

**Practice Guidelines:
Debt Collection Defense**

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Practice Guidelines
Debt Collection Defense

I. WHAT THESE GUIDELINES COVER

These guidelines cover how to assess a debt collection lawsuit (what information to gather from the client and why it is important), how to respond to a debt collection complaint and trial matters, negotiating with collection attorneys, possible court outcomes and substantive areas of the law that are relevant to debt collection defense. These guidelines do not provide in detail guidance on possible counterclaims or post judgment collection activity.¹

II. INFORMATION TO GATHER FROM CLIENT UP FRONT

Most of the information that is needed to defend a debt collection case will be gathered during the initial assessment of the case for acceptance of representation.

a. Has the Client been sued?

Clients often come in before there is ever a suit filed. Maybe a creditor or collection agency sent a demand letter; or the client is receiving harassing phone calls.² Ask client if he has received court papers. Check Alacourt to see if a suit was actually filed. If no suit is pending, the client may simply need advice about debts, debt collection harassment, etc. In addition this may be an opportunity to evaluate for possible FDCPA violations.³

LSA maintains a brochure on the portal, “What You Should Know About Debt Collection” that can be given to clients or can be handed out at various outreach events.⁴

¹ See NCLC Manuals on TILA, FDCPA, and UDTPA for counterclaims. See the practice guidelines on bank garnishments and wage garnishments for additional instruction on post judgment collection activity.

² See Appendix A, Doc 1 for example of collection letters.

³ Fair Debt Collection Practice Act violations occur with high frequency. These practice guidelines acknowledge the occurrence of violations, but do not address these issues in depth. For more information about this, see the materials on the portal under “Fair Debt Collection Practices CLE NCLC & NACA March 7-8, 2014” and the NCLC Manual on Fair Debt Collection Practices Act.

⁴ See Appendix A, Doc 2.

There are different rules that apply to original creditors and debt buyers/collection agencies on how they communicate with debtors on collecting the debt. There are few limits on when and how an original creditor can contact a debtor. However, there are many restrictions on debt buyers and collections agencies, including:⁵

1. A debt collector can only call a consumer between 8:00 AM and 9:00 PM
2. If the debt collector knows the consumer⁶ has an attorney, then the collector cannot consumer the debtor directly.
3. If the debt collector knows the consumer's employer prohibits the employee from receiving such communications, then the debt collector cannot call the consumer's place of employment.
4. A debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency, the creditor, the creditor's attorney and the debt collector's attorney.
5. If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except--
(1) to advise the consumer that the debt collector's further efforts are being terminated; (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. If such notice from the consumer is made by mail, notification shall be complete upon receipt.

b. Who is suing the client? Original Creditor or Debt Buyer

If the client has in fact been sued, then it is important to analyze who the Plaintiff is. Is it an original creditor? Or is it a debt buyer? If the Plaintiff is an original creditor, the likelihood of the Plaintiff prevailing at trial is greater,

⁵ See 15 USCS Sec 1692(c). A debtor may give prior express permission for waiving these requirements.

⁶ "Consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

simply because they are more likely to have within their possession the documents necessary to prove the debt (evidentiary issues discussed *infra*). When the Plaintiff is a debt buyer, there is often a gap in evidence linking the original debt to the client and to the debt buyer, thus it can be more difficult for a debt buyer to obtain a judgment.

It is also important to analyze where the Plaintiff is located. If the Plaintiff is a local business (ex. Family Loan) located in the county where the suit is brought, then the likelihood of the Plaintiff prevailing at trial is greater than if the Plaintiff is a major credit card business (ex. CitiFinancial). This is because the local business will be more likely to be able to bring a witness to trial than a major credit card business that will have to fly someone in to testify.⁷

c. Does the client owe the money?⁸

If client's response is "no", then ask, why. If the answer is "yes", then this may open a conversation about whether the client wants to (and can reasonably afford to) try to satisfy the debt and what concerns the client has about not paying the debt. Frequently clients have a misconception about what can happen if they do not pay a debt they owe ("They will put in me jail."; "It's bad for my credit", etc.).

Also this is a chance to evaluate litigation strategy (whether the client should appear at trial). In addition, note, that if the Plaintiff is a debt buyer, the client may say, "Well, yes, I did have that Wal-Mart credit card". Explain to the client that while that may be true, if the debt has been assigned, whether the client owes money to the debt buyer/whether the debt buyer can prove it owns the debt and is entitled to a judgment are different issues than whether the client incurred the original debt.

⁷ In Small Claims, a major credit card business may not have to fly someone in to testify, if the Court allows the Rules of Evidence to be relaxed. See Sec. IV(c)(i) on evidentiary issues.

⁸ Be careful with this question. If you ask and the client says, "yes", you will need to be cautious in your communications with the opposing counsel and the trial court.

If the client's explanation is identify theft, ask if they ever filed a police report, completed a fraud affidavit or notified the credit reporting agencies. Note, having completed a police report/fraud affidavit is not conclusive evidence in the client's favor, just as having not done these things is not conclusive evidence in the creditor's favor. However, it is important information to know and documentation to obtain, if available.

If the client admits owing the debt, ask when he obtained the debt, when did he last made a payment, etc. There may be a statute of limitations issue. See Sec. IV(b) below for specific statutes of limitations.

d. Does the client owe some, but not all?

Ask the client, what is the basis for the belief that he does not owe it all. If he disagrees with the accrued interest (and the interest rate is the contract rate), then there may not be anything that can be done about that. But if the client has an explanation as to why, he owes some, but not all; it may be enough for a defense. Ask the client if he has any documents supporting his position.

e. Before you received the court papers, when is the last time you received any correspondence regarding this debt? When did you last make a payment? When is the last time you made a credit charge?

Clients often get sued on old debts; debts that are beyond the applicable Statute of Limitation (see Sec. IV(b)). The last communication (including payments) may help ascertain if there is a Statute of Limitations defense. Ask for all communications to/from the creditor and any collections agency or attorney acting on behalf of creditor.

Also, if the last correspondence is from a different debt buyer/debt collector than the one suing the client, then there may be a gap in chain of title. This may make it difficult for the Plaintiff to prove his case.

In addition, knowing about the last payment (and the payment history in general) will assist in determine whether the amount sought by the Plaintiff is reasonable as compared to what the client says he owes.

If the client is unsure of this information, he can obtain a credit report which may provide some additional guidance on how old the debt is. Credit reports are available for free at www.annualcreditreport.com.⁹

f. Has the client been served? If so, when and where?

Address of Defendant. Check Alacourt to see if the Court has a good address for the debtor. Does the client live at that address? If the court records indicate the client was served somewhere he does not live, then there may be a good reason to set aside the service.¹⁰

Consider filing a Motion to Quash Service. See App. A, Doc. 4. Think about whether the service is bad on the face of the return of service and what the ultimate outcome of contesting service would be. (Ex. Process Server reports that he left it with a neighbor v. Process Server reports he served Defendant on a day that Defendant says she was out of town). If service is contested and a hearing is held to determine whether the client was served, then if the return of service is bad on its face, then the client will not have to be there to testify. However, if the service can only be proved to be incorrect by your client's testimony, then it may just delay the inevitable (your client gets served at the Motion to Quash hearing). (See Sec. II.(h) below for more on service issues).

If the service was good, then this information will determine when the client's answer is due. Small Claims and District Court: 14 days from date served; Circuit Court: 30 days from date served.

Venue. Check to see if there a venue issue. A lawsuit can be filed where the cause of action accrued (where a contract was entered) or where the defendant resides. If this case is not filed where the client resides, a request by Motion

⁹ A credit report that shows an account has been "charged off" means that it has been at least six months since the last payment. The credit report will also show what parties obtained a copy within the last year. (If a debt was old and the entity suing the client obtained a copy of the report within the last year, then the client may have a possible FDCPA violation, for the entity knowing/should have known this was uncollectible debt.

¹⁰ See Appendix A, Doc. 3: an example of a bad Return of Service: the Process Server indicated that he could not serve the Defendant while at the same time asserted he did serve her...

to Change Venue can be made.¹¹

Jurisdictional Limits of the Court. Also, the amount the Plaintiff asks for in its complaint is relevant for many reasons. First, it will determine whether the suit was filed in the proper court:

Small Claims Court: up to \$3,000.00

District Court: between \$3,000.00 and \$10,000.00

Circuit Court: \$3,000.00 or more

Is the amount owed, a relatively small amount owed to a local original creditor? If so, the creditor will likely be able to get a judgment. If it is (a relatively small amount to a local creditor), does the client want to try to make payments? Or, is the client judgment proof? (see Sec, II (i)) If so, does the client understand that there is little if anything the creditor can do to him?

If the case is filed in Small Claims or District Court, carefully look at the amount sued for, plus costs, attorneys fees, etc., if the total is over the court's jurisdictional limit, then the case is outside the court's jurisdiction and the case may be dismissed for lack of subject matter jurisdiction.

g. Has the client filed an Answer (if so, when?) And also, have you sent any correspondence to the Plaintiff ? (if so, please provide a copy).

It is important to know if the client has admitted any liability to the Plaintiff or the plaintiff's predecessor in interest. Furthermore, if the client is asserting identity theft (discussed supra), disputing a portion of the debt, etc., it is important to know if he has ever informed the plaintiff of this. Check Alacourt to see if a trial date has been scheduled.

If the client already filed an answer, it may be too late to file a 12(b) Motion to Dismiss.¹² Check to see if an Amended Answer needs to be filed to assert

¹¹ If you are not going to represent the client and there is a venue issue, there is a box to check on the Small Claims Answer form to ask for the case to be moved to the proper venue.

¹² Per Ala. R. Civ. Pro. 12(h) the following defense are waived if not included in the initial responsive pleading: lack of personal jurisdiction, improper venue, insufficiency of process, insufficiency of service of process.

any affirmative defenses (discussed *infra*).

If no answer has been filed, refer back to the service date to calculate when an answer is due.

h. Has a judgment already been entered against the client?

This is something that can be determined by a review of Alacourt. If the court already entered a judgment against the client, ask the client when he first became aware of the suit and how he became aware of it. Show him a summons and ask if he recalls receiving such a document. Ask where he resided when the alleged service occurred. Ask what his work hours were when he was supposedly served. Ask whether he could have been out of town at the time of the supposed service. Ask whether there were other adults living in the house at the time of the supposed service. Review the return of service for errors. See Appendix A, Doc. 3 for an example of a bad return.

If the client was never served with the original complaint and was not given an opportunity to dispute the complaint, then there may be grounds to vacate the entire judgment for lack of personal jurisdiction over the client. Pursuant to Ala. R. Civ. Pro. 4, if the complaint was not left with an individual (not a minor or incompetent) residing where the client resides, then the initial service was bad and the court never acquired jurisdiction over your client to enter judgment over that individual.¹³

If it appears that your client was never served with the original complaint, you have grounds for a Rule 60(b) Motion to Vacate as a Void Judgment.¹⁴ The Standard for such motion, being:

¹³ Ala. R. Civ. Pro. 4(c)(1) *Individual*. Upon an individual, other than a minor or an incompetent person, by serving the individual or by leaving a copy of the summons and the complaint at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process.

¹⁴ Ala. R. Civ. Pro. 60(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (4) the judgment is void; ... or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than four (4) months after the judgment, order, or proceeding was entered or taken... See Appendix A, Doc. 5, a sample Motion to Void Judgment.

“ ‘The standard of review on appeal from the denial of relief under Rule 60(b)(4) is not whether there has been an abuse of discretion. When the grant or denial of relief turns on the validity of the judgment, as under Rule 60(b)(4), discretion has no place. If the judgment is valid, it must stand; if it is void, it must be set aside. **A judgment is void only if the court rendering it lacked jurisdiction of the subject matter or of the parties**, or if it acted in a manner inconsistent with due process. *Satterfield v. Winston Industries, Inc.*, 553 So.2d 61 (Ala.1989).’ ” Emphasis added.

Weaver v. Weaver, 4 So. 3d 1171 (Ala. Civ. App. 2008).

If the client was in fact properly served and the judgment is valid, then it would be appropriate to provide the client with advice on collections judgments, post-judgment activities, and service issues for future reference.

i. Determine if the client is “judgment proof”/“collection proof”.

What is the debtor’s source of income?¹⁵ If employed, what are the wages?¹⁶ Do they have a bank account? If so, how much is in it? Does the debtor own a home? Is there a mortgage on it? Does the debtor own any vehicles or any other personal property items of significant value?

All of these questions are used to assess what financial harm the client will suffer from a judgment. If the debtor does not have anything that can be taken from them then the judgment may not be more than a piece of paper.

j. Does the client have other debts?

Discuss the client’s overall financial situation. It may be that the client has significant debts and a bankruptcy would be beneficial. See “Bankruptcy

¹⁵ Social Security Benefits, VA Benefits, Unemployment and Workers’ Comp along with various other benefits are all exempt from garnishment. See Appendix A, Doc. 6 for a complete list of exemptions.

¹⁶ Wages are exempt if under 30x the minimum wage and/or if below \$1,000.00 per pay period. See Practice Guidelines on Wage Garnishments and Bank Garnishments for more information.

Basics” available on the portal for further bankruptcy assessment.

k. Does the client want to pay this debt?

Occasionally, clients want to pay it and be done with it. If the client does not have other debts; then it really may be in his best interest to get this cleared up and done. It may be possible to negotiate a monthly payment plan or a lesser amount lump sum to get it cleared up (tax season is a good time for this).

III. IF YOU DECIDE TO REPRESENT THE CLIENT

After gathering all the information above, decide whether:

- a. Advice only is appropriate
- b. The case should be dismissed for procedural/subject matter reasons
- c. The client has an affirmative defense
- d. The likelihood of whether Plaintiff will be able to prove his case
- e. Whether the case should be defended for some other reason
 - i. Client wants to settle/pay debt, but needs time
 - ii. Client is going to file bankruptcy and wants to postpone judgment
- f. Does the client have a possible counter-claim

IV. ANSWERING THE COMPLAINT & LITIGATING THE CASE

a. Initial Response to Complaint – 12(b) Motion or Answer?

If the client has a 12(b)¹⁷ defense to the complaint, then there is the option of filing a Motion to Dismiss prior to filing an Answer or filing an Answer asserting the defense. LSA has prepared a sample motion to dismiss and answer for use in debt collection cases. See Appendix A, Doc. 7 and 8. Note, the Answer is a simplified answer, if there is a complex defense, more detail may be needed.

¹⁷ Ala. R. Civ. Pro. 12(b) Defenses: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19.

b. What is the Plaintiff's cause of action?

What the Plaintiff has to prove in order to obtain a judgment will depend on the cause of action claimed. The most common causes of action are:

Contract. The essential elements for a contract are competent parties, subject matter, legal consideration, mutuality of agreement and mutuality of obligation. Check to see if it is described as an "express contract" or an "implied contract". The existence of an express contract generally excludes an implied agreement as to the same subject matter. *Vardaman v. Florence City Board of Education*, 544 So. 2d 962 (Ala. 1989). SoL: Simple Contract, 6 years (6-2-34(9)); Contract or Writing under Seal, 10 years (6-2-33); Contract or Writing not under Seal, 6 years (6-2-34(4)).

Account Stated. A suit on an account stated is an action on an account balanced and rendered, with an asset, express or implied, to the balance, so that the demand is essentially the same as a promissory note given for the balance. *Mobile Rug and Shade Co. Inc. v. Daniel*, 424 So. 2d 1332 (Ala. Civ. App. 1983). The Plaintiff should provide an affidavit verifying the debt when the suit is filed. Ask the client if he has ever disputed the debt. If the Defendant disputed the alleged debt within a reasonable period of time, then the Plaintiff should not be able to meet the requirements. Even if the client did not dispute the debt, the Plaintiff may have difficulty proving this cause of action.¹⁸ An "account stated" is not a viable cause of action if there is an express contract setting out terms between the parties. 17A Am Jur.2d Contracts Sec. 17. If a debt buyer sues on an account stated, it must provide admissible evidence that a statement/bill for the account was mailed, properly addressed with sufficient postage or otherwise rendered; failure to do so may result in 3 year statute of limitations for open account being applied. *Ayers v. Calvary* 876 So. 2d 474 (Ala. Civ. App. 2003). SoL: 6 years (6-2-34).¹⁹

¹⁸ If the Plaintiff is a debt buyer, use FDCPA 15 U.S.C. 1692g(c): failure to dispute a debt cannot be construed by any court as an admission of liability.

¹⁹ For more on "account stated" see *Martin v. Stollenborg* 273 Ala 456 (Ala., 1962); *Reed v. Robinson*, 213 Ala. 14 (Ala., 1925).

Open Account. An open account must have a contract, express or implied; it is an action in assumpsit. *Ryder Truck Lines, Inc. Santiam Midwest Lumber Co.*, 431 So. 2d 966 (Ala. Civ. App. 1982). There must be materials purchased or services provided with a balance due and unpaid. The Plaintiff must provide proof of an account which begins either from the last zero balance or from the beginning of the account to the trial date. The Plaintiff should provide an affidavit when the suit is filed to verify the account. “A suit to recover amounts due under a written operating agreement is a suit in contract, not a suit on an open account” *Caddo Oil Co., Inc. v. O’Brien* 908 F.2d 13 (5th Cir. 1990). A creditor suing on open account must prove contact existed in order to obtain recovery of finance charges and other fees in the contract. A statement of the amount owed should be argued to be insufficient. The creditor should provide an itemization. SoL: 3 years from the date of the last item of the account (6-2-37(1)).²⁰

Unjust Enrichment: To prevail on a claim of unjust enrichment under Alabama law, a plaintiff must show that: (1) the defendant knowingly accepted and retained a benefit; (2) provided by another; (3) who has a reasonable expectation of compensation. *Matador Holdings, Inc. v. HoPo Realty Invs., L.L.C.*, 77 So. 3d 139 (Ala., 2011).

Money Had and Received. An action for money had and received is one in assumpsit based upon a promise to repay implied by law. An action for money had and received is founded upon the equitable principle that no one ought justly to enrich himself at the expense of another, and is maintainable in all cases where one has received money under such circumstances that in equity and good conscience he ought not to retain it because in justness and fairness it belongs to another. It is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which ... belongs to the plaintiff. *Jewett v. Boihem*, 23 So. 3d 658 (Ala., 2009). SoL: 6 years (treat like an account stated) *Mutual Bldg. & Loan Ass'n v. Watson*, 226 Ala. 526 (Ala., 1933)

²⁰ For more on “open account” see *Loventhal & Sons v. Morris* 103 Ala. 332 (Ala., 1893).

c. Defenses

- i. Ala. R. Civ. Pro. 12(b) defenses
- ii. General denial
- iii. Waiver/estoppel – or Oral Modification
- iv. Res Judicata
- v. Unconscionability
- vi. Void ab initio
- vii. Plaintiff is not registered to do business in the state
- viii. Defenses provided by substantive law. Sec. V

d. Evidentiary Issues

Evidentiary issues (what evidence is required) in each case may develop around three central factors: (1) the Court in which the case is pending; (2) the type of Plaintiff; and (3) the cause of action.²¹

Unless the client has a defense that he did not incur the debt or he is making an affirmative defense that the plaintiff did not complete a prerequisite to file suit, do not have the client come to trial (exception: client is subpoenaed). The Plaintiff's counsel will try to use the client's testimony to try to prove that he owes the debt.

The rules are least restrictive in Small Claims Court and more restrictive in District and Circuit Court. If a case gets into summary judgment motions, there will be more technical issues as well.

Small Claims. The Rules of Evidence are relaxed in Small Claims.²² This means the Court may accept a written statement of a witness without the witness being present. It does not mean that the Court may accept documents without the testimony of a witness (i.e., solely on the representations of the attorney). That does mean that the case is lost. Review the Plaintiff's documents closely to see if there is an affidavit of

²¹ This section will address the differences in Small Claims, District and Circuit Court. For the issues with type of plaintiff, see Sec. II(b); for the issues with cause of action see Sec. IV(b) and V.

²² Ala. Small Claims Rule J: ...The court in its discretion may participate freely in the examination of parties and witnesses may relax the rules of evidence and may receive sworn written or recorded statements of witnesses or parties not present at the trial.

witness authenticating the documents. Even if there is an affidavit, look closely at the affidavit to ensure it properly authenticates each document and look closely at the documents to ensure all are attached and that each actually states what the Plaintiff purports it states. In a debt buyer case, the Plaintiff will frequently have a stack of documents that looks intimidating, but in reality the affidavit does not authenticate, there is an assignment missing or some other flaw that should prevent a judgment for the Plaintiff.

District Court and Circuit Court. At trial, the plaintiff may try to get documents into evidence without a witness. Pursuant to Ala. R. Civ. Pro. 902(11) and (12)²³, documents of regularly conducted activity can be admitted by a affidavit. This rule does not allow for carte blanche admissibility, but if done correctly, will allow the proponent to overcome authentication, hearsay and best evidence rule objections. Other evidentiary objections may still apply.

Always remember to look at the actual content of the documents attached - is there a gap in chain of title? Is there an assignment that does not specifically reference the client's debt? Is the amount sought in the complaint different than the last statement amount? (See Sec. V(a)(iv)) Did the original creditor assign certain rights to Debt Buyer A that were not specifically assigned from Debt Buyer A to Debt Buyer B?²⁴ These are issues that can be brought up. Also, debt buyers and collections attorneys are notorious for getting their facts wrong in their affidavits. Review carefully to make sure that the documents are the ones referenced in the affidavit. Also, if the affiant's affidavit is more of testimony than mere document verification, object to the affidavit and ask for it to be stricken. Google the affiant's name to see if he/she as a robo-signer.

Rule 902 requires the proponent to make the record and the affidavit

²³ Ala. R. Civ. Pro. 902(11) and (12) are relatively new additions to the state rules and are modeled after R. 902 (11) and (12) of the Federal Rules of Civil Procedure, which have existed for quite some time. If there are no case notes under the state rule that are relevant to an issue you are having under this rule, look to the federal case notes for additional guidance.

²⁴ If Original Creditor assigned "receivables" to Debt Buyer A and the Debt Buyer A assigned "rights under the original contact" to Debt Buyer B, then Debt Buyer B has nothing.

available for inspection "sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them". There is no definition for "sufficiently in advance", but if at trial is the first time these are made available, an objection would be appropriate.

If there is no valid affidavit and the Plaintiff does not have a witness to authenticate the documents, then the documents should not be admissible. If the Plaintiff's counsel attempts to simply hand the documents over to the Court, object for failure to authenticate. See Appendix A, Doc. 9 for a "Cheat Sheet" of Common Trial Objections

Discovery. Discovery is always permissible in circuit court. In district court, absent an agreement, the party seeking discovery must get advance permission from the court. Ala. R. Civ. Pro. 26(dc).²⁵

Depending on the defenses presented, it may/not be in the client's interest to issue discovery requests to the Plaintiff. Sometimes discovery is not in the client's best interest, as this ends up helping the Plaintiff prove his case. However, if the client has a defense, such as identity theft, then discovery may be appropriate. See Appendix A, Doc. 10 as a list of possible discovery requests.

When the client is served with discovery requests by the adverse party, this is a good time to do some further evaluation of the strengths/weaknesses of the client's case. If the client's case is weak, consider negotiating a settlement.

Debt collectors frequently send requests for admissions as a way to provide their case through the client. Remember, any request for admission that is not responded to is deemed admitted. Lack of knowledge is a legitimate basis for an inability to admit or deny a request, if the party answering the requests has performed a reasonable inquiry and the information known or readily obtainable is insufficient to enable the party to admit or debt. A "reasonable inquiry" would not require the

²⁵ Some district courts have standing orders allowing for discovery.

defendant obtain documents from the original creditor; that would be up to the debt buyer/plaintiff. Grounds for objecting to a request for admission include: the statement calls for a purely legal opinion; irrelevant, overly burdensome; vague/ambiguous.

Summary Judgment - The Plaintiff may file for summary judgment. Review the supporting affidavit and documents carefully. **It is rare that a debt buyer gets this right.** Make sure the documents actually state what the affiant swears and also that the affiant is a proper person to provide such testimony. If there are errors in the affidavit, in addition to filing a Response to the Motion for Summary Judgment, a Motion to Strike the affidavit needs to be filed. **A response to a summary judgment motion that addresses issues with an affidavit will not be sufficient; the proper filing is a Motion to Strike.** See Appendix A, Doc. 11 for a Motion to Strike and Appendix A, Doc. 12 for a sample response to motion for summary judgment.

The grounds for contesting a summary judgment motion will depend on the cause of action claimed by the Plaintiff and the facts asserted. If more than one cause of action is complained of, then a response should address each one. Any issue presented in a motion for summary judgment that is not addressed in a response is deemed undisputed. In addition, there may be additional statutes that apply to the client's situation that would provide a counter to a motion for summary judgment. See Sec. IV(b), supra and Sec. V., infra for more on causes of action and specific types of collections cases.

Any response to a motion for summary judgment should include an affidavit from the client (and any other third party with knowledge) that puts facts into dispute. **Be very careful with the wording of the affidavit.** Do not have the client swear to something that is not true. This is especially true with debt buyer cases. The client can swear that the client did not enter an agreement with Debt Buyer and that client does not know Debt Buyer, but cannot swear that he did not incur the underlying debt.

If a Plaintiff fails in a Motion for Summary Judgment, consider trying to get adverse party to dismiss the case. Debt collectors frequently stop pursuing a case after losing a summary judgment motion.

V. NEGOTIATIONS AND JUDGMENTS

a. Negotiation tactics

Negotiations may occur at any time – from pre-suit (if the client wants to settle on an amount) to trial to post judgment.

If the negotiation revolves around a settlement amount/payment plan, talk with the client about whether it is something he can reasonably afford. There is no reason to commit a client to a payment plan that he cannot afford.

Collection attorneys sometimes ask for a consent order to include language like “if Defendant fails to pay the agreed upon amount, the judgment will revert from X [agreed amount] to Y [complaint amount]. This is not in the client’s interest. Try to keep such provisions out. But if the collection attorney will not agree to settle without it, at least try to get an amount the client can afford. Often times, the original debt is not unreasonable, it is the interest rate that causes issues for the client. If a settlement can be negotiated that involves no interest, only principal, it may be that the judgment would be one the client could afford to pay. See Appendix A, Doc. 13 as sample joint stipulation.

During the process of negotiations, the collection attorney may send a “Hardship Request Form” or “Hardship Affidavit” for the client to complete. **The client is under no obligation to complete this.** That said, if the client truly has no assets (receives SSI, no real property) and no expectation of assets in the future, then there may be no harm in completing the document. Otherwise, it is not in the client’s interest to complete this form. It is basically a free chance for the other side to see what assets the client has that can be used to satisfy the debt. Occasionally collections attorneys are looking for a reason to dismiss a case (the attorney knows it is a bad case, but needs to give the client/creditor a reason to dismiss). When this happens, paint a picture for

opposing counsel about why the client cannot pay (his only income is SSDI and his utilities alone are \$XX amount).

The client may have potential FDCPA, TILA, or UDTPA claims against the Plaintiff. It is possibly to use those as leverage to get a case dismissed.²⁶ A counterclaim may actually have to be filed to get the opposing party's attention.

Consider including in a settlement agreement, language that requires the Plaintiff to clean up the client's credit report. A "hard delete" would require the creditor to withdraw the entire report of the disputed debt.

The Plaintiff always has the ability to dismiss his case without input from the Defendant. A court action can be dismissed without prejudice (can be filed again) or with prejudice (cannot be filed again). It is in the client's interest that the case be "dismissed with prejudice" (this phrase actually included in the order). Since the Plaintiff can always dismiss a case, the debtor's attorney may have no say in whether the dismissal is with or without prejudice, but if possible, try to get dismissed "with prejudice".

If the case makes it to a trial date before settlement negotiations, have a conversation with the client prior to the trial about the client's settlement parameters (no settlement, principal only, XX amount, etc). The plaintiff's attorney is going to ask if the client can agree to something. An attorney has an ethical obligation to take all settlement offers to the client. However, if the attorney and the client have already had a conversation about what the authority the attorney has in settlement, then there will be less likelihood of a need to scramble to try to contact the client to get an answer (assuming client is not present at the trial).

²⁶ This requires having a conversation with the client about whether the counterclaim is something that will be actively pursued once filed or if it is for leverage. You want to be on the same page with your client about the reasonable and likely outcomes of filing a counterclaim.

b. Types of Judgments

Judgment for Plaintiff. A judgment for the Plaintiff allows the Plaintiff to execute/garnish property of the defendant to recover the debt. Depending on the cause of action, the rate of interest of the judgment will vary. If the judgment is based on a contract theory, then the rate of interest in the contract will vary. If the judgment is based on some other cause of action, the statutory rate will apply. The statutory rate is currently 7.5%. Ala. Code Sec. 8-8-10.

Dismissal (with or without prejudice). If a collections action is dismissed, then the plaintiff cannot use the various means available to judgment creditor to collect. The creditor can still try to collect through ordinary means (phone calls, letters, etc.).²⁷ If a case is dismissed without prejudice, then the plaintiff may refile the case against the defendant. If the case is dismissed with prejudice, then the plaintiff cannot refile the case against defendant. Usually when a case is dismissed with prejudice, this means that there is a fact present that means the plaintiff could not succeed on the merits of a case under any circumstances. When this is case, then it may be that contacting the client after a dismissal with prejudice would amount to a FDCPA violation.

Judgment for Defendant. A judgment for the defendant forecloses any right for the plaintiff to recover from the defendant. In addition, a debt that has been deemed not collectible by the court should be removed from the debtor's credit report. A client should be provided with information about his rights regarding the information on his credit report.

If a debt continues to be listed on a consumer's credit report after a judgment is entered for the defendant, the consumer has the right to request it be removed. If it is not removed, the consumer may have a claim for violation of the Fair Credit Reporting Act. To obtain a credit report at no charge, the consumer may contact Annual Credit Report at www.annualcreditreport.com, 1-877-322-8228 or complete the Annual Credit Report Request Form

²⁷ Just because a case is dismissed and the creditor still has some rights to attempt to collect the debt, that does not mean the creditor cannot use means that violate the Fair Debt Collections Act.

(available on the website) and mail it at the address listed on the form.

c. Post Judgment Motions

Just because a court enters a judgment for plaintiff that does not mean the case is completely over for the client. If the judgment appears to be against the evidence and/or law, then a post judgment motion may be appropriate. Options include:

R. 52 – Motion for Finding of Facts and Conclusion of Law. This would be appropriate in a bench trial where the plaintiff claimed multiple theories of recovery in the complaint, but the judgment for plaintiff, stated “Judgment for Plaintiff in the amount of \$XX...) without stating under which cause of action the court found for the plaintiff. In order for this to be a good case for appeal, it should be clear which theory the court used in rendering a judgment.

R. 59 – Motion to Alter, Amend or Vacate. If the Court ruled in favor of plaintiff, but the evidence and case law are in favor of defendant, a R. 59 motion would be an appropriate means to get good case law in front of the judge and ask to reconsider.

In many instances it will be appropriate to file both a R. 52 and R. 59 motion at the same time. Such motions must be filed within 30 days of the judgment in Circuit Court and 14 days in District Court. If the motion is not ruled on within 90 days in Circuit Court/14 days in District Court, then it is denied by operation of law and the appeal time begins to run. Any case that is being considered for appeal should be discussed with the Advocacy Director.

VI. SPECIFIC AREAS OF LAW RELEVANT TO COLLECTIONS CASES

a. Credit Card

- i. A credit card company must provide a copy of any changes in terms and notices. Ala. Code Sec. 5-20-5
- ii. “Store cards” are subject to the four year statute of limitations for the sale of goods under UCC. Ala. Code Sec. 7-2-725
- iii. Plaintiff may be trying to obtain a judgment for fees/interest that

are not consistent with the contract or for a balance accruing after the Defendant tried to close the account. *Discover Bank v. Owens*, 822 N.E.2d 869 (Ohio, 2004).

- iv. If a debt buyer sues on a account stated, it must provide admissible evidence that a statement/bill for account was mailed, properly addressed with sufficient post or otherwise rendered; failure to do so may result in the “open account” three year statute of limitations being applied. *Ayers v. Calvary* 876 So. 2d 474 (Ala. Civ. App. 2003).
- v. Cardholders have a claim/defense against a credit card account if the debt at issue is a result of a dispute against a merchant. 15 U.S.C. §1666i.
- vi. Cardholders liability for unauthorized use of a credit card is limited by 15 U.S.C. §1643. The burden of proof is on the card issuer to show that the use was authorized.
- vii. The failure of a consumer to dispute the validity of a debt under FDCPA “may not be construed by any court as an admission of liability by the consumer.” 15 U.S.C. §1692g(c).
- viii. An application or request for a card is required for a card to be issued. 15 U.S.C. §1642.
- ix. While failure to make timely objection to a credit card billing statement as may be required for the customer to assert certain statutory billing error rights, failure to do so can not be used as an admission or preclude assertion of any defenses on the debt at a later date. 15 U.S.C. §1666; *Citibank v. Mincks*, 135 S,W,3d 545 (Mo. Ct. App. 2004); *Crestar Bank, N.A. v. Cheevers*, 744 A.2d 1043 (D.C.2000); *People’s Bank v. Scarpetti*, 1998 Conn. Super. LEXIS 351 (Conn. 1998).
- x. Plaintiff in credit card debt cases must have both the contract and the details of charges and credits that resulted in the balance due. 12 CFR Part 30, app. A(c) Federally Regulated Financial Institutions [re: credit card companies] should establish and maintain loan documentation practices that...ensure that any claim against a borrower is legally enforceable.
- xi. Unjust Enrichment is not a valid cause of action in a credit card collection case as it is based on an implied contract and federal law

requires a contract for any credit card account. 15 U.S.C. 1637(a).

b. Automobile

- i. There is an argument for a 4 year statute of limitations under the UCC. Ala. Code Sec. 7-2-725. This includes retail installment contracts, which may include a vehicle purchase contract.
- ii. There are several counter-claims that may be relevant to a suit by an automobile lender: breach of contract, warranty of title (7-2-312), fraud and misrepresentation, revocation of acceptance, rescission, and deceptive trade practices. See “Basic Tips for Handling Automobile Cases” available on the portal for more on these possible counter-claims.

c. Secured Creditors

- i. A secured creditor should be able to provide a statement of the current balance owed. Ala. Code Sec. 7-9-208.
- ii. Co-signer. A co-signer is someone who agrees to be responsible for a debt obtained by another. Usually when a lender requires a co-signer it is because the borrower does not have good credit. A co-signer can be sued for a debt, just as the borrower. There are some statutory notices that are required by the lender/collector to the co-signer. If these are not given, the co-signer may have a defense to the collection of the debt.

Notice at time of loan: 16 CFR 444.3 requires a specific notice be given to a co-signer separate from the agreement at the time the agreement is entered.

iii. Notice at time of default/repossession:

1. Prior to the “disposition” (sale) of a repossessed item, the reposessor must give notice to the borrower and co-signer. Ala. Code § 7-9A-611.
2. The pre-disposition notice must include the following:
 - a. describes the debtor and the secured party;
 - b. describes the collateral that is the subject of the intended disposition;
 - c. states the method of intended disposition;
 - d. states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if

any, for an accounting; and

- e. states the time and place of a public disposition or the time after which any other disposition is to be made.
- f. a description of any liability for a deficiency of the person to which the notification is sent;
- g. a telephone number from which the amount that must be paid to the secured party to redeem the collateral under Section 7-9A-623 is available; and
- h. a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

Ala. Code § 7-9A-614.

- iv. Notice after sale of collateral: The reposessor must give the borrower and co-signer notice of the calculation of surplus/deficiency after the sale. Ala. § 7-9A-616.

d. UCC – Uniform Commercial Code

- i. The UCC applies to “transactions in goods”. Ala. Code Sec. 7-2-102. This does not apply to transactions intended to operate only as security transactions.
- ii. “Goods” is defined as “all things, (including specially manufactured goods) which are movable at the time of identification to the contact for sale). Ala. Code Sec. 7-2-105.
- iii. An action for breach of any contract for sale must be commenced within four years after the cause of action accrued. Ala. Code Sec. 7-2-725.

e. Debts Owed to the Government

- i. The Federal Claims Collection Act allows for extrajudicial collection of debts owed to the government.
- ii. Prior to initiating an extrajudicial method of collection, the government agency must first make at least one written demand for payment. Exception: the agency may sue or take action before such demand is made if the Statute of Limitations is about to run or prompt action is necessary to protect the government’s interest for

other reasons. 31 CFR 901.2(a).

- iii. The following notices must be provided to the debtor and can be included in the initial demand:
 - 1. That litigation may be initiated. 31 CFR 901.2(a).
 - 2. The debt will be reported to a credit reporting agency. 31USC 3711(a)(1)(C).
 - 3. The debt will be offset against a payment owed to the debtor. 31 CFR 285.5(d)(6), 901.3(b)(4)(ii).
- iv. Tax debts, tariff debts, and debts owed to Social Security (except certain overpayments) cannot be reported to a credit reporting agency. 31 USC 3701(d).
- v. Extrajudicial methods available to the federal government
 - 1. Administrative wage garnishment 31 USC 3701 et seq.
 - 2. Offset of federal employee wages. 5 USC 5514. This is limited to 15% of the employee's disposable income, unless the employee agrees otherwise, in writing.
 - 3. Tax refund interception. 31 USC 3720 A. The debtor must be given 60 days to provide evidence that the debt is not past due or legally enforceable. 31 CFR 285.2(s)(1)(ii)(C). The debtor must be given the opportunity to enter a repayment plan. 31 CFR 285.2d(1)(ii)D.
 - 4. Offset of any time of federal payment (exceptions below). For benefit payments, the offset cannot exceed 15% of the "monthly covered benefit payment." 31 CFR 285.4(e)(1)(ii). In addition, \$9,000.00 a year (\$750 a month) is exempt from offset. 31 USC 3716(c)(3)(A0(ii). Exceptions (cannot be offset): student loans (31USC 3716(c)(1)(C); veteran benefits cannot be offset, except for overpayments owed to the VA; benefits under Part C of the Black Lung Act; and Railroad Retirement Benefits (63 Fed. Reg. 44, 986 August 21, 1998).
 - 5. An Earned Income Tax Credit may be subject to interception. *Sorenson v. Sec. of Treasury*, 47 US 851. To avoid an offset, a debtor may decrease the amount withheld from paycheck. IRS, Employer Tax Guide, Circular E.

APPENDIX A

CHILDREN'S CLINIC OF LAGRANGE, LLC

1550 DOCTORS DRIVE
LAGRANGE, GEORGIA 30240
706-884-2686

JOSEPH M. ALMAND, JR., M.D.
GEORGE J. LECHACZ, M.D.
KARYN L. HUNNICUTT, M.D.

LILIYA SLUTSKER, M.D.
ERIC J. ZERLA, M.D.

Date March 14, 2011

1981 County Road 20
Roanoke, AL 36274

PATIENT NAME: _____
ACCOUNT NUMBER: _____
PATIENT BALANCE: 249.02

Dear _____

Your outstanding balance with the Children's Clinic is now seriously past due. Our previous statements and attempts to contact you have not resulted in settlement of your balance.

If we do not receive payment within 15 days of this notice, your account will be assigned to an outside collection agency for immediate resolution. Your account may be reported to a national credit bureau. This could adversely affect your personal credit standing. In addition, your credit status may impact your ability to schedule future appointments at The Children's Clinic.

Sincerely,

PATIENT FINANCIAL SERVICES
CHILDREN'S CLINIC OF LAGRANGE
1550 DOCTORS DRIVE
LAGRANGE, GEORGIA 30240
(706) 884-2686

FINAL NOTICE





P.O. Box 11366
 Birmingham, AL 35202
 2209 Morris Avenue
 Birmingham, AL 35203
 (800) 401-6789
 (205) 250-8437
 (205) 328-1958 Fax

Richard

05/12/2008

Creditor: Hsbc Bank Nevada, N.A.
 Creditor Number:
 ZS File Number: 08-10662

Your past due balance has been referred to us for collection. The total amount due as of the date of this letter is \$645.19. Your account balance may increase because of interest or other charges including attorney's fees.

To insure proper credit, please reference our file number on your check or money order and send your payment to our office.

This communication is from a debt collector. Federal Law requires us to inform you that this is an attempt to collect a debt and any information obtained will be used for that purpose. Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within 30 days from receiving this notice that this debt or any portion thereof is disputed, we will obtain verification of the debt or a copy of a judgment and we will mail you a copy of such verification or judgment. If you request in writing within 30 days of receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account.

THIS IS TO ADVISE YOU THAT THE ORIGINAL CREDITOR ON THIS ACCOUNT IS .

Sincerely,

Zarzur & Schwartz, P.C.

**THIS IS AN ATTEMPT TO COLLECT A DEBT.
 ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**

Zarzur & Schwartz, PC
 P.O. Box 11366
 Birmingham, AL 35202-1366

00149

Creditor: Hsbc Bank Nevada, N.A.
 Creditor Number:
 ZS Number:
 Amount Paid \$ _____
 Please call me to discuss payment options
 Home: _____
 Work: _____

895 Tanyard Hill Rd
 Sylacauga, AL 35151-6840

Zarzur & Schwartz, PC
 P.O. Box 11366
 Birmingham, AL 35202-1366



LTD Financial Services, L.P.
7322 Southwest Freeway, Suite 1600
Houston, Texas 77074
Phone: 713/773-3100
Fax: 713/414-2126

NOVEMBER 09, 2003

REF NO: [REDACTED]
RE: FIRST NATIONAL CREDIT CARD
ACCOUNT #: [REDACTED]
BALANCE: 573.25

895 TANYARD HILL RD
SYLACAUGA, AL 35151-6840

DEAR [REDACTED]

YOUR ACCOUNT WITH THE ABOVE NAMED CLIENT HAS BEEN ASSIGNED TO LTD FINANCIAL SERVICES, A COLLECTION AGENCY. THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

UNLESS YOU NOTIFY THIS OFFICE WITHIN 30 DAYS AFTER RECEIVING THIS NOTICE THAT YOU DISPUTE THE VALIDITY OF THE DEBT OR ANY PORTION THEREOF, THIS OFFICE WILL ASSUME THIS DEBT IS VALID. IF YOU NOTIFY THIS OFFICE IN WRITING WITHIN 30 DAYS AFTER RECEIVING THIS NOTICE THAT YOU DISPUTE THE VALIDITY OF THIS DEBT OR ANY PORTION THEREOF, THIS OFFICE WILL OBTAIN VERIFICATION OF THE DEBT OR OBTAIN A COPY OF A JUDGMENT, IF ANY, AND MAIL YOU A COPY OF SUCH JUDGMENT OR VERIFICATION. IF YOU REQUEST THIS OFFICE IN WRITING WITHIN 30 DAYS AFTER RECEIVING THIS NOTICE, THIS OFFICE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR, IF DIFFERENT FROM THE CURRENT CREDITOR.

YOU MAY CALL THIS OFFICE TO DISCUSS THIS DEBT AT 1-800-741-2100. PLEASE REFER TO THE REFERENCE NUMBER ABOVE.

↑ TEAR ALONG DOTTED LINE ↑

IMPORTANT: TO RECEIVE PROPER CREDIT, BE SURE TO ENCLOSE THIS PORTION WITH YOUR PAYMENT.



AMOUNT DUE 573.25

REF NO: C
NAME:
CLIENT:)
ACCOUNT #:

visit <https://payments.ltdfin.com> to pay online.

See the reverse side of this request for the Federal Validation Notice and other required information.

OUR TOLL FREE NUMBER IS 1-800-741-2100



March 24, 2011

File:

Dea

This firm represents Wal-Mart Stores Inc.. We are writing you because you attempted to purchase merchandise online at www.walmart.com on December 30, 2010. Our records indicate that the merchandise was shipped to you, but your payment did not process. According to the terms of the online agreement, you agreed to accept and pay for the item(s) requested.

Therefore, you currently owe \$644.26 as a result of this transaction.

Please call (877)749-2501 to speak with a representative in order to settle this matter before it proceeds any further within our office. Please refer to your file number when calling:

You may also use the attached payment coupon to make payment by credit card or send a cashier's check, money order, or other verified funds (no personal checks) to the address listed on the payment coupon below. For your convenience we also accept payment via Western Union Quick Collect® or MoneyGram ExpressPayment™.

If paying by Western Union Quick Collect®, please note the following instructions: Pay to: Bennett Law PLLC; Code City: BENLAW U; State: UT; Sender's Account Number: ; Attention: Your Name

If paying by MoneyGram ExpressPayment™, please note the following instructions: Receive Code: 4138; Company: Bennett Law PLLC; City: South Jordan; State: UT; Account Number: ; Attention: Your Name

(Any failure to properly identify your payment may result in your payment not being applied to your account or returned.)

This firm is considered a debt collector and this communication from the firm is an attempt to collect a debt. Any information obtained will be used for that purpose. Unless you dispute the validity of the debt, or any portion thereof, within thirty days after receipt of this notice, the firm will assume the debt to be valid. If you notify the firm in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the firm will seek to obtain verification of the debt or a copy of a judgment will be mailed to you by the firm if a judgment exists. Upon your written request within the same thirty-day period, the firm will provide you with the name and address of the original creditor, if different from the current creditor.

Sincerely,
Bennett Law PLLC

RECEIVED MAR 30 2011

1265 E. Fort Union Blvd, Suite 150, Cottonwood Heights, Utah, 84047 • Phone: 877-749-7707 • Email: major@blrecovery.com • Fax: 801-432-2956

Please Detach and Return Below Portion with Payment

P.O. Box 101269, Dept. 356
Birmingham, AL 35210-1269



00118

Visa [] MasterCard [] Discover [] American Express []

Payment Amount: _____

Card Name _____ Tel No. _____

Card Holder Signature _____

Card Holder Address _____

Card No. _____ Expiration Date _____

Total Settlement Amt.: \$644.26

County Road 20
Roanoke, AL 36274-3637



Bennett Law PLLC
PO Box 9163
Midvale, UT 84047-0190



7. File bankruptcy. Filing bankruptcy will instantly stop all debt collection efforts of any kind. Often, simpler and less expensive action will resolve debt collection harassment, but bankruptcy filing may provide you significant other advantages. Do not decide casually to file bankruptcy. Consult a competent professional before starting any bankruptcy.

8. Sue the debt collector. The federal Fair Debt Collection Practices Act allows you to sue debt collectors who violate the Act's provisions. If you win, you can get statutory damages up to \$1,000, actual damages, costs, and attorney's fees. Consult a lawyer to discuss such litigation.

Original text by
The National Consumer Law Center
www.nclc.org

Distributed by



To apply for FREE legal aid in Alabama:
Statewide Intake Hotline 1.866.456.4995
Apply Online at
www.AlabamaLegalHelp.org

What You Should Know About Debt Collection



This brochure provides a summary of your rights when dealing with debt collectors and some guidelines for determining what debts should be given priority in a financial crisis. Even when you do not have the money to pay your bills, you do not have to be subjected to collector pressure tactics.

February 2012

Which debts do I pay first?

You first should use your money to pay for what is most necessary for your family—food, clothing, shelter, and continued utility service. There is very little a debt collector can actually do to you, so don't let debt collection efforts affect your decision about which debts to pay first. Don't give much weight to threats to bring suit, seize household goods, or garnish wages unless you get court papers in a lawsuit that has *actually* been filed.

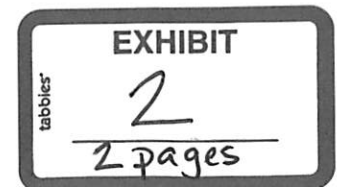
Some general rules for setting payment priorities are:

- Make Mortgage and rent payments first.
- Make whatever payments are necessary to insure essential utility service is not disconnected. The utility company may not require payment in full even if you are behind.
- Pay on a car loan after critical items (food, rent, clothing), but before most other debts for nonessentials.
- Generally, pay loans with only household goods as collateral only after more pressing debts.

- Give low priority to paying debts that do not have property pledged as collateral, such as credit cards, doctor and hospital bills, and accounts with merchants.
- The threat of a lawsuit should not raise the priority of a debt above that of a mortgage, rent, utility payments, or a car loan.
- Do not pay those debts that you have a good legal reason not to pay, such as when the car you borrowed money for is a lemon. Instead, seek legal advice as to how to best fight for your rights.
- When a creditor wins a lawsuit, your home and other assets may be at risk, depending on the amount of your equity in the property. If the property is truly at risk, make this a high priority debt.
- Pay tax liabilities and student loans ahead of low priority but after top priority debts.

Dealing with Debt Collectors

Once you have decided which debts you are able to pay and which will have to wait, the next step is to deal with the collectors that aren't being paid first.



How should I deal with collectors?

Don't let them pressure you into making the wrong choices about what to pay first. Explain to the debt collector, "I have to pay my rent and utility bills first. I have recently been laid-off. When I get a new job I will do my best to meet my credit card debt. I will pay you when I can."

What can a debt collector really do?

A debt collector collecting a debt of the creditor can do little more than demand payment. If the creditor has not taken your house, car, or other property as collateral on a loan, then legally the creditor can only do three things:

1. Stop doing business with you.
2. Report your default to a credit bureau (which will be unavoidable when you cannot pay most of your debts on time.)
3. Sue you in court. Although the threat to sue you may be very upsetting, it is not nearly as serious as you might think.

Many creditors don't follow through on their threats. If they do sue you, you can represent yourself and explain why you cannot or should not pay. After a period of time, the creditor may obtain a court judgment, but this judgment still does *not* force you to pay the debt. It only gives the creditor the right to try to seize part of your wages or get some of your property.

If you do not own very much or if you do not earn very much, even with a court judgment creditors will not be able to seize any of your property or wages. Creditors can *never* seize wages or property before a judgment, nor can they send you to jail or send your children to foster care.

How can I stop being harassed?

Federal law prohibits harassment by collection agencies or lawyers. For example, they may not contact you at unreasonable hours: before 8 a.m. or after 9 p.m., unless you give your permission. They also may not use obscene or profane language or call you constantly to annoy you. Some states also have laws that provide similar protection against creditors.

Consumers being harassed by debt collectors should follow these eight steps:

1. Head off harassment before it starts. When financial setbacks prevent you from paying all your bills, call the creditor and explain your situation. Explain that you have to pay the landlord and utilities first and that you will pay your other bills when you can. Don't over promise; it's better to be realistic about your prospects for paying. By contacting the creditor first, you may avoid having the debt turned over to a collection agency, which will usually be less flexible than the creditor in working out a payment plan.

2. Write a cease letter. If explaining the situation doesn't stop collection efforts, the simplest way to stop contacts is to write the collector a cease letter. Federal law requires

collection agencies to stop dunning after they receive a written request to stop. It's a good idea to include in the letter why you can't pay right now and what your expectations are for the future, though this is not necessary. You should also note in the letter any billing errors and/or abusive tactics debt collectors have used in their contacts with you. *Be sure to keep a copy of the letter.* Below is a sample letter:

[date]

[name of collection agency]
[address]

Dear Sir or Madam:

I am writing to request that you stop communications to be about my account number _____ with [name of creditor] as required by the Fair Debt Collection Practices Act 15 U.S.C. § 1692c(c).

[Describe any harassing contact by the collection agency. If appropriate, provide information about why you cannot pay the bill or do not owe the money.]

This letter is not meant in any way to be an acknowledgement that I owe this money. I will take care of this matter when I can. Your cooperation will be appreciated.

Sincerely,

[your name]
[your address]

3. Have a lawyer write a cease letter. You don't need a lawyer to write a cease letter, but if your letter does not stop the harassment, a letter from a lawyer usually will. Also, collection agencies must stop contacting you once they know you are represented by a lawyer.

4. Work out a payment plan. If you decide to work out a payment plan, you should only agree to a realistic plan, preferably one that significantly reduces the debt. In making any agreement, keep in mind your priorities: don't make even small payments if the payments would prevent you from paying your mortgage or rent, food, or utilities.

5. Complain about billing errors. Collection letters are sometimes in error. If a letter contains a mistake, you should write and request a correction. Keep a copy of your request. If you dispute the debt in writing within 30 days of your receiving notice of the right to dispute, the collection agency must investigate. It must stop collection efforts while it investigates. If the account is an open-end account, like a credit card, you can dispute a charge within 60 days of receiving the bill.

6. Complain to a government agency. Mail any complaint you have about a collector's conduct to the Consumer Response Center, Federal Trade Commission, CRC-240, Washington, DC 20580, to the consumer protection division within your state attorney general's office, and to any local office of consumer protection. You should be able to obtain these addresses from your local Better Business Bureau or office of consumer affairs. Send a copy of the letter to the collector and keep a copy.

IN THE SMALL CLAIMS COURT OF CALHOUN COUNTY, ALABAMA
7TH JUDICIAL CIRCUIT

REPUBLIC FINANCE,

PLAINTIFF,

VS.

ELIZABETH DAVIS,

DEFENDANT.

CIVIL ACTION NO.:

SM-2014-900526

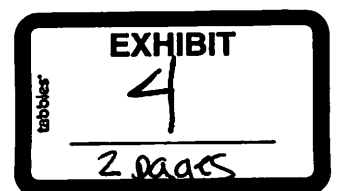
DEFENDANT'S MOTION TO QUASH SERVICE

Comes now the Defendant, **Elizabeth Davis**, by and through her counsel of record, Christopher G. McCary, and respectfully moves this court to **QUASH** the service of the summons and complaint herein. As grounds for said motion, said counsel states:

1. The Rule 4 of Alabama Rules of Civil Procedure provide as follows concerning serving process upon an individual:

[c] Upon Whom Process Served. Service of Process . . . shall be made as follows: (1) *Individual*. Upon an individual . . . by serving the individual or by leaving a copy of the summons and the complaint at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process.

2. That service was not perfected on the Defendant, in that, the summons and complaint were left at the door by the process server between the screen door and main door. The said documents were not served on any individual as required by Rule 4 [c] (1) herein and above.
3. That the process server's surname is not legible and the server's address is a P.O. Box



4. This Court lacks personal jurisdiction on the Defendant due to a failure of service of process.

WHEREFORE, PREMISES CONSIDERED, the Defendant, **Elizabeth Davis**, very respectfully moves this Court to QUASH service herein.

Elizabeth Davis, Defendant

SWORN to and SUBSCRIBED before me this ____ day of _____, 20____ as true and correct.

NOTARY PUBLIC

CHRISTOPHER G. MCCARY (MCC080)
Attorney for the Defendant
Legal Services Alabama, Inc.
1911 Noble Street
Anniston, Alabama 36201
(256) 237-3615, Ext. 3905
(256) 237-3660 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing motion on the Plaintiff by U.S. Mail, postage prepaid, this the ____ day of _____, _____.

Of Counsel

IN THE SMALL CLAIMS COURT OF MADISON COUNTY, ALABAMA

HEALTH CARE AUTHORITY OF THE)
CITY OF HUNTSVILLE, d/b/a)
HUNTSVILLE HOSPITAL,)

Plaintiff,)

v.)

MICHAEL JONES,)

Defendant.)

CASE NO. SM04-4206

DEFENDANT'S 60(b) MOTION

COMES NOW, the Defendant, Michael Jones, by and through his undersigned attorney and moves this Court, pursuant to Rules 60(b)(4) of the Alabama Rules of Civil Procedure, to relieve the Defendant of the Default Judgment entered against him on December 16, 2004, and states the following in support thereof:

1. The complaint in this action was filed on August 17, 2004.
2. The Defendant was never properly served with notice of the summons and complaint and was therefore unaware of the court action.
3. The return of service indicates that the Defendant was served on September 13, 2004 by serving him at 5018 Wayne Court, Huntsville, AL.
4. The Defendant's mother resided at 5018 Wayne Court, Huntsville, AL 35810 at the time of service.
5. The Defendant did not reside with his mother at that time nor was he at his mother's residence; his residence at that time was 3917 Shamrock Drive, Huntsville, AL.
6. The Defendant did not file an answer or respond because he was unaware of the court action.
7. The Plaintiff filed an application for default judgment on or about December 7, 2004. This court granted the default and the same was entered on or about December 16, 2004.
8. That as soon as Defendant became aware of this matter, he contacted an attorney for assistance.
9. Defendant must be served individually with the summons and complaint or a copy must be left at his "dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . ." AL. R. Civ. P. Rule (4)(c)(1).
10. "Strict compliance with the Rules of Civil Procedure regarding service of process is required." Wright v. Rogers, 435 So.2d 90, 91 (Ala. Civ. App. 1983). "Failure

EXHIBIT

5

5 pages

tabbles

of personal service of original process upon a defendant renders a judgment by default void." Id. at 91.

11. "Alabama law has always been that a void judgment could be vacated at any time." Comments to AL. R. Civ. P. Rule 60(b) (citing Sweeney v. Tritsch, 44 So. 184 (1907)).
12. Based on the above, the default judgment in this matter is void as a matter of law and should be vacated.

WHEREFORE, PREMISES CONSIDERED, the Defendant, Michael Jones, respectfully moves this Court for relief of its default judgment entered December 16, 2004 by setting aside the previously entered judgment of default.

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the motion on the following parties by AlaFile (email), or U.S. mail, postage prepaid, this the 16th day of January, 2014, addressed as follows:

Plaintiff's Attorney
Waldrop & Associates, P.C.
7037 Old Madison Pike, Suite 450
Huntsville, AL 35806

s/Pamela D. Jackson
OF COUNSEL

IN THE SMALL CLAIMS COURT OF MADISON COUNTY, ALABAMA

HEALTH CARE AUTHORITY OF THE)
CITY OF HUNTSVILLE, d/b/a)
HUNTSVILLE HOSPITAL,)

Plaintiff,)

vi.)

MICHAEL JONES,)

Defendant.)

CASE NO. SM04-4026

AFFIDAVIT

COUNTY OF MADISON)
STATE OF ALABAMA)

Before me, a Notary Public in and for said County in said State, personally appeared Michael Jones, who being known by me and by me first duly sworn, deposes and says as follows:

My name is Michael Jones. I am an adult of sound mind and I am the defendant in this court action. In September of 2004, I was living and receiving mail at 3917 Shamrock Drive NW, Huntsville, Alabama and had been residing there since February 14, 2004. Prior to that I lived on Ortega Street, Huntsville, Alabama and had lived there for about two years. Before that I lived in Pinehurst Apartments in Huntsville, Alabama and had lived there for about two or three years. I moved to this area from Detroit, Michigan in 1998 and very briefly stayed with my mother at 5018 Wayne Court, Huntsville, Alabama. However, I moved out within a few months and have not resided there since that time.

In 2004, I was employed at Target and worked at their warehouse facility on Greenbriar. My shift was always the same and I worked Saturday, Sunday and Monday from 6:00 pm to 6:00 am. I had regular habits when I worked in that I would arrive at work at about 5:15 pm and leave at 6:00 am to get home. At that time I shared a car with my wife and she needed to be at work at 7:00 am so I went directly home after work and did not leave the house again until I had to be at work the next evening.

I have never been served with a summons and complaint in this court action in person or by mail. I was never served with any court papers and I did not know that the Plaintiff had filed a complaint and gotten a default judgment. I did not become aware of any court action until after the Plaintiff contacted me about this discovery and contempt.

The complaint was supposedly served at my mother's residence at 5018 Wayne Court, Huntsville, Alabama, on September 13, 2004. I was not at my mother's house and could not

have been served at her house on that date due to my work schedule and habits as stated above. I had not designated my mother as my agent for purposes of accepting service of legal papers or for any other reason.

MICHAEL JONES

Sworn to and subscribed before me, this _____ day of _____, 20__.

NOTARY PUBLIC

My Commission Expires:

IN THE SMALL CLAIMS COURT OF MADISON COUNTY, ALABAMA

HEALTH CARE AUTHORITY OF THE)
CITY OF HUNTSVILLE, d/b/a)
HUNTSVILLE HOSPITAL,)
)
Plaintiff,)
)
vii.)
)
MICHAEL JONES,)
)
Defendant.)

CASE NO. SM04-4026

AFFIDAVIT

COUNTY OF MADISON)
)
STATE OF ALABAMA)

Before me, a Notary Public in and for said County in said State, personally appeared Mildred Jones, who being known by me and by me first duly sworn, deposes and says as follows:

My name is Mildred Jones and I am an adult of sound mind. I currently reside at 5018 Wayne Court, Huntsville, Alabama. I have lived at this address for more than 20 years.

Michael Jones is my son and at the time of service, I he did not reside at this address with me. He was living at 3917 Shamrock Drive in Huntsville, Alabama. My son did not reside with me at that time and he did not designate me as his agent to accept service of legal papers or for any other reason.

Also at that time, my son worked at Target on the weekends and did not come to my house to visit due to his work schedule. Although, I do talk to my son quite often on the phone, he rarely if ever comes to my house to visit so even without his work schedule; he would not have been at my house at that time.

MILDRED JONES

Sworn to and subscribed before me, this _____ day of _____, 20__.

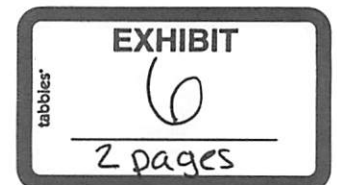
NOTARY PUBLIC

My Commission Expires:

ALABAMA EXEMPTIONS

Type of Property	Amount of Exemption	Statute Creating Exemption
Homestead of resident (includes mobile homes)	\$5,000 (single) \$10,000 (married, owning jointly) (cannot exceed 160 acres)	ALA. CODE § 6-10-2, See ALA. CONST. Art. X, § 205
Homestead of surviving spouse or minor children of deceased homesteader	\$6,000 (cannot exceed 160 acres)	ALA CODE §43-8-110, See Art X, § 205, ALA. CONST.
Burial lots and seat or pew in place of public worship	100%	ALA. CODE § 6-10-5
Personal property of resident (including wages for pre-4/12/1988 debt)	\$3,000	ALA. CODE § 6-10-6, ALA. CONST. Art X, § 204
Wages and other personal property	\$1,000	ALA. CONST. Art. X, § 204
Necessary wearing apparel of resident and family	100%	ALA. CODE. § 6-10-6
Family portraits or pictures and all books used by family	100%	ALA. CODE §§ 6-10-6 and 6-10-126(a)(2)
Wages, salaries and compensation for personal services	80% (pre-4/12/1988 consumer credit transactions) 75% (other judgments)	ALA. CODE § 5-19-15 15 U.S.C. § 1673
Proceeds of life insurance policies payable to person other than the insured (includes cash surrender value, loan value and dividends)	100%	ALA. CODE §§ 6-10-8 and 27-14-29
Property of value not exceeding \$3,500 (equity) in household goods, automobiles, and personal effects, etc.	100% (exemption applies only to surviving spouse or minor children of deceased resident)	ALA. CODE § 43-8-111
Social Security Benefits	100%	42 U.S.C. § 407(a)
Supplemental Security Income	100%	42 U.S.C. § 1383(d)(1)
Veteran's Benefits	100%	38 U.S.C. § 5301
Student Assistance	100% (unless garnishment is by the guaranty agency or USDE (15%), of property traceable to SA)	20 U.S.C. §1095a(d)
Growing or ungathered crops	100%	ALA. CODE § 6-9-41
Public assistance payments	100%	ALA. CODE § 38-4-8
Worker's Compensation benefits	100%	ALA. CODE § 25-5-86

Last revision November 18, 2009



ALABAMA EXEMPTIONS

Type of Property	Amount of Exemption	Statute Creating Exemption
Unemployment Compensation	100%	ALA. CODE § 25-4-140
Proceeds of disability insurance contracts	\$250 per month	ALA. CODE § 27-14-31
Annuity contracts	\$250 per month	ALA. CODE § 27-14-32
Fraternal benefit society benefits	100%	ALA. CODE § 27-34-27
Teachers' retirement system benefits	100%	ALA. CODE § 16-25-23
State employees' retirement system benefits	100%	ALA. CODE § 36-27-28
Peace officers' retirement and disability benefits	100%	ALA. CODE § 36-21-77
Partnership property	All (except partnership debts)	ALA. CODE § 10-8A-307
Veterans' pensions, Medal of Honor holders, exemption from execution	100%	<u>38 U.S.C. § 1562(c)</u>
Public safety officer's death benefits money paid, exemption from execution	100%	<u>42 U.S.C. § 3796(q)</u>
Injury or death compensation payments from war risk hazards	100%	<u>42 U.S.C. § 1717</u>
Railroad Retirement Act annuities and pensions	100%	<u>45 U.S.C. § 231m</u>
Railroad Unemployment Insurance	100%	<u>45 U.S.C. § 352(e)</u>
Federal Retirement benefits	100%	<u>5 U.S.C. § 8346</u>
Federal Civil Service disability and death benefits	100%	<u>5 U.S.C. § 8130</u>
Veterans' group life insurance benefits and servicemen's group life insurance benefits. (Note: not exempt from levy under 26 U.S.C. § 6331 <i>et seq.</i> , seizure of property for collection of taxes.)	100%	<u>38 U.S.C. § 1970(q)</u>
Military Survivor Benefit Plan annuities	100%	<u>10 U.S.C. § 1450(i)</u>
Deposits made in U.S. servicemen's savings institutions by servicemen while on permanent duty assignment outside U.S. and its possessions	100%	<u>10 U.S.C. § 1035(d)</u>
Wages of seamen	100%	<u>46 U.S.C. § 11109(a)</u>
ERISA benefits	100%	<u>29 U.S.C. § 1056(d)</u>
Wages of state employee – Only re: judgments in tort or other <i>ex delicto</i> obligations	100%	ALA. CODE § 6-6-482

IN THE SMALL CLAIMS COURT FOR ETOWAH COUNTY, ALABAMA

MIDLAND FUNDING, LLC,

Plaintiff,

vs.

Defendant.

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Case No. 31-SM 2013-~~7~~11111

RULE 12(b)(6) MOTION TO DISMISS

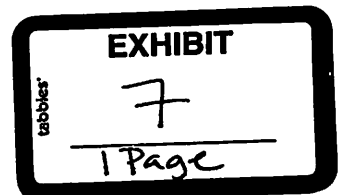
COMES NOW the Defendant pursuant to Ala. R. Civ. P. Rule 12(b)(6) and moves the court to dismiss this action with prejudice on the following grounds:

1. Plaintiff lacks standing to sue on this debt.
2. The applicable Statute of Limitations has long expired prior to the filing of this suit.
3. Plaintiff's Claim of *Breach of Contract* fails to state a claim upon which relief can be granted as (1) Plaintiff failed to attach an alleged copy of the agreement containing the terms of the contract, and/or (2) failed to state the terms of the alleged contract including but limited to: Date of Contract(s), Amount Borrowed, Term of loan, Amount of Payments, and the Timing and Schedule of payments; and the date the contract was allegedly breached.
4. Plaintiff's Claim of *Account Stated* fails to state a claim upon which relief can be based as no allegation was made of the Date that the original creditor (alleged to be Citi) changed the open account into an account stated. That failure renders the Account Stated claim defective as a matter of law. *Loventhal v. Morris, 103 Ala. 332 (Ala. 1893)*(attached).
5. Defendant disputed the debt with Plaintiff's corporate bedmate, Midland Credit Management, Inc. in 2012.
6. Plaintiff's claim of *Money Had and Received* fails to state a claim upon which relief can be based for the same reasons as set forth in paragraphs 3 and/or 4 which are incorporated herein.

"not"

WHEREFORE, PREMISES CONSIDERED, Defendant moves the court to dismiss this action, with prejudice, costs taxed as paid.

/s A. Wilson Webb (web002)
P.O. Box 130993
Birmingham, AL 35901
(256) 543-0150
Court email: awilsonwebb@gmail.com



SECOND AFFIRMATIVE DEFENSE

6. This action is barred by the applicable statute of limitations for a cause of action alleging an open account.

THIRD AFFIRMATIVE DEFENSE

7. The Defendant DENIES being liable to CAVALRY SPV I. The Defendant denies a contract with CAVALRY SPV I.

WHEREFORE PREMISES CONSIDERED, the Defendant moves this Court to dismiss Plaintiff's action or DENY the Plaintiff the relief requested.

Denise G. Welch
Attorney for the Defendant
Legal Services Alabama
1911 Noble Street
Anniston, Alabama 36201
(256) 237-3615; (256) 237-3660 (facsimile)
dwelch@alsp.org

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above and foregoing answer on the attorney for the Plaintiff's Attorney, James A. Nadler, Esq., by electronic filing on Alafile Electronic Transmission, this 16th day of July, 2013 addressed as follows:

OF COUNSEL

COMMON TRIAL OBJECTIONS

A. VOIR DIRE

1. Attempting to commit jurors to a specific verdict
2. Asking about votes in prior cases
3. Unnecessary probing in juror's background
4. Questions not going to ascertaining juror qualifications

B. OPENING STATEMENT

1. Arguing the law
2. Discussing inadmissible facts
3. Misstatements of the law
4. Expressing personal belief on the merits

C. WITNESS QUALIFICATIONS

1. Competency to Testify (prior to swearing in witness)
2. Privilege
3. Non-qualified expert

D. OBJECTIONS DURING DIRECT EXAMINATION

1. Leading
2. Not relevant
3. Hearsay
4. Calls for Speculation
5. Calls for a narrative answer
6. Asked and answered
7. Cumulative
8. Prejudicial effect outweighs probative value
9. Assumes facts not in evidence
10. Lack of personal knowledge (no foundation)
11. Misstatement of the record (misquoting the witness)
12. No proper foundation (specify missing elements)

E. OBJECTIONS DURING CROSS-EXAMINATION

1. Beyond the scope of direct
2. Hearsay
3. Asked and answered
4. Assumes facts not in evidence
5. Compound question
6. Misstatement of the record (misquoting the witness)
7. Argumentative
8. Improper impeachment
9. No good faith basis for the question

F. DOCUMENTS

1. Identification
2. Authentication
3. Relevancy
4. Best Evidence
5. Hearsay
6. Privilege

G. CLOSING ARGUMENT

1. Improper argument – facts not in evidence
2. Improper argument - Misstatement of the facts
3. Improper argument - Misstatement of the law
4. Stating personal belief in the merits of the case
5. Asking jurors to place themselves in the party's position
6. Deals with improper subject matter – settlement discussions, insurance, right to remain silent, etc.
7. Unduly prejudicial/inflammatory

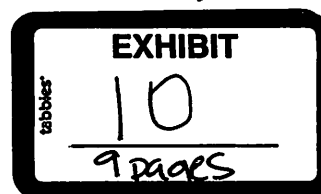
H. JURY INSTRUCTIONS

1. Misstating the facts of the case
2. Misstatement of the law
3. Unduly placing weight on certain legal issues or evidence
4. Failing to give instructions consistent with theory of the case
5. Failing to give requested instructions
6. Confusing/ambiguous



REQUEST FOR PRODUCTION OF DOCUMENT(S)

1. Produce the original contract.
2. Produce the assignment of the Contract to [PLAINTIFF].
3. Produce the assignment of the Contract to [ANY HOLDER BETWEEN ORIGINAL CREDITOR AND PLAINTIFF].
4. If the contract was not directly assigned from [ORIGINAL CREDITOR] to [PLAINTIFF], produce any and all intervening assignments.
5. Produce any and all notices and correspondence sent to [DEFENDANT] from [ORIGINAL CREDITOR].
6. Produce any and all notices and correspondence sent to [DEFENDANT] from [PLAINTIFF].
7. Produce any and all notices and correspondence sent to [DEFENDANT] from any other entity that has held the contract.
8. Produce any and all payment records related to this [VEHICLE/DEBT].
9. Produce any and all document(s) that [DEFENDANT] [PURCHASED THE VEHICLE/OBTAINED THE DEBT].
10. Produce any and all document(s) that [DEFENDANT] took possession of the vehicle at issue.
11. Produce any and all video or other recordings of the purchase of the vehicle at issue.
12. Produce any application for credit made by [DEFENDANT] for the account made the basis of this lawsuit.
13. Produce the document(s) that provide for the basis of [“BREACH OF CONTRACT”/”ACCOUNT STATED”/”OPEN ACCOUNT”/”UNJUST ENRICHMENT”/”MONEY HAD AND RECEIVED”] as alleged in Paragraph --- of the Plaintiff’s Complaint.
14. Produce the document(s) that evidence “Defendant has defaulted by failing to make payments on the account” as alleged in Paragraph – of the Complaint.
15. Produce the document(s) that evidence the date of Defendant’s initial default on the account made the basis of Plaintiff’s lawsuit.
16. Produce the document(s) that evidence the “principal balance due on the account is \$-----“ as alleged in Paragraph – of the Complaint.
17. Produce the document(s) that were reviewed, if any, by the affiant prior to (or contemporaneously with) the execution of the affidavit attached to Plaintiff’s Complaint.
18. Produce the document(s) that indicate the date of last payment.
19. Produce an unredacted copy of the Purchase and Sale Agreement between Plaintiff and the Issuer and any other entity in the chain of title from Issuer to Plaintiff.
20. Produce the document(s) you may offer as summary judgment evidence in this case.
21. Produce the document(s) you may offer as evidence at any trial of this case.



REQUESTS FOR ADMISSIONS

1. The Plaintiff does not have the original contract.
2. The Plaintiff cannot provide a chain of assignment from the original creditor to Plaintiff.
3. The Plaintiff has no evidence to offer by which it can prove any of the allegations contained in the Plaintiff's Complaint.
4. The Plaintiff has no witness to offer who can prove any of the allegations contained in the Plaintiff's Complaint.
5. The Plaintiff has no document(s) that evidence the ownership of the account made the basis of the Plaintiff's Complaint.
6. The Plaintiff does not have a copy of any notices or correspondence sent to [DEFENDANT] from [ORIGINAL CREDITOR].
7. The Plaintiff does not have a payment history of payments by [DEFENDANT] to [ORIGINAL CREDITOR].
8. The Plaintiff has no evidence that [DEFENDANT] took possession of the vehicle.
9. The Plaintiff has no video or other recoding of the purchase of the vehicle at issue.
10. The Plaintiff does not have any evidence that [DEFENDANT] applied for the account made the basis of this lawsuit.
11. The Plaintiff has no document(s) that provide the basis for ["BREACH OF CONTRACT"/"ACCOUNT STATED"/"OPEN ACCOUNT"/"UNJUST ENRICHMENT"/"MONEY HAD AND RECEIVED"] as alleged in Paragraph --- of the Plaintiff's Complaint.
12. The Plaintiff has no document(s) that indicate the "Defendant has defaulted by failing to make payments on the account" as alleged in Paragraph --- of the Plaintiff's Complaint.
13. The Plaintiff has no document(s) that indicate the date of Defendant's initial default on the account made the basis of Plaintiff's Complaint.
14. The Plaintiff has no document(s) that authenticate the assignment of the Defendant's purported debt to Plaintiff.
15. The Plaintiff has no document(s) that were reviewed by the affiant prior to (or contemporaneously with) the execution of the affidavit attached to Plaintiff's Complaint.
16. The Plaintiff has no documents that indicate the last date of payment.
17. Pertaining to the allegations set for in Paragraph – of Plaintiff's Complaint, at this time, Plaintiff has no personal knowledge that the Issues of the debt made the basis of plaintiff's complaint mailed to Defendant monthly bills reflecting, *inter alia*, all charges incurred with the credit card, any credits, the monthly payments due, and the total balance due.
18. As alleged in Paragraph --- of Plaintiff's Complaint, the Plaintiff has no personal knowledge that the Issuer of the debt made the basis of the Plaintiff's

complaint mailed to the Defendant's address, proper postage affixed and not returned undelivered to Issuer monthly billing statements.

19. [ORIGINAL CREDITOR] did not convert the alleged credit card agreement with Defendant to an "account stated" prior to the assignment of said account to the Plaintiff.
20. The debt made the basis of Plaintiff's complaint is a charged off credit card account.
21. Plaintiff did not purchase the alleged debt of Defendant as an "account stated" as that term is defined under Alabama law.
22. Defendant was not required to by any law to notify the credit card Issuer of any dispute.
23. Defendant was not required by any car agreement to notify the card issuer of any dispute.
24. Plaintiff did not purchase the alleged debt of Defendant as an equitable claim of Wells Fargo Credit Card or any other assignor.
25. The credit card agreement which Plaintiff Defendant executed does not include any term for the charging of interest on any open balance.
26. The credit card made the basis of Plaintiff's complaint does not provide for the charging of any late fee to the Defendant's account.
27. Plaintiff purchased the alleged credit card account of Defendant for "pennies on the dollar".
28. Plaintiff is not the assignee of the Issuer's right to be repaid by the defendant for any money allegedly "had and received" by or on behalf of Defendant.
29. No agreement existed prior to the filing of this suit between Plaintiff and the credit card Issuer or its assignee for the assignment of any rights other than an open account.
30. Plaintiff made no reasonable inquiry from the Issuer whether Defendant ever disputed any charge to the account made the basis of Plaintiff's complaint.
31. Plaintiff's attorneys have an ownership interest in the debt made the basis of Plaintiff's complaint.
32. Plaintiff does not possess an original written credit card agreement allegedly signed by Defendant.
33. Plaintiff has not seen a written credit card agreement alleged by Plaintiff's assignor to contain a genuine signature of Defendant.
34. Plaintiff possesses no admissible evidence that Defendant received and used a credit card as alleged in Paragraph --- of Plaintiff's complaint.
35. At the time this suit was filed, Plaintiff was without personal knowledge of the terms of any offer of credit, as it alleged in Paragraph --- of Plaintiff's complaint.
36. There is no express warranty from the Issuer of the account made the basis of Plaintiff's complaint that any and all charges are accurate.
37. Issuer has not provided Plaintiff with any information of the date the account made the basis of Plaintiff's complaint allegedly became stated.

38. Pursuant to controlling Alabama case law, no plaintiff may prevail upon both a claim for “open account” and for “account stated” converted from the open account.
39. Pertaining to the allegation in Paragraph #--- of Plaintiff's Complaint, neither Plaintiff nor its attorney sent to Defendant a full statement of all charges, debits, credit and payments on the account of the debt allegedly owed by Defendant.
40. Plaintiff purchased the alleged claim against Defendant as part of a portfolio of credit card accounts.
41. Plaintiff is in the business of purchasing delinquent credit card accounts which have been charged off by the Issuer.
42. Plaintiff possesses no evidence of the date the account made the basis of Plaintiff's complaint allegedly became stated.
43. Assuming Defendant is liable under Plaintiff's theory of “Money Had and Received”, Plaintiff has not suffered any damages therefrom.

INTERROGATORIES

1. Identify the individual(s) answering Defendant's Interrogatories by stating the full legal name, address, telephone number and business relationship to Plaintiff (i.e., general manager, bookkeeper, etc.) of each individual and anyone aiding in their preparation.
2. For each response to the Request for Admissions which is anything other than an unqualified admission of fact, answer the following:
 - a. State the name, address, telephone number, title and occupation of each person who has personal knowledge supporting your response, and your understanding of the knowledge held by each.
 - b. State the factual basis supporting your response.
 - c. Cite the legal authority or authorities upon which you rely.
 - d. Describe each and every document supporting said response and produce a legible copy of the same.
 - e. State the exact location upon each document used as a basis for your response.
 - f. Produce the original of each document. If the original is not available, please state the date and cause of the loss of such document(s) and produce the best copy of your original, if applicable.
 - g. Identify any software supporting your response.
3. Identify each and every document you received from the alleged original creditor concerning the alleged debt that is the subject matter of this litigation, regardless of delivery format (paper, electronic transfer, etc.).
4. Identify and state the telephone number and title (or former title if no longer employed by Plaintiff) of all persons who has personal knowledge of any of the facts, events, or matters alleged in Plaintiff's Complaint.
5. Identify and state the telephone number and title (or former title if no longer employed by Plaintiff) of all persons employed by the original creditor who had any communication or other involvement in any manner with the credit card account that is the subject matter of this litigation.
6. Do you contend that any documents concerning the credit card account that is the subject matter of this litigation were lost or destroyed? (If you do NOT contend that any documents were lost or destroyed, you may simply state so.) If you contend that any document(s) were lost or destroyed, please state:
 - a. Whether the document was lost or destroyed;
 - b. The time (date) that the document was lost or destroyed.
 - c. Identify all facts concerning the last time that you observed the document, including the employee's name (home address), date, and location the document was observed.
 - d. The method or type of loss or destruction;
 - e. If the document was destroyed, please state who ordered the destruction, their title in your organization, the place, date and manner of such destruction;

- f. Identify all persons who were custodians of the document.
7. Identify the computer software, including, but not limited to, name, type, model or version number, location and manufacturer utilized by the alleged original creditor which Plaintiff alleges was used to transfer any and all information and documents concerning the alleged debt that is the subject matter of this lawsuit, to Plaintiff, including identification of any electronic data interface utilized.
 8. Fully describe the computer software, including, but not limited to, name, type, model or version number, location and manufacturer which Plaintiff alleges that it utilized to receive any all documents concerning the alleged debt that is the subject matter of this lawsuit from the alleged original creditor, including identification of any electronic data interface utilized.
 9. Fully describe the computer software, including, but not limited to, name, type, model or version number, location and manufacturer which Plaintiff alleges that it utilized to store all documents concerning the alleged debt that is the subject matter of this lawsuit.
 10. Provide the name, job title, and last known address of the person(s) most knowledgeable regarding the following concerning this civil action:
 - a. collection activity of the Plaintiff;
 - b. letters directed by the Plaintiff to the Defendant;
 - c. agent(s) of the Plaintiff and supervisors or supervisors of Plaintiff, who dealt with, reviewed, or made decisions concerning the alleged account of Defendant;
 11. With respect to the credit card debt that is the subject matter of this litigation:
 - a. Was any portion or component of the debt, the account or the receivables securitized? If so, describe what was securitized?
 - b. If the debt, account, receivables or any component of the debt was securitized, list the identity of the entities (e.g., trusts, special purpose vehicles, etc.) involved in the account securitization, i.e., list each entity who now has or has ever had any interest in the credit card account including but not limited to any originator, lender, warehouse lender, trust, trustee, investor, trustee under a pooling and servicing agreement, servicer, or any other similar party.
 - c. If the debt, account, receivables or any component of the debt was securitized, list the identity of the entities (e.g., trusts, special purpose vehicles, etc.) involved in the receivables securitization, i.e., list each entity who now has or has ever had any interest in the receivables from the underlying credit card account, including but not limited to, any originator, lender, warehouse lender, trust, trustee, investor, trustee under a pooling and servicing agreement, servicer, or any other party.
 - d. If the debt, account, receivables or any component of the debt was securitized, identify the documents (e.g., prospectuses, registration statements, etc.) involved in the securitization of this debt or account.

12. For each document you have produced that you contend applies to the account and that does not contain the defendant's identifying information, such as the defendant's name, social security number, account number, or signature, explain how you know the document applies to the account.
13. Describe, step by step, the process utilized by Plaintiff to investigate and verify the credit card debt that is the subject matter of this litigation. In doing so, identify (1) all individuals and entities that were involved in Plaintiff performing the verification; (2) all individual and entities that were contacted in Plaintiff's verification; (3) all documents produced to Plaintiff as a result of its verification; and (4) all documents maintained by Plaintiff and/or produced to Plaintiff concerning its verification efforts.
14. Identify all correspondence, documents, database entries, or computer system notes that refer or relates in any way to the Defendant.
15. Identify each person who you believe has any knowledge of any of the relevant or material facts concerning the alleged credit card debt that is the subject of Plaintiff's complaint, and is not listed in any previous interrogatory, and state as to each person:
 - a. name, address, and phone number(s);
 - b. the subject matter on which such person has knowledge; and
 - c. the substance of the facts to which such person has such knowledge.
16. Provide the name, job title, and last known address of the person(s) most knowledgeable regarding the following concerning this civil action:
 - a. collection activity of the Plaintiff, Plaintiff's assignors, and entities who have previously attempted to collect his debt;
 - b. letters directed to the Defendant by the Plaintiff, Plaintiff's assignors, and entities who have previously attempted to collect his debt;
 - c. agent(s) and/or supervisor(s) of the Plaintiff, Plaintiff's assignors, and entities who have previously attempted to collect his debt who dealt with, reviewed, or made decisions concerning the alleged credit card account that is the subject matter of this litigation.
17. State the names, addresses, and job titles of all persons who performed the review, participated in the review, or supplied any information to the review of the alleged credit card account that is the subject matter of this litigation.
18. In the form of a chronology, identify and describe in detail and with particularity, the process, events, and circumstances under which you allegedly purchased the credit card debt that is the subject matter of this litigation, and identify all documents relevant to, related to, or reflecting such purchase.
19. Identify and describe all documents that you provided to the ----- law firm at the time that you instructed said law firm to attempt to collect the debt that is the subject matter of this litigation.
20. When you allegedly purchased the account upon which you based this civil action, how many other accounts did you purchase concurrently from the

same vendor?

21. Identify the date that the alleged credit card account that is the subject matter of this litigation was first used for a purchase or cash advance.
22. Identify the date that the alleged credit card account that is the subject matter of this litigation was first charged "late payment fees".
23. Identify the date that Defendant allegedly first became delinquent on the alleged credit card account that is the subject matter of this litigation.
24. Identify the date of the last payment allegedly made by Defendant on the credit card account that is the subject matter of this litigation.
25. Identify the date of the last purchase allegedly made by Defendant with the credit card that is the subject matter of this litigation.
26. Identify any person(s) other than Plaintiff or Issuer who owned the alleged debt or attempted to collect the alleged debt on behalf of Issuer or Plaintiff since the last payment preceding the filing of this suit.
27. Pertaining to the claim Plaintiff asserts in Paragraph --- of the Complaint that "Defendant is liable for repayment of such sums under the doctrine of money had and received", identify:
 - a. how much money Plaintiff paid for the alleged claim against Defendant;
 - b. how Plaintiff was damaged under its theory of "Money Had and Received";
 - c. itemize Plaintiff's damages;
 - d. why Defendant would be liable under an equity doctrine to a remote buyer of the alleged debt?
28. Pertaining to the Plaintiff's allegations in Paragraph --- of the Complaint, identify:
 - a. the date when a fully balanced and rendered account was delivered to Defendant by the original creditor.
 - b. the name of the person(s) with personal knowledge of the delivery of said document to the Defendant.
 - c. produce a genuine copy of the document which Plaintiff asserts constituted the final accounting statement(s).
 - d. the date at which the credit card account became an "account stated".
29. Identify the document(s) that evidence the ownership of the account made the basis of Plaintiff's Complaint.
30. Identify the document(s) that provide the basis for ["BREACH OF CONTRACT"/"ACCOUNT STATED"/"OPEN ACCOUNT"/"UNJUST ENRICHMENT"/"MONEY HAD AND RECEIVED"] as alleged in Paragraph --- of the Plaintiff's Complaint.
31. Identify the document(s) that indicate "Defendant has defaulted by failing to make payments on the account" as alleged in Paragraph -- of Plaintiff's Complaint.
32. Identify the document(s) that indicate Defendant's initial default on the account made the basis of Plaintiff's Complaint.
33. Identify document(s) that indicate or authenticate the assignment of the

Defendant's purported indebtedness to Plaintiff.

34. Identify the document(s) that were reviewed by the affiant prior to (or contemporaneously with) the execution of the affidavit attached to Plaintiff's Complaint.
35. Identify the document(s) that indicate the date of the last payment.
36. Identify the document(s) you may offer as summary judgment evidence in this case.
37. Identify the document(s) you may offer as evidence at any trial of this case.

IN THE DISTRICT COURT OF MADISON COUNTY, ALABAMA

CREDIT ACCEPTANCE CORPORATION

Plaintiff,

v.

MELINDA DANIEL,

Defendant.

)
)
)
)
) Case No. : DV08-1968
)
)
)
)

**DEFENDANT'S MOTION TO STRIKE AFFIDAVIT IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Defendant, MELINDA DANIEL, through counsel, respectfully moves to strike the Plaintiff's Affidavit in support of its Motion for Summary Judgment based on the grounds that such testimony is inadmissible because it does not comply with Ala. R. Civ. Proc. 56(e).

1. The documents and exhibits are inadmissible hearsay and do not fit within one of the established exceptions under Ala. R. Evid. 803(6); and further, the records sought to be introduced have not been properly authenticated as required under Ala. R. 901.

2. In addition, included in the exhibits is irrelevant and immaterial information which is private and confidential and could be damaging, such as copies of the Defendant's Non-Driver License, Social Security numbers, credit reporting information, credit applications, child support information, bank statements, dismissed bankruptcy filings and credit references.

2. The affidavit and exhibits are inadmissible partly because the witness is not identified as the proper person to testify to the contents of the affidavit, and fails to



state if she is an employee of the Plaintiff or another identity, or contain the facts to lay a proper foundation even as to her involvement in this case.

3. Plaintiff's proffered testimony fails to establish that the witness has any personal or first-hand knowledge of what has transpired. Her proffered testimony as to an alleged deficiency balance owing on the debt was obviously created in preparation for this litigation that goes to the ultimate issue, therefore is inadmissible hearsay.

4. Plaintiff's proffered testimony also does not comport with the requirements of Ala. R. Civ. P. 56(e), and does not entitle the plaintiffs to a judgment as a matter of law. Rule 56(e) provides:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts *as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit *shall be attached thereto* or served therein....
(emphasis added)

Ala. R. Civ. P. 56(e).

5. The Plaintiff's affidavit does not meet the personal knowledge requirement of a valid affidavit since affiant does not provide facts which lay any foundation to explain the basis of any personal knowledge of how she came to her conclusion, or its accuracy.

6. The second requirement is that a valid affidavit must set forth "facts as would be admissible in evidence." In determining admissibility under Rule 56(e), the same standards apply at trial. Thus, in ruling upon summary judgment motions, courts refuse to consider hearsay, unauthenticated documents, inadmissible expert testimony, documents without a proper foundation, and parole evidence.

7. The affidavit is entirely inadmissible hearsay since no records, conclusions or exhibits are properly authenticated and sworn, or certified as copies of the relevant documents.

8. All information submitted is essentially out-of-court statements offered for its truth of the matter asserted, it is hearsay and inadmissible under Ala. R. Evid. 801(c) unless it fits within an established exception.

7. It is a well established evidence that to admit any document into evidence, the party offering the evidence must show that the document is genuine or authentic. Hampton v. Bruno's, Inc., 646 So.2d 597, 599 (Ala. 1994). The authentication requirement is separate from the business records requirement. Although authentication is necessary for admission under the business record exception, authentication alone is never sufficient to admit a document as a business record because under the business records exception, the offering party must prove:

- (1) the document was genuine or authentic;
- (2) the document met all of the elements of the business records exception, and
- (3) the document was relevant.

Id.

8. Ala. R. Civ. P 44(h) provides the further requirements for admission of documents under the business exceptions rule of hearsay, which the Plaintiff has failed to prove:

- (1) the document is a memorandum or record of an act, transaction, occurrence, or event;
- (2) that the document offered for admission was prepared in the opposing party's regular course of business; and
- (3) that it was in the regular course of business for the opposing party to prepare such a document.

Ala. R. Civ. P. Rule 44(h).

9. The further plaintiff fails to meet the requirements of admissibility for the supporting affidavit because many of the documents were not prepared by the plaintiff in its regular course of business, but were prepared by an entirely different entity, which fails to meet the third prong of the business record exception as being prepared in the regular course of business of the plaintiff offering the exhibit.

CONCLUSION

Defendant's Motion to Strike the affidavit attached to the plaintiff's motion for summary judgment is due to be granted.

RESPECTFULLY SUBMITTED,

/s/ Thomas G. Keith

Thomas G. Keith
Attorney for Defendant
Legal Services Alabama
2000-C Vernon Ave.
Huntsville, AL 35805
256) 536-9645, x3320

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of this document to Plaintiff's attorney at:

G. Hampton Smith, Esq.
Zarzur & Schwartz, PC
P.O. box 11366
Birmingham, AL 35202

address postage prepaid this 9th day of December, 2008.

/s/ Thomas G. Keith

Thomas G. Keith
Legal Services Alabama, Inc.
2000-C Vernon Ave.
Huntsville, AL 35805
(256)536-9645 x3320



IN THE CIRCUIT COURT OF MARSHALL COUNTY, ALABAMA

CAPITAL ONE BANK (USA), N.A.,)
)
Plaintiff,)
)
v.)
)
EDDIE THOMPSON,)
)
Defendant.)

CASE NO. CV13-000038

**BRIEF IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

Comes now the Defendant, Eddie Thompson, by and through his attorney of record, Pamela Jackson, and files his Brief in Opposition to Plaintiff's Motion for Summary Judgment. For the reasons stated below, the Plaintiff's Motion for Summary Judgment is due to be denied, there are issues of material fact and these issues and claims are due to be tried.

STATEMENT OF FACTS

The Defendant did request to open a credit account with Capital One. The Defendant then made some purchases and payments as required on the account. However, the Defendant does not agree with the amount Capital One claims is due and owing on the account; he does not agree with the calculation of all the charges and fees and is not sure about all additional charges that may have been added to the amount. In addition the Defendant has stated in his affidavit, he was being charged monthly for a payment protection plan that he did not ask for or sign up for; the Defendant should not be responsible for these additional unauthorized charges as he did not ask for such a plan.

STANDARD OF REVIEW

Summary judgment is appropriate upon a showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Rule 56, Ala.R.Civ.P.; Mitchell v. Richmond, 754 So. 2d 627, 628 (Ala. 1999). "When the movant makes a prima facie showing that no genuine issue of material fact exists, the burden shifts to the nonmovant to present substantial evidence creating such an issue." Ayers v. Cavalry, 876 So.2d 474, 476 (Ala. Civ. App. 2003) (quoting Rutledge v. Wings of Tuscaloosa, Inc., 848 So. 2d 1005, 1006 (Ala. Civ. App. 2002)). In reviewing a summary judgment, the Court will view the evidence in the light most favorable to the nonmovant and will resolve all reasonable doubts against the movant. Fincher v. Robinson Brothers Lincoln-Mercury, Inc., 583 So.2d 256 (Ala. 1991).

INTRODUCTION AND BACKGROUND

In September 2006, a 108-page report issued by the United States Government Accountability Office titled "Credit Cards-Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers", available at www.gao.gov, as Document GAO-06-929 (912006).

EXHIBIT
12
7 pages

The importance of this GAO Report is that it officially concludes that while the credit cardholder, looking at the statement, can see the amount of the charges that were imposed, he or she is unlikely to know whether the charges are consistent with the contract governing the cardholder's obligations. Consequently, he or she is not in a position to either agree or disagree with the amount of the balance in any monthly statement. In short, disclosures are too complicated for consumers to understand and the obligations imposed on the cardholder are not easily understood without reference to the provisions of a very complex express contract. For that reason alone, account or account stated is not warranted in a collection action.

While prior to 1990, most issuers charged fixed rates and imposed few other types of charges, today revolving credit cards feature complex pricing structures. Also, the cards usually provide for payments to be allocated first to the balance assessed at the lowest interest rate. In addition to having separate rates for the different transactions at different times, the cards increasingly impose interest rates that vary periodically as market interest rates change. Issuers typically establish these variable rates by taking the prevailing level of a base rate, such as the prime rate, and adding a fixed percentage amount. They frequently reset the interest rates. Most credit cards also provide for a penalty fee, described as a late fee, which issuers assess when they do not receive at least a minimum required payment by the due date and a penalty fee for exceeding the credit limit, with the fees involving the use of a tiered structure. Id. at 19-21.

The Report concluded that the disclosures which provide information about the costs and terms of using credit cards "had serious weaknesses that likely reduce their usefulness to consumers; . . . The disclosures . . . [were] written at a level too difficult for the average consumer to understand, and [had] design features, such as text placement and font sizes, that did not conform to guidance for creating easily readable documents.

When attempting to use these disclosures, cardholders were often unable to identify key rates or terms and often failed to understand the information in [the] documents." The pricing structures depend upon the circumstances of the cardholder, and credit card disclosures are inadequate to inform cardholders as to the interest rates, fees, penalties, and other costs that may be imposed.

Based on the GAO's findings, cardholders aren't able to know whether finance charges, fees, penalties and costs that are claimed and set forth are permitted and valid or not. Therefore, there is no sort of requisite intent and meeting of the minds for an implied cause. For that reason and other reasons the mailing of billing card statements as required by law does not in any way relieve a Plaintiff of the burden of proof or proving the amounts owed without the sort of documentation necessary to legally establish such claims based on the terms of the express contract or contracts allegedly agreed to with the credit card issuer.

ARGUMENT

The Plaintiff states in their motion that they are entitled to judgment as a matter of law; they claim that there are no genuine issues of material fact and that Defendant is liable to Plaintiff under a theory of contract and/ or account stated or open account. Defendant will present several issues in reply to show that there are material issues of fact, that Plaintiff has failed to produce sufficient evidence as to proof of default to express contractual terms, proof of the amount of damages, and that Plaintiff has been unable to produce any competent evidence that would support the allegation that an account stated exists. Moreover, where an express

contract exists that sets out express terms between the dealings of the parties there are no implied causes of action that are available to support a cause of action based on governed transactions between the parties to the contract. *See* 17A Am Jur.2d Contracts Sec.17; Vardaman v. Florence City Board of Education, 544 So.2d 962, 965 (Ala. 1989).

I. Plaintiff's Motion is Due to be Denied Because Plaintiff has failed to Prove Defendant is Liable to Plaintiff for Breach of Contract

The Plaintiff's motion is due to be denied because Plaintiff has failed to meet an essential element in proving that they are entitled to judgment as a matter of law on a contract theory. As in the case of any express written contract, the Plaintiff must provide a copy of the binding contract and prove a default pursuant to those express contractual terms based on admissible evidence in order to recover damages. "In the ordinary breach of contract action, the claimant must prove: (1) the existence of a valid contract binding the parties in the action, (2) his own performance under the contract, (3) the defendant's nonperformance, and (4) damages." Southern Medical Health Systems, Inc v. Vaughn, 669 So.2d 98, 99 (Ala. 1995. Civ. App. 2003).

Plaintiff has failed to show the existence of a valid binding contract between the parties therefore Plaintiff's argument that they need not produce a separate signed agreement because use of the card signals assent to the terms is irrelevant. Plaintiff has attached a card agreement, identified in their affidavit as "the Cardmember Agreement applicable to the account of the Defendant." (Plaintiff's Affidavit). Plaintiff then alleges that by use of the credit card Defendant became bound by these terms. However, this agreement is dated 2010, the statements provided as evidence of the account start in Oct./Nov. of 2006 and already show a previous balance. (Plaintiff's Exhibits B and C). This conflict creates a question of fact as to what contract terms Defendant may have agreed to and when, whether by express or implied consent.

Moreover, the fact that the Defendant admitted to once having a credit card account is not proof of any default or existence of other binding contracts with the alleged creditor as to later transactions. A Plaintiff must provide the terms of the contract covering rules for the credit as to relevant later periods, with terms to show which charges were allowable during the period of time those charges were imposed and applied to the balance.

Under Alabama law, Capital One must not only provide evidence of express terms of the contract and charges allowable **during the time the credit card accounts were used and as various charges were incurred**, along with proper posting and allocation of payments made to principal, interest and charges as provided by terms of such contract, but that any changes of terms were properly noticed in compliance with Code of Alabama. § 5-20-5, which requires in part:

" ..In the event any domestic lender or credit card bank desires to modify in any respect any term of the credit card account, it shall first provide at least 30 days' prior written notice of such modification to the debtor. In providing such notice, such domestic lender or credit card bank shall first advise the debtor in writing that the debtor as the option (i) to surrender the credit card whereupon the debtor shall have the right to continue to pay off the credit card account in the same manner and under the same terms and conditions as then in effect; or (ii) to hold the credit card after the 30-day period has elapsed, or to use the credit card during such period, either of which shall constitute the debtor's consent to the

modification.”

As explained by the U. S. Supreme Court, the “One who asserts a claim is entitled to the burden of proof that normally comes with it.” Raleigh v. Ill. Dep’t of Revenue, 530 U.S. 15 (U.S. 2000). In this case, the Plaintiff has failed to submit any evidence of the express contract that governed the parties’ transactions prior to 2010 or any accounting of debits and credits according to the terms of a contract prior to Oct./Nov. of 2006.

Even if the Plaintiff can show a valid binding contract between the parties, Plaintiff has failed to prove damages. Plaintiff claims that they are entitled to judgment in the amount of \$2,313.26 which is the balance on the account that is presently due. (Plaintiff’s Affidavit). However, Defendant has stated in his affidavit that there were unauthorized charges to the account for a payment protection plan.

Plaintiff has the burden of proof to show that the charges are authorized charges. 15 U.S.C. § 1643(b); *See Citibank (S.D.) v. Gifelman*, 773 A.2d 993 (Conn. App. Ct. 2001); Martin v. American Express, 361 So.2d 597 (Ala. Civ. App. 1978). Plaintiff has failed to present any evidence regarding these charges to the account and whether or not they were authorized by the Defendant.

Although, the Defendant did not report this information to the Plaintiff nor did he dispute these charges prior to the filing of this motion, he is still entitled to the defense of unauthorized charges which creates a question of fact as to what amount, if any, Defendant remains liable for on the account. *See Citibank v. Mincks*, 135 S.W.3d 545 (Mo. Ct. App. 2004); Crestar Bank, N.A. v. Cheevers, 744 A.2d 1043 (D.C. 2000); People’s Bank v. Scarpetti, 1998 Conn. Super. LEXIS 351 (Conn. Super. Ct. 1998).

II. Plaintiff’s Motion for Summary Judgment is Due to be Denied Because Plaintiff has Failed to Show Any Competent Evidence of an Account Stated

The Plaintiff’s motion is due to be denied because Plaintiff has failed to make a prima facie showing that they can meet the necessary elements to prove an account stated. Plaintiff has been unable to show by competent evidence that they can even meet the first required element in an action on an account stated.

In order to show an account stated, it is first necessary to show “a statement of the account between the parties is balanced and rendered to the debtor.” Ayers v. Cavalry, 876 So.2d 474, 477 (Ala. Civ. App. 2003). Nowhere in Plaintiff’s affidavit have they even alleged that there was a balanced itemized statement of the account rendered to the Defendant. The affidavit merely states that they have attached “copies of transactional history statements generated on the Capital One account of the Defendant between October/November 2006 and February/March 2013, as kept in the ordinary course of business of Plaintiff.”

The Plaintiff has also attached these monthly statements containing the Defendant’s address as evidence of a stated account. In Ayers, the Plaintiff attached invoices containing the defendant’s address but the court found that this evidence failed to establish that a statement of account was ever rendered to the defendant. Id. Instead, it found that “Cavalry did not present any evidence indicating that a statement of or a bill for the account was ever mailed, properly addressed with sufficient postage, or rendered to Ayers. Thus, Cavalry failed to present evidence

in support of this first element necessary to establish a cause of action for an account stated.” Id.

However, even if this Court determined that these monthly statements were enough to establish that said statements were indeed rendered to the Defendant, this would still be insufficient evidence of an account stated. An account stated is a post-transaction agreement. It is well settled law that an account stated is not founded upon an original liability but instead upon a new promise to pay. Wyatt v. Bradford & Co., P.C., 456 So.2d 822, 823 (Ala. Civ. App. 1984) (citing Martin v. Stoltenborg, 142 So.2d 257 (Ala. 1962)).

These alleged statements to the Defendant may have represented an original liability on a current open running account but not an account stated. An account stated is a new promise to pay a total account as balanced and rendered to the Defendant. Mobile Rug & Shade Co., Inc. v. Daniel, 424 So.2d 1332, 1332 (Ala. Civ. App. 1983). A demand for an account stated is as if there has been a promissory note given for the balance agreed upon by the parties as due and owing. Wyatt v. Bradford & Co., P.C., 456 So.2d 822, 823 (Ala. Civ. App. 1984). If there are “current dealings between the parties, and the account, because of contemplated future dealings is kept open . . . then the demand is on an open account.” Loventhal & Son v. Morris, 15 So. 672, 673 (Ala. 1893) (alteration in original).

In addition, by law a creditor cannot bind a customer to a debt by an implied agreement based on failure to object to billing statements such as those that are provided with a credit card account. Federal law requires that the credit card customer must have the opportunity to raise any defenses, and failure to make timely objection to the statement as may be required for the customer asserting certain other available special billing error rights has been held not to in any way preclude assertion of any defenses on the debt. 15 U.S.C. § 1666i. See Citibank v. Mincks, 135 S.W.3d 545 (Mo. Ct. App. 2004); Crestar Bank, N.A. v. Cheevers, 744 A.2d 1043 (D.C. 2000); People’s Bank v. Scarpetti, 1998 Conn. Super. LEXIS 351 (Conn. Super. Ct. 1998).

III. Plaintiff’s Motion for Summary Judgment is Due to be Denied Because Plaintiff has Failed to Prove Defendant is Liable to Plaintiff on an Open Account

The Plaintiff’s motion is due to be denied because Plaintiff has failed to prove they are entitled to recovery based on an open account. Although the Plaintiff has attached monthly statements that may represent an open running account, the Plaintiff has failed to establish that all charges and fees contained in these statements are authorized charges by the Defendant.

There are charges on these statements, including those for a payment protection plan, which Defendant has clearly stated in his affidavit he did not authorize the Plaintiff to make on his behalf. If Defendant did not authorize all charges then Plaintiff is not entitled to the amount claimed in their complaint.

As previously stated in the argument above, Plaintiff has the burden of proof to show that the charges are authorized charges. 15 U.S.C. § 1643(b); See Citibank (S.D.) v. Gifelman, 773 A.2d 993 (Conn. App. Ct. 2001); Martin v. American Express, 361 So.2d 597 (Ala. Civ. App. 1978). Plaintiff has failed to present any evidence regarding these particular charges to the account and whether or not they were authorized by the Defendant.

Although, the Defendant did not report this information to the Plaintiff nor did he dispute these charges prior to the filing of this motion, he is still entitled to the defense of unauthorized

charges which creates a question of fact as to what amount, if any, Defendant remains liable for on the account. See Citibank v. Mincks, 135 S.W.3d 545 (Mo. Ct. App. 2004); Crestar Bank N.A. v. Cheevers, 744 A.2d 1043 (D.C. 2000); People's Bank v. Scarpetti, 1998 Conn. Super. LEXIS 351 (Conn. Super. Ct. 1998).

CONCLUSION

Plaintiff's Motion for Summary Judgment is due to be denied. Plaintiff has failed to show that there is an undisputed statement of facts. Plaintiff has failed to make a prima facie showing of all the elements in a breach of contract claim. There is a material question of fact as to whether or not a binding, valid contract existed between the parties. Plaintiff has failed to make a prima facie showing of the existence of an established account stated between Plaintiff and Defendant. There are clearly material issues of fact that are in dispute in this action.

s/Pamela D. Jackson
Pamela D. Jackson (JAC088)
Attorney for the Defendant
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(256) 536-1544 (facsimile)
pjackson@alsp.org (email)

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing brief on the following parties by AlaFile (email), or U.S. mail, postage prepaid, this the 30th day of January, 2014, addressed as follows:

Plaintiff's Attorney
Nathan & Nathan, P.C.
2215 1st Avenue South
Birmingham, AL 35233

s/Pamela D. Jackson
OF COUNSEL



IN THE CIRCUIT COURT OF MARSHALL COUNTY, ALABAMA

CAPITAL ONE BANK (USA), N.A.,)
)
Plaintiff,)
)
v.)
)
EDDIE THOMPSON,)
)
Defendant.)

CASE NO. CV13-000038

AFFIDAVIT

COUNTY OF MADISON)
)
STATE OF ALABAMA)

Before me, a Notary Public in and for said County in said State, personally appeared Eddie Thompson, who being known by me and by me first duly sworn, deposes and says as follows:

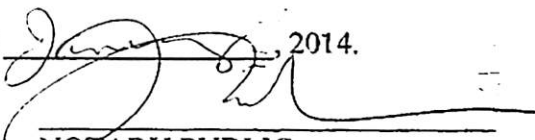
My name is Eddie Thompson, I am an adult of sound mind and I am the defendant in this court action. I did open an account with Capital One. I did use the card to make purchases and I made payments on the account. However, I do not agree with the Plaintiff's complaint. The Plaintiff's methods for calculating charges and fees are confusing and I am not sure about all these additional charges. I do not believe the amount that Capital One is claiming as due is correct.

Also, after reviewing the Plaintiff's attachments to their summary judgment motion it has come to my attention that I was paying every month for a payment protection plan. I do not recall ever having signed up for such a plan or ever agreeing to such a plan. I did not realize what this was or what it was for until it was pointed out to me by my attorney. I just thought it was part of the payments and charges that I had no choice but to pay. If I had known that I had this payment protection plan and what it was actually for, I would have contacted them for assistance at the time that I became unable to continue making payments.

I was also paying a monthly member fee; I did not understand at the time of applying for this card that this was not a standard fee. I thought all credit cards had this fee and did not realize that I had a choice about such a fee in deciding what or if I would accept any credit card offers that were made to me.


EDDIE THOMPSON

Sworn to and subscribed before me, this 30th day of January, 2014.


NOTARY PUBLIC

My Commission Expires: 1-05-2015

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

CRESTWOOD MEDICAL CENTER,)
PLAINTIFF,)
v.)
DEFENDANT.)

CASE NO. : CV 12-

**STIPULATION FOR DISMISSAL WITH PREJUDICE
AND MUTUAL RELEASE OF ALL CLAIMS**

This Agreement made and entered on this the ____ day of _____, 2013, by and between parties in the above styled action, witnesseth that:

WHEREAS, the parties in the above styled case, are now willing and desiring to settle and lay to rest forever all claims between them or arising from or connected with the above proceedings or other matters whatsoever; NOW THEREFORE, the premises considered and in consideration of the agreements hereinafter contained, and other good and valuable consideration, the parties hereto do and hereby agree with the other as follows:

1. All claims and counterclaims against each other by all parties of whatsoever nature are hereby dismissed with prejudice by each party, including but not limited to all claims raised or that could be raised in or regarding the above Case No. 12- and/or the above Case No. SM11- , are hereby voluntarily dismissed with prejudice by stipulation of the parties, and further the parties do each hereby release the other and each does hereby release the other's agents, employees, representatives and any others employed or associated with in any way the other from all claims, damages, liabilities, interests, grievances to any court whatsoever, actions, causes of actions and demands of every kind whatsoever which each may now have against the other or which in any way arises from or out of or is in any way connected with or based upon their conversations, contracts, claims, which either of them had or has up to the date of these presents against the other for or by reason of or in respect to any act cause , including any pending matter or thing arising from or connected with the above case.

2. It is specifically understood and agreed that this settlement and release is full, complete and forever final but is not construed as admission of any liability or obligation on part of any of the parties hereto, their heirs, representatives, agents, employees, or others associated therewith.

The above read, approved and ratified by:

Date
Hon. Robert D. Reynolds, Attorney for Plaintiff

Date
Thomas G. Keith, Attorney for Defendant

