card Services, N.A., ("FIA Card Services," having its principal place of business located at 1100 N King Street, Wilmington, DE 19884 and CACH, LLC ("The Company," having its principal place of business located at 4340 S. Monaco, 2nd Floor, Denver, CO 80237. When used herein, "FIA Card Services" shall mean FIA Card Services and its Affiliates. When used herein, Affiliates shall mean a business entity now or hereafter controlled by, controlling or under common control with a Party. Control exists when an entity owns or controls directly or indirectly 50% or more of the outstanding equity representing the right to vote for the election of directors or other managing authority of another entity.

CACH, LLC
("The Company")
By: ____________________________
Name: Paul Larkin
Title: Manager
Date: 4/21/10

FIA Card Services, N.A.
("FIA Card Services")
By: ____________________________
Name: Jim Novosad
Title: Senior Vice President
Date: 4/19/10
RECEITALS

Each of the parties wishes to disclose to the other party and examine certain confidential and proprietary information for the purpose of discussing and evaluating a possible business arrangement (the "Discussions").

The parties mutually agree that the disclosure of said confidential and proprietary information may be required for the Discussions to proceed.

In consideration of the mutual covenants and agreements herein contained, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each of the parties, The Company and FIA Card Services covenant and agree as follows:

1. During the Discussions, each party may disclose to the other party certain confidential and proprietary data and information for the sole purpose of conducting the Discussions. The parties hereby agree that the following terms and conditions shall apply to the delivery, disclosure and use of certain technology, know-how, data and/or other information relating to each party's current and/or proposed products, including, but not limited to, each party's research, products, services, compilations, techniques, development efforts, inventions, processes, designs, drawings, marketing or finances, and all other information ("Confidential Information") disclosed by either party to the other in written or other tangible form, orally or visually, and in the case of non-tangible information, provided such Confidential Information transmitted verbally or visually by either party to the other is identified as confidential at the time of disclosure. Notwithstanding the foregoing, in the case of information relating to the customers of FIA Card Services or their accounts, the parties agree that such information shall be kept strictly confidential regardless of whether such information is in writing or tangible form or whether marked or otherwise identified as proprietary or confidential. The Confidential Information disclosed shall be at the sole discretion of the Disclosing Party. Each party warrants that it has the right to disclose all such Confidential Information pursuant to this Agreement, and any such Confidential Information PROVIDED TO EITHER PARTY UNDER THIS AGREEMENT IS PROVIDED "AS IS." NO OTHER WARRANTIES WITH RESPECT TO SUCH CONFIDENTIAL INFORMATION, EITHER EXPRESS OR IMPLIED, ARE MADE BY EITHER PARTY HEREUNDER.

2. The Company acknowledges that FIA Card Services has a responsibility to its customers to keep information about its customers and their accounts ("Customer Information") strictly confidential. Confidential Information includes Customer Information hereunder. In addition to the other requirements set forth in this Agreement regarding Confidential Information, Customer Information shall also be subject to the additional restrictions set forth in this paragraph. The Company shall not disclose or use Customer Information other than to carry out the purposes for which FIA Card Services or one of its Affiliates disclosed such Customer Information to The Company. The Company shall not disclose any Customer Information other than on a “need to know” basis and then only to: (a) Affiliates of FIA Card Services; (b) The Company’s representatives, provided that any such representatives which constitute nonaffiliated third parties shall be subject to subsection (d) below; (c) affiliates of The Company provided that such affiliates shall be restricted in use and redisclosure of the Customer Information to the same extent as The Company; (d) to carefully selected subcontractors provided that such subcontractors shall have entered into a confidentiality agreement no less restrictive than the terms hereof; (e)
to independent contractors, agents, and consultants designated by FIA Card Services, or (f) pursuant to the exceptions set forth in 15 USC 6802(c) and accompanying regulations which disclosures are made in the ordinary course of business. The restrictions set forth herein shall apply during the term and after the termination of this Agreement.

3. Each party acknowledges and agrees that title to and ownership of the Confidential Information shall remain with the Disclosing Party, and that the Confidential Information disclosed under this Agreement is confidential and proprietary and constitutes valuable trade secret information of the Disclosing Party. Each party hereto agrees not to use the Confidential Information of the Disclosing Party for its own use or for any other purpose except to evaluate whether The Company and FIA Card Services desire to become involved in a business arrangement. Neither party shall copy or reproduce, in any manner, any Confidential Information disclosed by the other, beyond that necessary for evaluation of the Confidential Information. Each party agrees that it will hold the Confidential Information in confidence and will not disclose same to any third party, and will limit disclosure of the Confidential Information only to those of its bona fide employees, agents or consultants who will be directly involved with the Discussions. Further, each party agrees that it will take all appropriate action to satisfy its obligations under this Agreement. Each party shall use no less than reasonable care to satisfy its obligations under this Agreement.

4. The provisions of this Agreement shall not apply to any Confidential Information which:

(a) the Receiving Party can establish by competent documentation was known to it without restriction prior to disclosure by the Disclosing Party; or

(b) was independently developed by the Receiving Party; or

(c) is now or hereafter comes into the public domain through no fault of the Receiving Party; or

(d) is disclosed to the Receiving Party without restriction on disclosure by a third party who has the lawful right to make such disclosure to the Receiving Party; or

(e) is required by operation of law to be disclosed by the Receiving Party, provided, however, that the Disclosing Party is given reasonable advance notice of the intended disclosure and reasonable opportunity to challenge such legal requirement(s).

5. The terms of confidentiality under this Agreement shall not be construed to limit either party's right to independently develop or acquire products without use of the other party's Confidential Information. The Disclosing Party acknowledges that the Receiving Party may currently or in the future be developing information internally, or receiving information from other parties, that is similar to the Confidential Information. Accordingly, nothing in this Agreement will be construed as a representation or agreement that the Receiving Party will not develop or have developed for it products, concepts, systems or techniques that are similar to or compete with the products, concepts, systems or techniques contemplated by or embodied in the Confidential Information provided that the Receiving Party does not violate any of its obligations under this Agreement in connection with such development.
6. This Agreement shall be effective as of the date and year above cited and the term shall extend through and until a period of one (1) year thereafter unless the term of this Agreement is extended, in writing, by the mutual agreement of the parties hereto. However, either party may terminate this Agreement upon thirty (30) days prior written notice to the other party. Upon any such termination or expiration of this Agreement, the Receiving Party will return to the Disclosing Party, or at the request of the Disclosing Party destroy, any and all Confidential Information disclosed hereunder within ten (10) days of said date of termination or expiration.

7. Audit. Buyer agrees that FIA Card Services or its regulatory authorities shall have the right upon twenty-four (24) hours notice to Buyer to perform audits or engage the services of its auditors to examine Buyer's performance hereunder and use of the Information, and to evaluate compliance with this Confidentiality Agreement. Reports generated as a result of these audits may contain reasonable process improvement requirements for the handling of Information by Buyer. Upon presentation to Buyer and following a discussion of issues and recommendations prior to publishing a final report, Buyer agrees that any such process improvements requirements to which it consents shall be binding upon Buyer, shall be deemed to be part of this Confidentiality Agreement, and shall be attached hereto as Addendum A.

8. The non-disclosure and non-use obligations of each party under this Agreement shall survive any termination or expiration of this Agreement for a period of five (5) years from the date of any such termination or expiration, except in the case of Customer Information which confidentiality survives perpetually and irrevocably.

9. Nothing herein shall obligate FIA Card Services to enter into any agreements with The Company or to obtain products or services from The Company, or for The Company to enter into an agreement with FIA Card Services or to provide products or services to FIA Card Services. Further, the Confidential Information of each party shall remain the Disclosing Party's sole and exclusive property, and this Agreement shall not be construed as granting or conferring any rights by license or otherwise in or to any Confidential Information, or as encouragement or commitment on the part of either party to expend or otherwise commit resources in research, development, or production efforts.

10. The validity, terms, performance and enforcement of this Agreement shall be governed and construed by its provisions and in accordance with the laws of the State of Delaware and of the United States of America.

11. Should any provision of this Agreement be deemed illegal or otherwise unenforceable, that provision shall be severed and the remainder of this Agreement shall remain in full force and effect. The waiver of any right or election of any remedy in one instance, by either party, shall not affect any rights or remedies in another instance. A waiver shall be effective only if made in writing and signed by an authorized representative of both parties.

12. All notices which either party is required or may desire to give the other party under this Agreement shall be given by addressing the communication to the address set forth on the first page of this Agreement, and may be given by certified or registered mail, overnight carrier, telex or cable. Such notices shall be deemed given on the date of receipt (or
refusal) of delivery of said notice. Either party may designate a different address for receipt of notices upon written notice to the other party.

13. Neither party may transfer or otherwise assign its rights, duties or obligations under this Agreement to any other person or entity, in whole or in part, without the prior written consent of the other party. Any such prohibited assignment shall be void.

14. This Agreement supersedes in full all prior discussions and agreements between the parties relating to the Confidential Information, constitutes the entire agreement between the parties relating to the Confidential Information, and may be modified or supplemented only by a written document signed by an authorized representative of each party.

15. The signatories hereto warrant and represent that they are duly authorized to bind The Company and FIA Card Services, respectively, and to execute this Agreement.

16. Each party agrees that its obligations provided in this Agreement are necessary and reasonable in order to protect the Disclosing Party and its business, and each party expressly agrees that monetary damages would be inadequate to compensate the Disclosing Party for any breach by the Receiving Party of its covenants and agreements set forth in this Agreement. Accordingly, each party agrees and acknowledges that any such violation or threatened violation will cause irreparable injury to the Disclosing Party and that, in addition to any other remedies that may be available, in law, in equity or otherwise, the Disclosing Party shall be entitled to obtain injunctive relief against the threatened breach of this Agreement or the continuation of any such breach by the Receiving Party, without the necessity of proving actual damages.

17. Because the FIA Card Services Customer Information provided by FIA Card Services to Buyer is extremely valuable and completely proprietary, and because the nature of this asset makes an evaluation of damages after a violation of this Agreement impossible, in the event that a violation of this Confidentiality Agreement is established under this Section 17, FIA Card Services will be entitled to damages no less than twenty-five dollars ($25.00) for each FIA Card Services Customer about whom FIA Card Services Customer Information is deemed to have been used in violation of this Confidentiality Agreement.

IN WITNESS WHEREOF, the parties have hereto caused this Agreement to be executed above by their duly authorized representatives as of the day and year above stated.
EXHIBIT G

FORM OF
ASSIGNMENT AND ACCEPTANCE AGREEMENT

THIS ASSIGNMENT AND ACCEPTANCE AGREEMENT (the "Assignment Agreement") dated as of ______, 2010 is entered into among ________________ ("Assignor"), ________________ ("Assignee") and FIA Card Services, N.A. (the "Seller").

Reference is made to the Loan Sale Agreement __________, as amended and modified from time to time (the "Loan Sale Agreement") between Buyer, Guarantor and Seller. Terms defined in the Loan Sale Agreement are used herein with the same meaning.

The Assignor hereby sells and assigns, without recourse, to the Assignee, and the Assignee hereby purchases and assumes, without recourse, from the Assignor, effective as of ______, 2010 (the "Effective Date") all of the Assignor's rights and obligations under the Loan Sale Agreement with respect to the purchase and sale of Additional Loans occurring after such Effective date ("Future Sales"). From and after the Effective Date (i) the Assignee shall be the "Buyer" under, and be bound by the provisions of the Loan Sale Agreement and have the rights and obligations of the Buyer thereunder with respect to Future Sales and (i) the Assignor shall relinquish its rights and be released from its obligations under the Loan Sale Agreement with respect to Future Sales. The Assignee hereby makes all of the representations, warranties and covenants set forth in Article VII of the Loan Agreement as of the Effective Date. Notwithstanding anything to the contrary herein contained, the representations and warranties made by the Seller to the Assignor in the Loan Sale Agreement shall survive, with respect to the Assignor, the assignment effected by this Agreement.

This Assignment Agreement shall be governed by and construed in accordance with the laws of the State of Delaware.
The terms set forth above are hereby agreed to by

____________________, as Assignor

By: ________________________________
Name: ____________________________
Title: _____________________________

____________________, as Assignee

By: ________________________________
Name: ____________________________
Title: _____________________________

____________________, as Seller

By: ________________________________
Name: ____________________________
Title: _____________________________

Address and information relating to the Assignee:

Name:

Address:

Contact Person:

Telephone No.:

Telecopy No.:

Tax I.D. /ss No:
EXHIBIT H

INFORMATION SHARE DOCUMENT

Buyer agrees to provide the Information Share Document on a monthly basis within 10 business days of the preceding month with the prior month’s performance.

<table>
<thead>
<tr>
<th>Sale Date</th>
<th>Jan-10</th>
<th>DD/MM/YY</th>
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</thead>
<tbody>
<tr>
<td>Sale Type</td>
<td>Bac Fresh</td>
<td>Le Fresh, Bulk</td>
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<tr>
<td>Sale Price</td>
<td>price paid</td>
<td></td>
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<tr>
<td>Volume sold</td>
<td>total volume purchased</td>
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</tr>
<tr>
<td>Sale Price</td>
<td>30</td>
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<tr>
<td># of Accnt Sold</td>
<td># of accounts</td>
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</tr>
<tr>
<td>Sale Name</td>
<td>buyers name for sale (Le 2255)</td>
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<tr>
<th></th>
<th>Gross Collections</th>
<th>Regstg Revenue</th>
<th>Buybacks</th>
<th>Coats / Fees S</th>
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