IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2013

No. 64

RAINFORD G. BARTLETT,

Petitioner,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Respondent.

No. 76

JAMES TOWNSEND,

Petitioner,

v.

MIDLAND FUNDING, LLC,

Respondent.

On Writ of Certiorari to the Circuit Court for Baltimore City
(W. Michel Pierson (No. 64) and Pamela J. White (No. 76), Judges)

BRIEF OF ATTORNEY GENERAL OF MARYLAND AND MARYLAND STATE COLLECTION AGENCY LICENSING BOARD AS *AMICI CURIAE*

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INTEREST OF *AMICI CURIAE*

The Maryland State Collection Agency Licensing Board in the Office of the Commissioner of Financial Regulation (the "Agency") is responsible for licensing and regulating persons engaged in collection agency activities in the State of Maryland

pursuant to the Maryland Collection Agency Licensing Act ("MCALA,"), Md. Code Ann., Bus. Reg. §§ 7-101—7-502, and for otherwise enforcing the provisions of MCALA and of the Maryland Consumer Debt Collection Act ("MCDCA"), Md. Code Ann., Com. Law, §§ 14-201—14-204. This licensing and regulation authority extends to debt buyers filing actions in Maryland State courts, because these debt buyers satisfy the statutory definition of "collection agencies" under MCALA and qualify as "collectors" under the MCDCA. Further, the Office of the Attorney General is responsible for enforcing the terms of the MCDCA through the Maryland Consumer Protection Act, Md. Code Ann., Com. Law, §§ 13-101—13-501. The Agency and the Attorney General have an important interest in ensuring that members of the debt buying industry comply with Maryland law in the collection of those debts, including the use of litigation to support collection activities.[1]

These appeals raise important issues concerning the business practices of debt buyers who bring collection cases in Maryland State courts. In particular, the court below in both cases was required to construe rules adopted by this Court in 2011 that govern the presentation of evidence in debt collection cases brought by debt buyers. The Agency and the Attorney General's Office have a unique perspective on the operation of those rules, because they worked in concert to bring attention to abusive practices in

[1] Any illegal activities in the collection of consumer debts from Maryland consumers, including violations of the federal Fair Debt Collection Practices Act ("FDCPA") or other related federal statutes, constitute a violation of MCALA. Because debt buyers are subject to the FDCPA and related federal laws, the Agency has an important interest in ensuring that the debt buying industry complies with those laws as well.

debt-collection litigation and led the effort to curb those abuses by proposing amendments to the rules, which ultimately led to this Court's adoption, in 2011, of amendments to the rules provisions at issue in these appeals.

STATEMENT OF THE CASE

The *amici* adopt the petitioners' statements of the case in both appeals.

STATEMENT OF FACTS

The *amici* adopt the petitioners' statements of the facts in both appeals.

QUESTION PRESENTED

Did the court below err in admitting hearsay testimony and a hearsay affidavit as proof of the defendants' liability, where the testimony and affidavit failed to establish that the records on which the plaintiffs relied are admissible under the hearsay exception for business records, as required by Rule 3-306?

ARGUMENT

I. THE DEBT BUYING INDUSTRY LACKS REGULAR BUSINESS PRACTICES AND SYSTEMATIC PROCEDURES FOR TRANSFERRING AND MAINTAINING ORIGINAL CONSUMER ACCOUNT DOCUMENTS.

A. The State's Knowledge of Debt Buying Practices, Based on Experience in Regulating the Industry

Through their regulatory oversight of debt buyers, the Office of the Attorney General and the Agency have acquired knowledge that makes them uniquely qualified to understand the business practices of debt buyers, like the respondents in these appeals,

including their acquisition and use of consumer account documents, the competency of their employees to testify about such documents or to certify them as business records, and other matters at issue in these appeals.

Much of the State's knowledge about the industry was learned during the course of various enforcement actions brought by the Attorney General on behalf of the Agency since 2009, all of which resulted in settlement agreements, which have generated substantial benefits for the State and its consumers. These include: an enforcement action against one of the respondents in these appeals, Midland Funding, LLC, and other business entities in the Encore Capital Group family of companies, which resulted in a settlement agreement in December 2009 (*In re Midland Funding, LLC*, DFR-FY-2010-063 (Md. Collection Agency Lic. Bd. Dec. 17, 2009)); an action against Mann Bracken LLC (a collections law firm that has representing Midland and other debt buyers), which resulted in a consent revocation of the company's collection agency license in 2010 (*In re Mann Bracken, LLP*, DFR-FY-2010-216 (Md. Collection Agency Lic. Bd. Aug. 10, 2010)); a settlement with Worldwide Asset Management LLC, Worldwide Asset Purchasing LLC, West Asset Purchasing LLC and other affiliated companies in 2010 (*In re Worldwide Asset Management, LLC*, DFR-FY2010-221 (Md. Collection Agency Lic. Bd. Aug. 10, 2010)); settlements with Sunshine Financial Group, LLC, Credit Service, LLC, and their owner, J. Scott Morse, Esq. in 2011 (*In re Sunshine Financial Group, LLC*, CFR-FY2011-135, CFR-FY2012-019 (Md. Collection Agency Lic. Bd. Sept. 9, 2011) and *In re Credit Service, LLC*, CFR-FY2012-077 (Md. Collection Agency Lic. Bd.

Oct. 14, 2011)); and an action against LVNV Funding LLC, Resurgent Capital Services LP, and other businesses under the Sherman Financial Group family of companies in 2011, which ultimately settled in 2012 (*In re LVNV Funding LLC*, CFR-FY2012-012 (Md. Collection Agency Lic. Bd. Jun. 28, 2012)).[2] Other investigations and enforcement actions involving debt buyers are ongoing.

During the course of these various investigations and enforcement actions, the Agency and the Office of the Attorney General have reviewed not only a large number of individual court case files and sworn statements detailing company policies and procedures of major debt buyers, but also thousands of pages of corporate documents relating to the debt buying industry, such as manuals addressing internal company policies and procedures, business agreements with local counsel, and hundreds of documents that can be characterized as "sales agreements" or "bills of sale." These include documents providing for the sale of consumer debts from various original creditors—including Chase Bank, the original creditor in the two cases on appeal—to debt buyers and documents providing for the further sale of consumer debts from debt buyers to other debt buyers, including the respondents in these appeals. The observations of the Agency and the Office of the Attorney General acquired through this experience are consistent with the findings made by the Federal Trade Commission ("FTC") in a recent report. *See* FTC, *The Structure and Practices of the Debt Buying Industry* (Jan.

[2] Copies of these settlement agreements are available at the Agency's website: http://www.dllr.state.md.us/finance/consumers/enforcement.shtml.

2013), *available at* http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf. ("FTC Report").

B. Overview of the Debt Buying Industry

The respondents in both appeals are debt buyers who purchase consumer accounts in bulk from original creditors or from other debt buyers. While the assignment of debts for collection is not a new phenomenon, the consumer debt buying industry has grown exponentially in the wake of the recent economic crisis. *See* Peter A. Holland, *The One Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. Bus. & Tech. L. 259, 264 (2011). In 2010, sales of charged-off debt exceeded 86 billion dollars. *See id.* at 265. Debt buyers frequently attempt to collect on these debts by filing lawsuits in state courts. The respondents in these appeals, Midland and Portfolio, each file thousands of actions each year in the District Court of Maryland.

Debt buyers typically purchase hundreds—or more commonly, thousands—of consumer accounts at a time. Frequently, the debts are bought either in a single bulk purchase agreement or pursuant to what is known as a "forward flow" agreement, by which the debt buyer agrees to purchase accounts in bulk at regular intervals in the future, often in either monthly or 3-month intervals. These bundled groups of accounts sold to debt buyers are termed "portfolios" of consumer debt. The purchased accounts may be credit cards, consumer loans, installment sales agreements, utility bills, or any number of other types of consumer debt. The majority of these consumer accounts, however, consist of credit card debt. As the FTC noted in its January 2013 report on the debt

buying industry, "bank sales of credit card debt direct to debt buyers account for 75% or more of all debt sold." FTC Report at 13. Debt is sometimes bundled into other types of groupings, such as accounts subject to bankruptcy proceedings.

In the context of "forward flow" agreements, at the time of each future interval purchase, the parties normally execute a one-page assignment document (or "bill of sale") that makes reference to the "forward flow" agreement under which the interval purchase is made. Both single bulk purchase agreements and the one-page assignment documents are accompanied by a "sale data file" or "final data file," which is an electronic spreadsheet that lists the hundreds or thousands of consumer accounts being transferred with the sale or assignment. Under Rule 3-306(d)(3)(B), as amended in 2011, a debt buyer's affidavit supporting a debt collection claim must attach this documentation to show that the defendant's account was actually included as part of the transferred portfolio. (The names and information for consumers other than the defendant who are listed on the printout from the spreadsheet can be redacted. *See* Committee Note to Rule 3-306(d)(3).)

The specific consumer accounts at issue in both of these appeals allegedly were transferred from Chase Bank to the respondents by one-page bill of sale assignment documents that had been executed pursuant to forward flow agreements. In *Bartlett*, the one-page assignment document, titled "Bill of Sale" and dated June 28, 2011, indicates that it was executed pursuant to a December 10, 2010 forward flow agreement between

Chase Bank and Portfolio, titled "Credit Card Account Purchase Agreement." (B.E. 16)[3] In *Townsend*, the one-page assignment document, also titled "Bill of Sale," is dated June 30, 2011 but was not fully executed until August 11, 2011 and indicates that it was executed pursuant to a November 30, 2010 forward flow agreement between Chase Bank and Midland, also titled "Credit Card Account Purchase Agreement." (T.E. 67.) Neither plaintiff complied with Rule 3-306(d)(3)(B) by attaching the spreadsheet printout from the "sale data file" or "final data file," as required to demonstrate ownership of the debt. [4]

Accounts sold to debt buyers are usually considered to be in default by the seller of the accounts (whether the original creditor or another debt buyer). In the context of credit cards, the accounts have already been "charged off" by the original creditor, which is an accounting requirement to remove the debt from the creditor's books that normally occurs 180 days after the account becomes delinquent. This final "charge-off amount" includes not only principal, but also interest, late fees, and other fees and charges added to the amount of the debt by the original creditor, which are collectively considered "interest" under the National Bank Act. *See* 12 C.F.R. § 7.4001. However, as the FTC has reported, debt buyers typically do not receive enough information at the time of purchase to allow them to break down the outstanding balances into principal, interest, and other fees. *See* FTC Report at ii-iii, 36.

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[3] References to the record extract in *Bartlett* and *Townsend* are indicated with the notations "B.E. __" and "T.E. __," respectively.

[4] In *Bartlett*, the witness who testified for the plaintiff acknowledged that the document identifying the consumer account as belonging to the defendant (B.E. 15) is not actually part of the "sale data file" (B.E. 318-19).

Debt buyers purchase portfolios of consumer accounts at a fraction of the total face value of the debt at the time of sale—typically paying between 1.75% and 6% of the face value of the debt portfolio, based on the sales agreements reviewed by the State in connection with its investigations and enforcement actions. The FTC reports that the average price paid by major debt buyers is 4% of the face value of the debt. *See* FTC Report at ii, 23. The precise amount paid for a given portfolio of consumer debt depends on numerous factors, such as the number of accounts in the portfolio, the types and quality of accounts, the age of the accounts, and the length of time since the charge-off or since the last purchase or payment. *See, e.g.*, FTC Report at 17-24. The sales agreements and one-page assignment documents typically provide information about the payment amount, but in both of these cases, in *Bartlett* and *Townsend*, the debt buyers only provided 1-page assignment documents, in which the amount of consideration paid for the portfolios of transferred debts was redacted. (B.E. 16, T.E. 67.)

Once an account is purchased, debt buyers try to collect the full face value of the debt from the consumer. *See* Holland, *The One Billion Dollar Problem*, at 265; *see also* Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* 3 (2007), available at http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf.

C. Common Characteristics of Sales Agreements for Consumer Debt

Although the single bulk sales agreements and the forward flow agreements vary somewhat among different sellers and buyers, and even among the same parties for

different types of consumer debts, such sales agreements still contain common features that are germane here.

First, the accounts are always sold "as is, where is," and "with all faults," with the debt buyers being considered sophisticated purchasers. Any representations or warranties contained in the document are limited to the existence and ownership of the account. The original creditor generally disclaims all other warranties, even as to the enforceability or collectability of the accounts. The agreements also state that there are no other representations or warranties of any kind, including as to the authenticity or accuracy of the original account documents—documentation that the industry refers to as "media," which consists of account statements; original account contracts or applications; the agreement terms and conditions, including amendments to those terms and conditions; communications from the creditor to the consumer, such as notifications of rate increases; and similar documents. *See* FTC Report at 24-25.

The one-page assignment documents issued pursuant to forward flow agreements also state that they make no representations or warranties of any kind, except possibly as provided in the forward flow agreement. *See id.* Such disclaimers are evident in the one-page assignment documents in the present cases. (B.E. 16 ("This Bill of Sale is executed without recourse except as stated in the Credit Card Account Purchase Agreement. No other representation of or warranty of title or enforceability is expressed or implied."), *Townsend* Bill of Sale, T.E. 67 ("This Bill of Sale is executed without recourse except as

stated in the Credit Card Account Purchase Agreement to which this is an Exhibit. No other representation of or warranty of title or enforceability is expressed or implied.").

A second common feature of these sales agreements is that they do not provide for the automatic transfer of the original account documents from seller to buyer in conjunction with the sale. *See* FTC Report at ii-iii, 26. Rather, sales agreements from an original creditor to a debt buyer generally contain provisions allowing for the buyer to obtain between 10% and 25% of the original account documents for free upon request, and allowing the buyer to obtain additional documents by paying a charge of five to ten dollars (or more) for each additional page or document. *See id.* at iii. The FTC reports that sales agreements typically establish how long the original creditor has to respond to requests for documents from the immediate debt buyers, which is generally between 30 and 60 days. *See id.* The sales agreements generally limit or eliminate the original creditor's obligation to provide supporting documentation if the debt buyer sells the account to a downstream debt purchaser. *See id.* at iii-iv. Thus, if the accounts are subsequently sold to other downstream debt buyers, there is no guarantee that these downstream purchasers will be able to obtain any account documents from the original creditor. *See id.* The sales agreements from one debt buyer to another generally contain additional provisions stating that the seller cannot guarantee the availability of any original account media.

Third, the agreements typically contain terms providing for the possibility that some of the transferred accounts may be uncollectible, such as if the accounts were

already paid in full, were not owned by the seller, were discharged in bankruptcy, or were held by consumers who have since died. *See id.* at 25.

D. Transfer of Accounts and Documents

The actual transfer of original accounts documents is addressed in sales agreements, which, as discussed above, disclaim all representations and warranties. At the time that a portfolio of consumer debts is sold or assigned, the only thing that is always transferred is a database listing the accounts transferred pursuant to the sale (often called a "sale data file" or "final data file"). The complete printouts from these databases are typically spreadsheets listing thousands of different consumer accounts, with each row containing a different consumer's name, account number, and other basic account information. Subsequently, the original creditor may provide the debt buyer with supplemental account information, and all of this data will be modified and imported into the debt buyer's own, larger accounts database containing basic consumer account data fields, from which the debt buyers can create a one-page account summary for each consumer. The summary printouts provided by the plaintiffs in support of their claims in these cases appear to be from their own accounts databases. As noted above, the plaintiffs did not provide the sale data file that would show that the defendants' consumer accounts were among the accounts purchased by the debt buyers, which is necessary for them to demonstrate that they acquired legal ownership of the debt. (The documents that the plaintiffs provided instead clearly were generated by the debt buyers from their own records after the purported transfer; they show that the plaintiffs obtained access to the

defendants' account information, but do not show that the plaintiffs acquired ownership of the account debt. (B.E. 15 (record identified as having been "printed by Midland . . . . from electronic records provided by Chase Bank"); T.E. 66 ("printed by Portfolio . . . from electronic records provided by Chase Bank").))

Before the recent changes to the Maryland Rules, very little, if any, documentation was transferred from the original creditors to the debt buyers. Occasionally, sellers might provide a sample of the terms and conditions that applied to a particular type of account from approximately the same period as the accounts transferred in the portfolio, but these were representative examples only, and did not necessarily pertain to any of the actual accounts that had been sold. A few sellers also provided buyers with the last account statement, which was usually considered to be the same as the "charge-off statement," but that varied from seller to seller.[5] However, the original creditors did not consistently transfer original account documents with portfolios at the time of sale or assignment. Again, the State's experience in this area is in accord with findings made by the FTC, which reported: "For most portfolios, buyers did not receive any documents at the time of purchase. Only a small percentage of portfolios included documents, such as account statements or the terms and conditions of credit." FTC Report at iii; *see also id*. at 34-35.

[5] Despite contentions by many debt buyers to the contrary, such "charge-off" statements alone, which are issued 6 months after the account becomes delinquent, do not satisfy the requirement of proving the existence of the debt under Rule 3-306(d)(1), because they fail to show actual use of the credit card, or payment on that account, by the consumer. However, this is not an issue in either of these appeals, where the plaintiffs submitted billing statements, though these statements were not properly admitted into evidence.

Since the changes to Rule 3-306 went into effect, some debt buyers have altered their business practices and now obtain additional billing statements for the accounts at issue from the original creditors, as well as partial assignment documents. In both cases here, the plaintiffs apparently obtained a smattering of such documents (B.E. 10-14, 207-38; T.E. 15-32, 48-65), but the State has seen nothing to suggest that debt buyers obtain complete account records from original creditors. Among the numerous sales agreements reviewed by the Agency involving multiple different debt buyers, including the respondents, none provided for the transfer of all account documents as part of the portfolio sale.

The account documents missing from what the plaintiffs submitted below that Chase Bank would presumably have maintained include the original account applications from the consumers, the original terms and conditions applicable to the specific consumers, amendments to those terms and conditions, the complete range of billing statements issued since the account was opened, additional communications sent from Chase to the consumer, including notices of interest rate increases; a printout of the running account diary maintained and updated by Chase Bank's employees or agents; and written communications between Chase Bank and the consumer, such as requests for verification or disputes of the debt. The failure of the debt buyers to submit more complete account information may be attributable to the limitations imposed by the applicable sales agreements on the debt buyers' ability to obtain documentation from the original creditor or the large fees charged for providing this documentation under the

terms of the agreement, assuming that the sales agreements that are not part of the record resemble those that the State and the FTC have found to be common in the industry. But another troubling explanation must be considered: that the account records were not properly maintained by the original creditor, Chase Bank, whose recordkeeping practices have been shown to be strikingly deficient. *See, e.g.*, *Chase Bank USA, N.A. v. Fekete*, No. 2010-20731-CONS DIV 78, slip op. (Fla. Volusia County Ct. Feb. 1, 2011) (noting the lack of documents in Chase's file for the consumer-defendant) (attached hereto as Appendix 1); *see generally* Section II.B. below.

It also bears emphasizing that an account may be sold multiple times before it ever becomes the subject of litigation. However, the specific documents and information transferred to each subsequent debt buyer in the ownership chain varies widely. Again, the only things that are always transferred are the listing of accounts transferred pursuant to the sale ("sale data file"), along with any supplementary account information. In the event that the debt buyer subsequently decides to sell the accounts, the debt buyer may or may not transfer any account documents obtained from previous owners of the debt to the downstream debt buyer, which in turn may or may not transfer some of those documents to yet other downstream debt buyers.

In the event that a debt buyer decides to bring a collection action against a consumer-defendant in Maryland, the process generally works as follows for the major debt buyers. First, the debt buyer will have a representative of the company or of a related servicing company execute an affidavit stating that the company owns a particular

account, that the consumer has failed to pay them the amount owed, that the affiant has reviewed the account records confirming this information, and that the person has personal knowledge about their company's record keeping practices. The affidavit may be intended to be used for the purpose of satisfying the judgment-on-affidavit rule, Rule 3-306; and, in the event the consumer files a notice of intention to defend the claim, the plaintiff may seek to use the affidavit in an effort to certify and authenticate business records to be used at trial under Rule 5-902(b). That affidavit and any account documents and information in the company's possession will be transmitted to debt buyer's local law firm for further collections, normally with the expectation that a lawsuit will be filed.

If the local law firm believes additional documents may be required, the law firm may contact the debt buyer and request that the documents be obtained from the original creditor. The debt buyer is unlikely to undertake this effort unless or until a defendant files a notice of intention to defend or court denies judgment on affidavit and assigns the case for trial. Many debt buyers have a division of the company that exists specifically for purposes of coordinating with original creditors to obtain documents requested by attorneys (if the documents are available); then, whatever documents are obtained from the original creditor are forwarded by the debt buyer to the local law firm, which will in turn use them for purposes of the litigation.

II. THE DOCUMENTS SUBMITTED BY THE DEBT BUYERS IN THESE CASES WERE NOT PROPERLY INTEGRATED INTO THE DEBT BUYERS' OWN RECORDS, WERE NOT INHERENTLY RELIABLE, AND WERE NOT CORRECTLY CERTIFIED OR OTHERWISE PROPERLY AUTHENTICATED.

Under Maryland law, in order for records to quality for the exception to the hearsay rule for business records under Rule 5-803(b)(6), a business is required to have a competent sponsoring witness who can give live testimony demonstrating that requirements (A) through (D) of Rule 5-803(b)(6) are satisfied. Alternatively, the proponent of such evidence may invoke the mechanism for self-authentication of records under Rule 5-902(b)(2), *if* the procedural requirements of Rule 5-902(b)(1) are satisfied and *if* the adverse party does not file a timely objection on the ground that the sources of information or the method or circumstances of preparation indicate a lack of trustworthiness. Not all business records, even if properly authenticated, can be used as evidence of the truth of the matters stated in the records; the hearsay exception does not apply "if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness." Rule 5-803(b)(6). In the cases at issue in this appeal, as in many cases brought by debt buyers against consumers, the records at issue are not the debt buyer's, the information in the documents is not shown to be trustworthy, and the documents are not properly authenticated by a competent sponsoring witness or by the self-authentication procedure of Rule 5-902(b).

A. The Account Documents in These Cases Do Not Have Any of the Hallmarks of a Business Record of the Debt Buyer.

The plaintiffs' arguments in the proceedings below depend on an assumption that the documents they relied on are their own business records. Their own business records, however, would be inadequate to establish the defendants' liability, which could be shown only by records that demonstrate a debt owed to the original creditor. Though some courts have allowed an entity other than the business that created the records to avail itself of the business-records hearsay exception, on the grounds that the records have been "incorporated" or "integrated" into the entity's own records, the business practices of debt buyers do not incorporate creditor records in a manner that establishes their reliability.

First, since debt buyers do not obtain all (or even most) account documents for the accounts in a given portfolio, they never actually incorporate all account documents into their own business records. Accordingly, to the extent that the documents become "records" of the debt buyer, those records are incomplete at best. Furthermore, while a debt buyer may have the ability to obtain some additional account documents from the original creditor, many of those are generally not obtained until needed for purposes of litigation, or are never obtained at all. Moreover, there is considerable variability among original creditors as to which, if any, original account documents they retain, for how long they retain them, and whether they are willing to provide them to any subsequent, downstream debt buyers who request them. Thus, the possibility that an original creditor or previous owner of the debt *may* have particular account documents does not mean that

such documents automatically become the business records of the downstream debt buyer. *See, e.g., MRT Construction, Inc. v. Hardrives*, 158 F.3d 478, 483 (9th Cir. 1998) (witness must show (1) incorporation of third party records in the ordinary course of business; (2) reliance upon the records for their accuracy; and (3) substantial interest in the records' accuracy); *United States v. Ullrich*, 580 F.2d 765, 771 (5th Cir. 1978) (witness must show (1) incorporation of third party records; (2) reliance on those records; and (3) steps taken to confirm their accuracy).

Most debt buyers do not maintain itemized lists of which original account documents they obtained for a given account, if any, much less when those documents were obtained and from whom, making it impossible to know which particular account documents were available for a debt buyer affiant to review at the time the affiant attested to the records for a particular account. Rather, debt buyers obtain account documents on an *ad hoc* basis, at different times and in a non-systematic manner, obtaining different documents and information from original creditors at different times, even for accounts in the same portfolio, depending on the needs of collections lawsuits. Without any type of comprehensive and systematic integration process, the debt buyers can never satisfy the "regular practice" requirement of Rule 5-803(b)(6)(D), among other things.

Furthermore, the document transfer process in the debt buying industry lacks the formality associated with the true integration of another company's business records. Neither the debt seller nor the debt buyer generally maintains any sort of complete list of account documents, and sales agreements generally do not contemplate that any account

documents will automatically be transferred with the sale (much less all account documents). Moreover, the companies selling the accounts rarely, if ever, provide any sort of certification pertaining to transferred account documents at the time of account transfer, and the debt buyers do not take the steps necessary to ensure the accuracy of the account records. For the debt buyers' purposes, an inaccurate record is no less useful than an accurate one, and the debt buyer has negotiated away any right to insist on accurate records from the original creditor or intermediate debt buyer, by accepting the disclaimer of warranties. The record generated in the cases on appeal gives no indication that Chase Bank ever provided any certification or assurance of accuracy for the records that the plaintiffs relied on.

Instead, the first attempt to certify the account documents as business records is made by the debt buyer in the context of litigation. And the declarations submitted as part of this effort generally fail to specify which particular account documents the affiant is claiming to have reviewed. As a result, when affiants employed by a debt buyer make the general statement that they have reviewed the company's account records, it is impossible to know which specific account records were available for them to review (assuming they actually reviewed anything at all).[6] Often, all they may have had

[6] The "robo-signing" of affidavits by employees of debt buyers is a significant problem. For example, an Ohio federal court determined that Midland had employees signing 200-400 affidavits based on "personal knowledge," even though they had not reviewed any of the underlying account documents. *See Midland Funding LLC v. Brent*, 644 F. Supp. 2d 961, 966 (N.D. Ohio 2009). The State is aware of other major debt buyers' employees signing hundreds of affidavits a day, also purportedly based on "personal knowledge."

available to review was their company's own accounts database, without any original account documents.

The cases on appeal illustrate the problem. Portfolio's affiant in *Bartlett* and Midland's in *Townsend* both make statements indicating that they reviewed all records in existence for the consumer's account being sued upon (B.E. 203, T.E. 11-12), but neither debt buyer can claim to have acquired all (or even most) of the account documents from Chase Bank, much less to have done so as a regular business practice.

B. The Business Records of National Banks and Other Original Creditors Are Not Inherently Reliable.

There is a common misperception that the business records of federally-regulated banks are inherently reliable. Recent events in the mortgage industry and elsewhere have shown that they are not. The largest national banks have had to acknowledge major recordkeeping deficiencies in the mortgage context, including with their original loan origination documents, their documentation pertaining to the sales of mortgages, and the records of subsequent servicing of such mortgages. *See, e.g.*, United States Government Accountability Office, *Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulatory Oversight*, GAO-11-433 (May 2011), *available at* http://www.gao.gov/assets/320/317923.pdf; Federal Reserve System, et al., *Interagency Review of Foreclosure Policies and Practices* (April 2011), *available at* http://occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf.[7]

[7] *See also* Office of the Comptroller of the Currency, *OCC Takes Enforcement Action*

Given these major problems with the records of national banks in the context of large mortgage loans secured by residential real property, there is nothing to suggest that their record-keeping procedures would be any better in the context of credit cards with relatively small amounts of unsecured debt. In fact, Chase Bank, the original creditor in both of these cases, is currently the subject of an administrative enforcement action by the Comptroller of the Currency as a result of its debt collection litigation practices. *See* Office of the Comptroller of the Currency, *OCC Takes Action Against JPMC to Protect Consumers and to Ensure Servicemembers Receive Credit Protections for Their Non-Home Loans* (Sept. 19, 2013), *available at:* http://www.occ.gov/news-issuances/news-releases/2013/nr-occ-2013-139.

Additionally, a recent investigative series published by the *American Banke*r—a publication that is well-respected within the banking and lending industries—revealed serious flaws in Chase Bank's recordkeeping with respect to delinquent credit card

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Against Eight Servicers for Unsafe and Unsound Foreclosure Practices, http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html (last visited Oct. 22, 2013); Kate Berry, *Robo-Signing Redux: Servicers Still Fabricating Foreclosure Documents*, American Banker, Aug. 31, 2011, http://www.americanbanker.com/issues/176_170/robo-signing-foreclosure-mortgage-assignments-1041741-1.html?zkPrintable=1&nopagination=1 (last visited Oct. 22, 2013); Chad Terhune, *Mortgage Mess: Shredding the Dream*, Bloomberg Businessweek, Oct. 21, 2010, http://www.businessweek.com/magazine/content/10_44/b4201076208349.htm (last visted Oct. 22, 2013); Jeffrey Brown, *'Robo-Signing' Paperwork Breakdown Leaves Many Houses in Foreclosure Limbo*, PBS Newshour, Oct. 6, 2010, http://www.pbs.org/newshour/bb/business/july-dec10/foreclosures_10-06.html (last visited Oct. 22, 2013); Robert Canova & Madeline Marsden, *Examining Recent Mortgage Foreclosure Issues*, http://www.frbatlanta.org/documents/pubs/financialupdate/10q4_vp_wp_canova-marsden.pdf (last visited Oct. 22, 2013).

accounts. *See* Jeff Horwitz, *OCC Probing JPMorgan Chase Credit Card Collections*, American Banker, March 12, 2012, http://www.americanbanker.com/issues/177_49/chase-credit-cards-collections-occ-probe-linda-almonte-1047437-1.html (last visted Oct. 22, 2013), Jeff Horwitz, *JPM Chase Quietly Halts Suits Over Consumer Debts*, Jan. 10, 2013, http://www.americanbanker.com/issues/177_7/jpmorgan-chase-consumer-debt-collection-1045606-1.html (last visited Oct. 22, 2013), Jeff Horwitz, *'Robo' Credit Card Suits Menace Banks*, American Banker, Jan. 30, 2012, http://www.americanbanker.com/issues/177_20/robosigning-credit-card-suits-1046175-1.html (last visited Oct. 22, 2013), Horwitz, *OCC Probing JPMorgan Chase*, Jeff Horwitz, *How a Whistleblower Halted JPMorgan Chase's Card Collections*, American Banker, March 15, 2012, http://www.americanbanker.com/issues/177_52/jpmorgan-chase-credit-card-collections-1047573-1.html (last visited Oct. 22, 2013), Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, American Banker, March 29, 2012 http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html (last visited Oct. 23, 2013); Maria Aspan, *Borrower Beware: B of A Customer Repaid Her Bill Yet Faced a Collections Nightmare*, American Banker (March 29, 2012), http://www.americanbanker.com/issues/177_62/bofa-credit-cards-debt-collections-delinquent-robosigning-1047991-1.html (last visited Oct. 22, 2013). Chase Bank employees told the *American Banker* that the bank used three different computer systems to track the amount owed on delinquent accounts and that those systems

frequently "disagreed about how much debtors actually owed." Horwitz, *OCC Probing JPMorgan Chase*. Former Chase Bank employees also alleged that when selling judgments to outside debt purchasers, the bank frequently sold accounts that were "missing proofs of judgment or other essential information . . . [and] misstated how much the borrower owed." *Id.* Further, according to the bank's own records, in at least one Chase Bank facility, correspondences from borrowers, including "bankruptcy notifications, address changes, and hardship requests, were being dropped on an unmanned desk." *Id*. And employees who were responsible for reviewing accounts and signing legal affidavits verifying that the account records were accurate "rarely if ever" reviewed the files and "routinely signed stacks of affidavits on flights and in meetings." *Id.*

Even in litigation brought by Chase Bank itself, at least one court determined that Chase Bank's own designated record custodian had insufficient knowledge about Chase's account documents and record-keeping practices to be able to certify its account documents in a lawsuit brought by Chase against a consumer-defendant. *See Chase Bank USA, N.A. v. Fekete*, No. 2010-20731-CONS DIV 78, slip op. (Fla. Volusia County Ct. Feb. 1, 2011). In *Fekete*, the Florida court determined that the records submitted by Chase at trial "were not made in the ordinary course of business on or about the time of the event described therein, but were created for this trial." *Id.* at 4. Because the court determined that the documents offered by Chase Bank "lacked credibility and trustworthiness" they were therefore not admissible. *Id.* Further, the court found that the

employee that Chase Bank sought to have testify as a sponsoring witness lacked the requisite personal knowledge necessary for her testimony to be admissible. *See id.* at 4-5.

Anecdotal evidence suggests that such problems are not limited to Chase Bank. As an example, for nearly three years, from 2006 to 2009, Maryland resident Karen Stevens was hounded by debt buyers over a $1,900 credit card debt to Bank of America that she had already paid off. *See* Aspan, *Borrower Beware*. In 2006, when she was contacted by a collection agency representing Bank of America, Ms. Stevens wrote a check paying the account in full, which Bank of America cashed. *See id.* Yet the bank still sold the account to a third-party debt purchaser, and even though Ms. Stevens provided the debt buyer's representatives with a copy of her canceled check and a letter from the bank confirming that the account was paid in full, the collection calls continued. *See id.* In 2009, that debt buyer sold the debt to a second debt buyer, which in turn brought suit against Ms. Stevens in the District Court of Maryland; it was not until Ms. Stevens hired a private attorney to defend the suit and file a counter-claim that her ordeal ended. *See id.*

All of this shows that the records of original creditors, including Chase Bank and others, are not inherently reliable, which helps to explain why their account debts are sold with disclaimers and at a steep discount. Thus, courts should be wary of accepting original creditors' records under a hearsay exception, even when properly authenticated, because, as Rule 5-803(b)(6) advises, such records "may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that

the information in the record lacks trustworthiness." Given these concerns about the reliability of these records, it is imperative to have an appropriately qualified witness establish the authenticity of documents used to establish liability, and to subject that witness to cross-examination to test whether he or she has personal knowledge of the original creditor's recordkeeping practices and can explain when the records were prepared and how they were maintained.

C. The Employees of Debt Buyers Are Not Competent to Certify or to Testify About the Authenticity or Accuracy of the Records of an Original Creditor.

One of the most fundamental rules of witness competency is that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 5-602. Further, Rule 3-306, which lays out the minimum standards a plaintiff must meet in order to obtain judgment on affidavit, provides that the affidavit supporting a demand for affidavit judgment "shall: (1) be made on personal knowledge; (2) set forth facts that would be admissible in evidence; [and] (3) show affirmatively that the affiant is competent to testify to the matters stated in the affidavit . . ." Rule 3-306(c). Moreover, even when a court is not required to strictly adhere to the rules of evidence, "it must still strictly adhere to the rules relating to the competency of witnesses." *In re Billy W.*, 387 Md. 405, 444 (2005).

A debt buyer who cannot satisfy the proof standards necessary to prevail on a demand for judgment on affidavit cannot be put to a lesser standard at trial. Any affidavit or live testimony offered by a debt buyer in support of a small claims action must also

come from a witness with personal knowledge who is competent to testify to the matters stated. When the witness purports to testify on behalf of a business, the court must ensure that the witness has personal knowledge of the practices and procedures of that business. *See Bernadyn v. State*, 390 Md. 1, 22-23 (2005). While the records custodian of a consumer debt purchaser may be able to testify as to the policies and procedures employed by the debt buyer in maintaining its own records, that employee is not competent to testify to the recordkeeping practices of the original creditor or any upstream debt buyers. The debt buyer's records custodian is not competent to provide evidence about when the original creditor's records were prepared, whether they were created in the regular course of business, or how the records were maintained; and the employee of the debt buyer certainly does not have requisite personal knowledge of, and familiarity with, the recordkeeping practices of the original creditor.

The petitioners' briefs persuasively demonstrate that a debt buyer's employee is not competent to authenticate the business records of an original creditor, as required to establish a defendant's liability on a consumer debt. *See Bartlett* Petitioner's Brief at 8-13; *Townsend* Petitioner's Brief at 16-20, 27-35. The Agency and the Attorney General would simply add the observation that,, when this issue has been decided by the highest courts of other states, those courts have determined that the debt buyers' employees are not competent to certify the records of the original creditors. *See, e.g., CACH, LLC v. Askew*, 358 S.W.3d 58 (Mo. 2012); *LVNV Funding, LLC v. Mastaw*, 2012 Tenn. App. Lexis 282 (Tenn. Ct. App. Apr. 30, 2012). The decisions of other state and

federal courts reaching the same conclusion are discussed in the petitioner's briefs and will not be repeated here. In addition to the authorities cited by the petitioners, however, the State would call the Court's attention to the case of *In re Gilbreath,* 409 B.R. 84 (Bankr. S.D. Tx. 2009). In *Gilbreath*, the bankruptcy court disallowed five proofs of claim filed by debt buyer LVNV on the grounds that the claims were not supported by sufficient evidence. In considering the affidavits and bills of sale submitted in support of the proofs of claim, the court observed that all of the business records submitted by LVNV were "based entirely on information transmitted from Citibank to Sherman, and then from Sherman to LVNV." 409 B.R. at 123. The court went on to find that the affiant, who was an employee of LVNV, "was not competent to testify as to the accuracy of the business records of LVNV's predecessors." *Id.* This Court should reach the same conclusion with respect to the affidavit and witness testimony proffered by the respondents in the court below.

III. THE CHANGES TO RULES 3-306 AND 3-509 WERE INTENDED TO LEVEL THE PLAYING FIELD FOR UNSOPHISTICATED CONSUMER-DEFENDANTS.

In December 2010, the Agency and the Office of the Attorney General submitted a joint proposal to the Maryland Judiciary recommending changes to Rules 3-306, 3-509, and others to address abusive collection-related litigation practices by debt buyers in Maryland courts. *See Bartlett* Petitioner's Brief, Appendix 3. This Court ultimately approved a version of these proposed changes in rules orders issued on September 8 and 15, 2011, which adopted amendments proposed in the 171st Report of the Court's

Standing Committee on Rules of Practice and Procedure. The rulings by the court below defeat the intention of the amended rules.

Among the considerations underlying the original proposal described above was the fact that, under the FDCPA (and, by extension, MCALA, *see* note 1, above), debt buyers and other collection agencies owe consumer-defendants in litigation the "least sophisticated consumer standard of care," which is a higher standard of care than plaintiffs owe to defendants in any other area of litigation. *Spencer v. Hendersen-Webb, Inc.*, 81 F. Supp. 2d 582, 593-94 (D. Md. 1999); *see United States v. National Financial Services, Inc*., 98 F.3d 131, 135 (4th Cir. 1996); *see also Federal Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504 (6th Cir. 2007); *Clark v. Capital Credit & Collection Services, Inc*., 460 F.3d 1162, 1171 (9th Cir. 2006); *Rosa vs. Gaynor*, 784 F. Supp. 1 (D. Conn. 1989). This standard of care serves "to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd, . . . the ignorant, the unthinking and the credulous." *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993). Despite the heightened standard of care imposed on debt collectors and their attorneys, the enormous volume of collections lawsuits led to shortcuts being taken by plaintiff debt buyers, who were normally able to obtain a judgment on affidavit in Maryland courts even though their filings did not satisfy the requirements of the rules in effect at the time. In fact, the high-volume nature of this litigation practice produced filings that were often far inferior to those in other actions brought by attorneys representing sophisticated businesses.

The practical effect of the rules changes this Court adopted in 2011 has thus far been mixed. On their face, the amended rules provide significant protections for consumer-defendants. However, while some debt buyers have altered their business practices to obtain additional billing statements from original creditors, they normally still fail to obtain adequate certifications for the limited records that they do acquire, many are claiming to have personal knowledge about matters and information that they simply do not have, and they often fail to comply with Rule 3-306 in their initial filings in court. Moreover, if a collection lawsuit actually goes to trial, as occurred in the two cases on appeal, some courts have ignored the protections embodied in the new rules, based on a belief that the rules of evidence do not apply in the small-claims context. The sum result is that, despite the changes to the Maryland Rules that went into effect on January 1, 2012, many plaintiff debt buyers still do not comply with the least-sophisticated-consumer standard of care, a standard of care that they owe to Maryland consumer-defendants even in the context of litigation—and, lamentably, these plaintiff debt buyers often are not held accountable by the courts, based on an incorrect understanding of the pertinent proof requirements, as happened in the proceedings below.

IV. THE PLAINTIFFS' AFFIDAVITS AND ACCOMPANYING DOCUMENTATION SEEKING JUDGMENT ON AFFIDAVIT DID NOT COMPLY WITH THE MANDATORY REQUIREMENTS OF RULE 3-306.

In both of the cases on appeal, the plaintiffs relied below on documents that were not properly certified or otherwise properly authenticated, as Rule 3-306 requires. Moreover, the plaintiffs failed to properly demonstrate ownership of the consumer debts

in accordance with Rule 3-306(d)(3), since they did not submit a printout from the sale data file demonstrating that the consumer account being sued upon was actually included as part of the applicable assignment. Additionally, the affidavits submitted to certify business records in both cases are misleading insofar as they indicate that the affiants reviewed all records in existence for the consumer-defendants' accounts. (B.E. 203, T.E. 11-12.) It is impossible to know which specific account records were available for the affiants to review at that point in time, nor is it possible to know which specific documents they were attempting to certify as business records.

Other language in these documents is misleading as well. Portfolio's affiant states that attached documents were "made and kept in the course of" Portfolio's "regularly conducted business activity, even though most of the pertinent documents were created by Chase Bank, not Portfolio (B.E. 203); Midland's affiant claims only to be "familiar with the manner and method by which [Midland] maintains its business records" (T.E. 11-12), but Midland nevertheless seeks to rely on Chase Bank records that were not created by Midland. Finally, both Midland and Portfolio submitted affidavits in which the affiants claimed to have personal knowledge of the debt being sued upon, although it is fairly evident that they did not actually have personal knowledge of the accounts, and at most could have legitimately attested to facts based on "information and belief"—a level of knowledge that does not satisfy the basic affidavit requirement of Rule 3-306 (a requirement that existed even before the recent rules changes).

V. THE FAIREST INTERPRETATION OF THE SMALL CLAIMS RULE IS THE ONE ADVOCATED BY THE PETITIONERS.

In advocating for adherence to the more stringent proof requirements established by the amendments to Rules 3-306 and 3-509, the Agency and the Attorney General are not unaware of the relaxed evidentiary standards that otherwise apply in small-claims actions, under Rules 3-701(f) and 5-101(b)(4). But the tension between the informal standards that generally apply in small-claims cases and the amended rules' insistence on admissible evidence to support a debt buyer's claim against a consumer-defendant is readily reconciled when one considers the policy underpinnings of the rules. The rules are meant to make it possible for less sophisticated litigants to present their claims, and so the rules generally provide that the rules of evidence do not apply. Importantly, however, Rule 5-101(b)(4) does not exempt small-claims actions from evidentiary standards "relating to the competency of witnesses." Debt buyers are not unsophisticated litigants, but their adversaries often are; thus, it makes sense to adopt special rules, as this Court did in 2011, that apply when debt buyers appear as plaintiffs in small-claims actions.

The interpretation of the rules advanced by the petitioners (and the Pro Bono Resource Center as *amicus curiae*) best balances the competing concerns for fairness in the treatment of unsophisticated litigants. Rule 3-701 contemplates participation by unrepresented litigants, who can be expected to have difficulty understanding and satisfying the rules of evidence. There is no sound reason, however, for extending these relaxed evidentiary standards, across the board, to the *adversaries* of unsophisticated litigants. The amended rules impose proof standards that are specifically adapted to the

unique circumstances of the debt buying industry and its litigation practices, which involve thousands of cases being filed through experienced collections attorneys.

Moreover, plaintiff debt buyers are still obligated to adhere to the least-sophisticated-consumer standard of care in their litigation against consumer-defendants, a higher standard than plaintiffs owe to defendants in any other area of litigation, which was one of the reasons the Agency and the Attorney General sponsored changes to Rules 3-306 and 3-509 in 2010. In recognition of this higher standard, the Maryland Judicial Ethics Committee has determined that courts may treat collections-related actions by debt buyers and other debt collectors differently, by denying a plaintiff judgment in a collection-related lawsuit on limitations grounds, even when the defendant fails to assert this affirmative defense. *See*. Ethics Opinion Request No. 2006-05. The Committee reasoned that the FDCPA creates an affirmative duty for debt collectors to comply with the statute of limitations. *See id.* The same reasoning justifies holding debt buyers to the proof standards set forth in Rule 3-306 and requiring them to present their evidence through competent witnesses.

The approach urged by the petitioners is more faithful to the intent of the 2011 rules changes than the approach taken by the court below in allowing the plaintiffs to make their cases on inadmissible evidence. At the time that the Attorney General and Agency's proposal for rules changes was discussed and debated in 2010 and 2011, it was common knowledge that the vast majority of debts sued upon in court by debt collectors were small amounts, well below $5,000. The amendments to Rule 3-306 focused on the

form of disposition where abuses were most evident, in judgments on affidavit. But the amended rules also addressed another common method of disposition—namely, default judgments. Much of the discussion and analysis among participants in the rules drafting process centered on how a judge would apply the default judgment provisions of Rule 3-509 when the circumstances were such that a defendant had either failed to appear or had failed to file a notice of intention to defend. Although the proposal that emerged, in the form of current Rule 3-509(a), gives judges discretion in their ultimate decision, they are still required by the amended rule to at least consider all of the requirements set forth in Rule 3-306, both as to liability and as to damages.

It would be incongruous to require a judge to impose the proof standards of Rule 3-306, including those requiring that documents be properly certified or authenticated, in ruling on a demand for judgment on affidavit and to require the judge to at least consider those proof standards in imposing a default judgment, while allowing the judge to disregard the same requirements in a contested trial. This Court should hold that evidence admitted at trial must be at least as trustworthy as the affidavits that would suffice to avoid a trial and should reverse the judgments below.

CONCLUSION

The judgments of the Circuit Court for Baltimore City in both cases should be reversed.

Respectfully submitted,

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November 1, 2013

Rule 8-504(a)(9) Certification: This brief has been printed with proportionally-spaced type—Times New Roman, 13 point.

PERTINENT PROVISIONS

12 C.F.R. § 7.4001**.** Charging interest at rates permitted competing institutions; charging interest to corporate borrowers.

(a) Definition. The term "interest" as used in *12 U.S.C. 85* includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, creditor-imposed not sufficient funds (NSF) fees charged when a borrower tenders payment on a debt with a check drawn on insufficient funds, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

(b) Authority. A national bank located in a state may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state. If state law permits different interest charges on specified classes of loans, a national bank making such loans is subject only to the provisions of state law relating to that class of loans that are material to the determination of the permitted interest. For example, a national bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company, without being so licensed, but subject to state law limitations on the size of loans made by small loan companies.

(c) Effect on state definitions of interest. The Federal definition of the term "interest" in paragraph (a) of this section does not change how interest is defined by the individual states (nor how the state definition of interest is used) solely for purposes of state law. For example, if late fees are not "interest" under state law where a national bank is located but state law permits its most favored lender to charge late fees, then a national bank located in that state may charge late fees to its intrastate customers. The national bank may also charge late fees to its interstate customers because the fees are interest under the Federal definition of interest and an allowable charge under state law where the national bank is located. However, the late fees would not be treated as interest for purposes of evaluating compliance with state usury limitations because state law excludes late fees when calculating the maximum interest that lending institutions may charge under those limitations.

(d) Usury. A national bank located in a state the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by a corporate borrower.

Maryland Rules

Rule 3-306. Judgment on affidavit

(a) Definitions. In this Rule the following definitions apply except as expressly otherwise provided or as necessary implication requires:

(1) Charge-off. "Charge-off" means the act of a creditor that treats an account receivable or other debt as a loss or expense because payment is unlikely.

(2) Charge-off Balance. "Charge-off balance" means the amount due on the account or debt at the time of charge-off.

(3) Consumer Debt. "Consumer debt" means a secured or unsecured debt that is for money owed or alleged to be owed and arises from a consumer transaction.

(4) Consumer Transaction. "Consumer transaction" means a transaction involving an individual seeking or acquiring real or personal property, services, future services, money, or credit for personal, family, or household purposes.

(5) Original Creditor. "Original creditor" means the lender, provider, or other person to whom a consumer originally was alleged to owe money pursuant to a consumer transaction. "Original creditor" includes the Central Collection Unit, a unit within the State Department of Budget and Management.

(6) Original Consumer Debt. "Original consumer debt" means the total of the consumer debt alleged to be owed to the original creditor, consisting of principal, interest, fees, and any other charges.

Committee note. -- If there has been a charge-off, the amount of the "original consumer debt" is the same as the "charge-off balance."

(7) Principal. "Principal" means the unpaid balance of the funds borrowed, the credit utilized, the sales price of goods or services obtained, or the capital sum of any other debt or obligation arising from a consumer transaction, alleged to be owed to the original creditor. It does not include interest, fees, or charges added to the debt or obligation by the original creditor or any subsequent assignees of the consumer debt.

(8) Future Services. "Future services" means one or more services that will be delivered at a future time.

(9) Future Services Contract. "Future services contract" means an agreement that obligates a consumer to purchase a future service from a provider.

(10) Provider. "Provider" means any person who sells a service or future service to a consumer.

(b) Demand for Judgment by Affidavit. In an action for money damages a plaintiff may file a demand for judgment on affidavit at the time of filing the complaint

commencing the action. The complaint shall be supported by an affidavit showing that the plaintiff is entitled to judgment as a matter of law in the amount claimed.

(c) Affidavit and Attachments -- General Requirements. The affidavit shall:

(1) be made on personal knowledge;

(2) set forth such facts as would be admissible in evidence;

(3) show affirmatively that the affiant is competent to testify to the matters stated in the affidavit; and

(4) include or be accompanied by:

(A) supporting documents or statements containing sufficient detail as to liability and damages, including the precise amount of the claim and any interest claimed;

(B) if interest is claimed, an interest worksheet substantially in the form prescribed by the Chief Judge of the District Court;

(C) if attorneys' fees are claimed, sufficient proof evidencing that the plaintiff is entitled to an award of attorneys' fees and that the fees are reasonable; and

(D) if the claim is founded upon a note, security agreement, or other instrument, the original or a photocopy of the executed instrument, or a sworn or certified copy, unless the absence thereof is explained in the affidavit.

(d) If Claim Arises from Assigned Consumer Debt. If the claim arises from consumer debt and the plaintiff is not the original creditor, the affidavit also shall include or be accompanied by (i) the items listed in this section, and (ii) an Assigned Consumer Debt Checklist, substantially in the form prescribed by the Chief Judge of the District Court, listing the items and information supplied in or with the affidavit in conformance with this Rule. Each document that accompanies the affidavit shall be clearly numbered as an exhibit and referenced by number in the Checklist.

(1) Proof of the Existence of the Debt or Account. Proof of the existence of the debt or account shall be made by a certified or otherwise properly authenticated photocopy or original of at least one of the following:

(A) a document signed by the defendant evidencing the debt or the opening of the account;

(B) a bill or other record reflecting purchases, payments, or other actual use of a credit card or account by the defendant; or

(C) an electronic printout or other documentation from the original creditor establishing the existence of the account and showing purchases, payments, or other actual use of a credit card or account by the defendant.

(2) Proof of Terms and Conditions.

(A) Except as provided in subsection (d)(2)(B) of this Rule, if there was a document evidencing the terms and conditions to which the consumer debt was subject, a certified or otherwise properly authenticated photocopy or original of the document actually applicable to the consumer debt at issue shall accompany the affidavit.

(B) Subsection (d)(2)(A) of this Rule does not apply if (i) the consumer debt is an unpaid balance due on a credit card; (ii) the original creditor is or was a financial institution subject to regulation by the Federal Financial Institutions Examination Council or a constituent federal agency of that Council; and (iii) the claim does not include a demand or request for attorneys' fees or interest on the charge-off balance in excess of the Maryland Constitutional rate of six percent per annum.

Committee note. -- This Rule is procedural only, and subsection (d)(2)(B)(iii) is not intended to address the substantive issue of whether interest in any amount may be charged on a part of the charge-off balance that, under applicable and enforceable Maryland law, may be regarded as interest.

Cross references. -- See Federal Financial Institutions Examination Council Uniform Retail Credit Classification and Account Management Policy, *65 Fed. Reg. 36903* -- 36906 (June 12, 2000).

(3) Proof of Plaintiff's Ownership. The affidavit shall contain a statement that the plaintiff owns the consumer debt. It shall include or be accompanied by:

(A) a chronological listing of the names of all prior owners of the debt and the date of each transfer of ownership of the debt, beginning with the name of the original creditor; and

(B) a certified or other properly authenticated copy of the bill of sale or other document that transferred ownership of the debt to each successive owner, including the plaintiff.

Committee note. -- If a bill of sale or other document transferred debts in addition to the consumer debt upon which the action is based, the documentation required by subsection (d)(3)(B) of this Rule may be in the form of a redacted document that provides the general terms of the bill of sale or other document and the document's specific reference to the debt sued upon.

(4) Identification and Nature of Debt or Account. The affidavit shall include the following information:

(A) the name of the original creditor;

(B) the full name of the defendant as it appears on the original account;

(C) the last four digits of the social security number for the defendant appearing on the original account, if known;

(D) the last four digits of the original account number; and

(E) the nature of the consumer transaction, such as utility, credit card, consumer loan, retail installment sales agreement, service, or future services.

(5) Future Services Contract Information. If the claim is based on a future services contract, the affidavit shall contain facts evidencing that the plaintiff currently is entitled to an award of damages under that contract.

(6) Account Charge-off Information. If there has been a charge-off of the account, the affidavit shall contain the following information:

(A) the date of the charge-off;

(B) the charge-off balance;

(C) an itemization of any fees or charges claimed by the plaintiff in addition to the charge-off balance;

(D) an itemization of all post-charge-off payments received and other credits to which the defendant is entitled; and

(E) the date of the last payment on the consumer debt or of the last transaction giving rise to the consumer debt.

(7) Information for Debts and Accounts not Charged Off. If there has been no charge-off, the affidavit shall contain:

(A) an itemization of all money claimed by the plaintiff, (i) including principal, interest, finance charges, service charges, late fees, and any other fees or charges added to the principal by the original creditor and, if applicable, by subsequent assignees of the consumer debt and (ii) accounting for any reduction in the amount of the claim by virtue of any payment made or other credit to which the defendant is entitled;

(B) a statement of the amount and date of the consumer transaction giving rise to the consumer debt, or in instances of multiple transactions, the amount and date of the last transaction; and

(C) a statement of the amount and date of the last payment on the consumer debt.

(8) Licensing Information. The affidavit shall include a list of all Maryland collection agency licenses that the plaintiff currently holds and provide the following information as to each:

(A) license number,

(B) name appearing on the license, and

(C) date of issue.

(e) Subsequent proceedings.

(1) When notice of intention to defend filed. If the defendant files a timely notice of intention to defend pursuant to Rule 3-307, the plaintiff shall appear in court on the trial

date prepared for a trial on the merits. If the defendant fails to appear in court on the trial date, the court may proceed as if the defendant failed to file a timely notice of intention to defend.

(2) When no notice of intention to defend filed.

(A) If the defendant fails to file a timely notice of intention to defend, the plaintiff need not appear in court on the trial date and the court may determine liability and damages on the basis of the complaint, affidavit, and supporting documents filed pursuant to this Rule. If the defendant fails to appear in court on the trial date and the court determines that the pleading and documentary evidence are sufficient to entitle the plaintiff to judgment, the court shall grant the demand for judgment on affidavit.

(B) If the court determines that the pleading and documentary evidence are insufficient to entitle the plaintiff to judgment on affidavit, the court may deny the demand for judgment on affidavit or may grant a continuance to permit the plaintiff to supplement the documentary evidence filed with the demand. If the defendant appears in court at the time set for trial and it is established to the court's satisfaction that the defendant may have a meritorious defense, the court shall deny the demand for judgment on affidavit. If the demand for judgment on affidavit is denied or the court grants a continuance pursuant to this section, the clerk shall set a new trial date and mail notice of the reassignment to the parties, unless the plaintiff is in court and requests the court to proceed with trial.

Cross references. -- Rule 3-509.

(f) Reduction in amount of damages. Before entry of judgment, the plaintiff shall inform the court of any reduction in the amount of the claim by virtue of any payment or other credit.

(g) Notice of judgment on affidavit. When a demand for judgment on affidavit is granted, the clerk shall mail notice of the judgment promptly after its entry to each party at the latest address stated in the pleadings. The notice shall inform (1) the plaintiff of the right to obtain a lien on real property pursuant to Rule 3-621, and (2) the defendant of the right to file a motion to vacate the judgment within 30 days after its entry pursuant to Rule 3-535 (a). The clerk shall ensure that the docket or file reflects compliance with this section.

Rule 3-509. Trial upon default

(a) Requirements of proof. When a motion for judgment on affidavit has not been filed by the plaintiff, or has been denied by the court, and the defendant has failed to appear in court at the time set for trial:

(1) if the defendant did not file a timely notice of intention to defend, the plaintiff shall not be required to prove the liability of the defendant, but shall be required to prove damages; except that for claims arising from consumer debt, as defined in Rule 3-306 (a)(3), when the plaintiff is not the original creditor, as defined in Rule 3-306 (a)(5), the court (A) may require proof of liability, (B) shall consider the requirements set forth in Rule 3-306 (d), and (C) may also consider other competent evidence;

(2) if the defendant filed a timely notice of intention to defend, the plaintiff shall be required to introduce prima facie evidence of the defendant's liability and to prove damages. For claims arising from consumer debt, as defined in Rule 3-306 (a)(3), when the plaintiff is not the original creditor, as defined in Rule 3-306 (a)(5), the court shall consider the requirements set forth in Rule 3-306 (d) and may also consider other competent evidence.

(b) Property damage -- Affidavit. When the defendant has failed to appear for trial in an action for property damage, prima facie proof of the damage may be made by filing an affidavit to which is attached an itemized repair bill, or an itemized estimate of the costs of repairing the damaged property, or an estimate of the fair market value of the property. The affidavit shall be made on personal knowledge of the person making such repairs or estimate, or under whose supervision such repairs or estimate were made, and shall include the name and address of the affiant, a statement showing the affiant's qualification, and a statement that the bill or estimate is fair and reasonable.

(c) Notice of judgment. Upon entry of a judgment against a defendant in default, the clerk shall mail notice of the judgment to the defendant at the address stated in the pleadings and shall ensure that the docket or file reflects compliance with this requirement.

Rule 3-701. Small claim actions

(a) Applicable rules. The rules of this Title apply to small claim actions, except as provided in this Rule.

Cross references. -- Code, *Courts Article, § 4-405*.

(b) Forms. Forms for the commencement and defense of a small claim action shall be prescribed by the Chief Judge of the District Court and used by persons desiring to file or defend such an action.

(c) Trial date and time. A small claim action shall be tried at a special session of the court designated for the trial of small claim actions.

Upon the filing of the complaint, the clerk shall fix the date and time for trial of the action. When the notice of intention to defend is due within 15 days after service, the original trial date shall be within 60 days after the complaint was filed. When the notice of intention to defend is due within 60 days after service, the original trial date shall be within 90 days after the complaint was filed. With leave of court, an action may be tried sooner than on the date originally fixed.

Cross references. -- See Rule 3-307 concerning the time for filing a notice of intention to defend.

(d) Counterclaims -- Cross-claims -- Third-party claims. If a counterclaim, cross-claim, or third-party claim in an amount exceeding the jurisdictional limit for a small claim action (exclusive of interest, costs, and attorney's fees and exclusive of the original claim) is filed in a small claim action, this Rule shall not apply and the clerk shall transfer the action to the regular civil docket.

Cross references. -- Rule 3-331 (f).

(e) Discovery not available. No pretrial discovery under Chapter 400 of this Title shall be permitted in a small claim action.

(f) Conduct of trial. The court shall conduct the trial of a small claim action in an informal manner. Title 5 of these rules does not apply to proceedings under this Rule.

Cross references. -- See Rule 5-101 (b) (4).

Rule 5-101. Scope

(a) Generally. Except as otherwise provided by statute or rule, the rules in this Title apply to all actions and proceedings in the courts of this State.

(b) Rules inapplicable. The rules in this Title other than those relating to the competency of witnesses do not apply to the following proceedings:

(1) Proceedings before grand juries;

(2) Proceedings for extradition or rendition;

(3) Direct contempt proceedings in which the court may act summarily;

(4) Small claim actions under Rule 3-701 and appeals under Rule 7-112 (d)(2);

(5) Issuance of a summons or warrant under Rule 4-212;

(6) Pretrial release under Rule 4-216 or 4-216.1 or release after conviction under Rule 4-349;

(7) Preliminary hearings under Rule 4-221;

(8) Post-sentencing procedures under Rule 4-340;

(9) Sentencing in non-capital cases under Rule 4-342;

(10) Issuance of a search warrant under Rule 4-601;

(11) Detention and shelter care hearings under Rule 11-112; and

(12) Any other proceeding in which, prior to the adoption of the rules in this Title, the court was traditionally not bound by the common-law rules of evidence.

Committee note. -- The Rules in this Chapter are not intended to limit the Court of Appeals in defining the application of the rules of evidence in sentencing proceedings in capital cases or to override specific statutory provisions regarding the admissibility of evidence in those proceedings. *See,* for example, *Tichnell v. State, 290 Md. 43 (1981);* Code, *Correctional Services Article, § 6-112 (c).*

(c) Discretionary application. In the following proceedings, the court, in the interest of justice, may decline to require strict application of the rules in this Title other than those relating to the competency of witnesses:

(1) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 5-104 (a);

(2) Proceedings for revocation of probation under Rule 4-347;

(3) Hearings on petitions for post-conviction relief under Rule 4-406;

(4) Plenary proceedings in the Orphans' Court under Rule 6-462;

(5) Waiver hearings under Rule 11-113;

(6) Disposition hearings under Rule 11-115, including permanency planning hearings under Code, *Courts Article, § 3-823*;

(7) Modification hearings under Rule 11-116;

(8) Catastrophic health emergency proceedings under Title 15, Chapter 1100;

(9) Hearings on petitions for coram nobis under Rule 15-1206; and

(10) Any other proceeding in which, prior to the adoption of the rules in this Title, the court was authorized to decline to apply the common-law rules of evidence.

(d) Privileges. In all actions and proceedings, lawful privileges shall be respected.

Rule 5-602. Lack of personal knowledge

Except as otherwise provided by Rule 5-703, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony.

Committee note. -- This Rule does not prevent the admission of testimony as to a witness's own age, date of birth, or other similar matters of personal history, when a requirement of first-hand knowledge cannot be met.

Rule 5-803. Hearsay exceptions: Unavailability of declarant not required

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

(a) Statement by party-opponent. A statement that is offered against a party and is:

(1) The party's own statement, in either an individual or representative capacity;

(2) A statement of which the party has manifested an adoption or belief in its truth;

(3) A statement by a person authorized by the party to make a statement concerning the subject;

(4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment; or

(5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

Committee note. -- Where there is a disputed issue as to scope of employment, representative capacity, authorization to make a statement, the existence of a conspiracy, or any other foundational requirement, the court must make a finding on that issue before the statement may be admitted. These rules do not address whether the court may consider the statement itself in making that determination. Compare *Daugherty v. Kessler, 264 Md. 281, 291-92 (1972)* (civil conspiracy); and *Hlista v. Altevogt, 239 Md. 43, 51 (1965)* (employment relationship) with *Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 775 (1987)* (trial court may consider the out-of-court statement in deciding whether foundational requirements for coconspirator exception have been met.)

(b) Other exceptions.

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and

describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

(5) Recorded recollection. See Rule 5-802.1 (e) for recorded recollection.

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Cross references. -- Rule 5-902 (b).

Committee note. -- Public records specifically excluded from the public records exceptions in subsection (b) (8) of this Rule may not be admitted pursuant to this exception.

(7) Absence of entry in records kept in accordance with subsection (b) (6). Unless the circumstances indicate a lack of trustworthiness, evidence that a diligent search disclosed that a matter is not included in the memoranda, reports, records, or data compilations kept in accordance with subsection (b) (6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind about which a memorandum, report, record, or data compilation was regularly made and preserved.

(8) Public records and reports.

(A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth

(i) the activities of the agency;

(ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or

(iii) in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law.

(B) A record offered pursuant to paragraph (A) may be excluded if the source of information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness.

(C) A record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action.

(D) This paragraph does not supersede specific statutory provisions regarding the admissibility of particular public records.

Committee note. -- This section does not mandate following the interpretation of the term "factual findings" set forth in *Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988).* See *Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581 (1985).*

(9) Records of vital statistics. Except as otherwise provided by statute, records or data compilations of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

Cross references. -- See Code, *Health General Article, § 4-223* (inadmissibility of certain information when paternity is contested) and § 5-311 (admissibility of medical examiner's reports).

(10) Absence of public record or entry. Unless the circumstances indicate a lack of trustworthiness, evidence in the form of testimony or a certification in accordance with Rule 5-902 that a diligent search has failed to disclose a record, report, statement, or data compilation made by a public agency, or an entry therein, when offered to prove the absence of such a record or entry or the nonoccurrence or nonexistence of a matter about which a record was regularly made and preserved by the public agency.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and a statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document or the circumstances otherwise indicate lack of trustworthiness.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more, the authenticity of which is established, unless the circumstances indicate lack of trustworthiness.

(17) Market reports and published compilations. Market quotations, tabulations, lists, directories, and other published compilations, generally used and reasonably relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in a published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation, prior to the controversy before the court, among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history.

(A) Reputation in a community, prior to the controversy before the court, as to boundaries of, interests in, or customs affecting lands in the community.

(B) Reputation as to events of general history important to the community, state, or nation where the historical events occurred.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) [Vacant]. There is no subsection 22.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the matter would be provable by evidence of reputation under subsections (19) or (20).

(24) Other exceptions. Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial

guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Committee note. -- The residual exception provided by Rule 5-803 (b)(24) does not contemplate an unfettered exercise of judicial discretion, but it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5-102.

It is intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 5-803 and 5-804 (b). The residual exception is not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by amendments to the Rule itself. It is intended that in any case in which evidence is sought to be admitted under this subsection, the trial judge will exercise no less care, reflection, and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

Rule 5-902. Self-authentication

(a) Generally. As used in this Rule, "certifies," "certificate," or "certification" means, with respect to a domestic record or public document, a written declaration under oath subject to the penalty of perjury and, with respect to a foreign record or public document, a written declaration signed in a foreign country which, if falsely made, would subject the maker to criminal penalty under the laws of that country. The certificate relating to a foreign record or public document must be accompanied by a final certification as to the genuineness of the signature and official position (1) of the individual executing the certificate or (2) of any foreign official who certifies the genuineness of signature and official position of the executing individual or is the last in a chain of certificates that collectively certify the genuineness of signature and official position of the executing individual. A final certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country who is assigned or accredited to the United States.

Except as otherwise provided by statute, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the trust territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in subsection (a)(1) of this Rule, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation and accompanied by a final certification. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with this Rule or complying with any applicable statute or these rules.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued or authorized by a public agency.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. To the extent provided by applicable commercial law, commercial paper, signatures thereon, and related documents.

Cross references. -- See, e.g., Code, *Commercial Law Article, §§ 1-202*, *3-308*, and *3-505*.

(10) Presumptions under statutes or treaties. Any signature, document, or other matter declared by applicable statute or treaty to be presumptively genuine or authentic.

(11) Items as to which required objections not made. Unless justice otherwise requires, any item as to which, by statute, rule, or court order, a written objection as to authenticity is required to be made before trial, and an objection was not made in conformance with the statute, rule, or order.

Committee note. -- As used in this Rule "document" is a generic term. It includes public records encompassed by Code, *Courts Article, § 10-204*.

(b) Certified records of regularly conducted business activity.

(1) Procedure. Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803 (b)(6) that has been certified pursuant to subsection (b)(2) of this Rule, provided that at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, (A) the proponent (i) notifies the adverse party of the proponent's intention to authenticate the record under this subsection and (ii) makes a copy of the certificate and record available to the adverse party and (B) the adverse party has not filed within five days after service of the proponent's notice written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

Committee note. -- An objection to self-authentication under subsection (b)(1) of this Rule made in advance of trial does not constitute a waiver of any other ground that may be asserted as to admissibility at trial.

(2) Form of certificate. For purposes of subsection (b)(1) of this Rule, the original or duplicate of the business record shall be certified in substantially the following form:

Certification of Custodian of Records

or Other Qualified Individual

I, , do hereby certify that:

(1) I am the Custodian of Records of or am otherwise qualified to administer the records for:

(identify the organization that maintains the records), and

(2) The attached records

(a) are true and correct copies of records that were made at or near the time of the occurrence of the matters set forth by, or from the information transmitted by, a person with knowledge of these matters; and

(b) were kept in the course of regularly conducted activity; and

(c) were made and kept by the regularly conducted business activity as a regular practice.

I declare under penalty of perjury that the foregoing is true and correct.

Signature and title:

Date:

IN THE COUNTY COURT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CHASE BANK USA, N.A.
Plaintiff,

vs.

CASE NO:: 2010-20731-CONS
DIV 78

AMBER D. FEKETE
Defendant
_____/

ORDER FOR FINAL JUDGMENT FOR PLAINTIFF

On November 17, 2010, a bench trial on this matter was conducted before the Honorable Shirley A. Green. Present in the courtroom were the Defendant, Amber Fekete, and her attorney Leonard Cabral of Sanford, Florida. Present in the Courtroom for the Plaintiff, Chase Bank USA, N.A., were Plaintiff's witness, Michelle Donaldson of Maryland, as the representative of Chase Bank USA, N.A. as the Business Analyst and Custodian of Records for "Chase" and Attorney Pace A. Allen, Jr. of Daytona Beach, Florida who represented the Plaintiff for JPMorgan Chase - Legal Department.

The Plaintiff filed a one count Complaint for Account Stated arising from two accounts and Chase relied on the decision in *Parrical Farley v Chase Bank, USA., NA* No. 4D09-651 (Fla. 4th DCA, 2010), ___ So.3d _____ to form its prima facie case for Account Stated. In *Farley*, the Court found "when an account statement has 'been rendered to and received by one who made no objection thereto within a reasonable time,' a prima facie case for the correctness of the account and the liability of the debtor has been made", citing *Daytona Bridge Co. V. Bond*, 356 So.445, 447 (Fla 1904); *Gendzier v Bielechi*, 97 So,.2d 604,608 (Fla. 1957). The *Farley* Court further stated that "[a] debtor may overcome a prima facie case of an account stated by 'meeting the burden of proving fraud, mistake[,] or error' in the account", citing *Robert C. Malt & Co. v. Kelly Tractor Co.*, 518 So. 2d 991, 992 (Fla. 4th DCA 1988); *Gendzier*, 97 So. 2d at 608. [1]

Plaintiff called the Defendant, Amber Fekete, as its first witness. Defendant testified that she had two Chase credit cards, that there was an outstanding balance on the cards but did

not remember receiving any of the statements attached to the Plaintiff's Complaint and that she disputed the amounts owed according to those statements. Defendant testified that she examined the documents produced for trial and they contained inaccurate information including incorrect address for her residence at the time they were sent. Defendant further testified that some of the documents contained an address where no building existed at the time of the dates shown on the documents, and some of the documents contained blanks where Defendant's address information should have been and other documents contained "Sample A. Sample, 1234 Main Street, Anytown, USA 00000" where a name and address should have appeared.

On cross examination, the Defendant, Amber Fekete, testified that both of her Chase accounts were "zero interest" accounts and that she did not remember ever receiving a notice of change of terms notifying her that Chase intended to increase the interest rate on her account. She personally calculated the balance of her Chase accounts and according to her records and caloulations, she owed Plaintiff a total of $85.22 for both accounts and had *no objection* to paying this amount. Defendant testified that she inspected but did not remember ever receiving the documents sought to be introduced by Chase as evidence for trial titled Important Notice for Credit Card Customers about Changes to Your Cardmember Agreement and the Important Information Regarding Changes to Your Account and Your Right to Reject Changes.

Plaintiff called as its second witness Chase employee, Michelle Donaldson, and sought through its witness to have documents presented at trial admitted as business records as an exception to the hearsay rule. Defendant's counsel was allowed to voir dire the witness.

After questioning by Defense Counsel, the Chase's witness, Ms. Donaldson, stated that she worked for Chase but was unable to state whether she worked for Chase Bank USA, N.A. or Chase Bankcard Services, Inc. Chase's witness testified that there was no hard copy or physical paper file of the account record. Chase's witness testified that all the records were computerized but that she did not input any of the information. Chase's witness stated that she lacked personal knowledge of Chase's procedures for inputting

any of the information contained in the computer file nor could Chase's witness produce any manuals or written policies explaining the procedure or policy of how the customer information was inserted into the computer. Chase's witness did not know if the same computer system was being used when the account was opened and at the time the credit card charges were made and if or how the data was converted to a new system. The witness could not testify that she had personal knowledge of the reliability of the computer system or the audit procedure used to assure the integrity of the computer records.

Chase's witness, Ms. Donaldson, identified a document titled Important Notice for Credit Card Customers about Changes to Your Cardmember Agreement. Chase's witness testified that the Important Notice for Credit Card Customers about Changes to Your Cardmember Agreement, is the document that is sent to its customers to inform them of an increase in the percentage rate and terms of their credit card account but did not know what triggered a change to the interest rate on a credit card account. Chase's witness also admitted during her testimony that the Important Notice for Credit Card Customers about Changes to Your Cardmember Agreement produced as evidence for trial did not contain the addressee's name, address or to whom the notice was mailed.

Chase's witness, Ms. Donaldson, identified a document titled Important Information Regarding Changes to Your Account and Your Right to Reject Changes and a similar document titled Important Notice of Change in Terms and Right to Opt-Out. Chase's witness admitted during her testimony that on the document titled Important Information Regarding Changes to Your Account and Your Right to Reject Changes and the similar document titled Important Notice of Change in Terms and Right to Opt-Out were produced for evidence for this trial and the name and address shown on both documents were "Sample A. Sample, 1234 Main Street, Anytown, USA 00000" and not the name and address of the Defendant. Furthermore the documents did not contain an account number or a date the changes were to take effect.

Chase's witness, Ms. Donaldson, identified a document titled Primary Applicant Information and testified that it contained the information taken from the Defendant at

the time the accounts were opened. The document titled Primary Applicant Information not only contained an address where the Defendant did not reside at the time she applied for the credit cards but contained an address where no building existed at that time.

Other documents the Plaintiff's witness, Ms. Donaldson, sought to have admitted into evidence either had no address for the Defendant or contained blank spaces where the name and address should have appeared.

Defendant timely objected to the documents the Plaintiff sought to introduce into evidence at trial and the Court sustained the objection. The business records exception to the hearsay rule authorizes admission of certain written material made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. Fla. Stat. §90.803(6).

It is apparent that these records were not made in the ordinary course of business on or about the time of the event described therein, but were created for this trial. The records offered by Plaintiff lacked credibility and trustworthiness and are not admissible. Because the documents lacked credibility, Chase's witness, Ms. Donaldson, is limited to testify at this trial only to her personal knowledge about the Defendant's accounts.

Chase's witness, Ms. Donaldson, then testified that she did not have personal knowledge if an Important Notice for Credit Card Customers about Changes to Your Cardmember Agreement was sent to or received by the Defendant, what the interest rate would have changed to nor the date the interest rate or other changes on the Defendant's accounts would have taken effect if such a notice was sent to the Defendant.

Chase's witness, Ms. Donaldson, then testified that she did not have personal knowledge if an Important Information Regarding Changes to Your Account and Your Right to Reject Changes or the similar Important Notice of Change in Terms and Right to Opt-Out was sent to or received by the Defendant, what the interest rate would have changed to

ner the date the interest rate or other changes on the Defendant's accounts would have taken effect if such a notice was sent to the Defendant.

Chase's witness, Ms. Donaldson, testified that she did not physically calculate the account balances herself but relied on comparing the computer records with the computer screen for the balance of the Defendant's accounts.

Chase's witness, Ms. Donaldson, then testified that she did not have any personal knowledge that the statements attached to the Complaint were sent to the Defendant or if the Defendant received them nor did she have personal knowledge whether or not the Defendant objected to the statements attached to the Complaint. Chase's witness had no personal knowledge or evidence whatsoever of proof of mailing the statements attached to the Complaint or any return receipt from the U.S. Post Office.

It is therefore FOUND:

1. The account records produced by Plaintiff at trial and sought to be introduced as evidence of the Defendant's accounts with the Plaintiff contained omissions, mistakes and errors and lacked credibility, reliability and trustworthiness and did not qualify for any exception to the hearsay rule. They are not admissible as evidence in this trial.
2. Chase's witness, Ms. Donaldson, had no personal knowledge or admissible evidence that the Important Notice for Credit Card Customers about Changes to Your Cardmember Agreement, the Important Information Regarding Changes to Your Account and Your Right to Reject Changes and/or the Important Notice of Change in Terms and Right to Opt-Out were furnished to or received by the Defendant.
3. Chase's witness, Ms. Donaldson, had no personal knowledge or admissible evidence whatsoever to prove that the account statements attached to the Complaint were furnished to or received by Defendant nor if the Defendant made no objection to the account statements.

4. The testimony of Chase's witness, Ms. Donaldson, was insufficient to prove the Plaintiff's case for Account Stated against the Defendant.
5. The Defendant admitted during her testimony that she did have two credit cards with Chase and admitted that she owed $85.22 to the Plaintiff for the balance owed on both credit card accounts and that she had no objection to a judgment in that amount.

ORDERED AND ADJUDGED that a Final Judgment be entered in favor of the Plaintiff, Chase Bank USA, N.A. in the amount of $85.22 (Eighty-five Dollars and Twenty Two Cents).

Ordered in New Smyrna Beach, Volusia County, Florida on this 1 day of Feb, 2011.

Shirley A. Green
County Court Judge

I HEREBY CERTIFY that on this 1 day of Feb, 2011 a copy of this Order for Final Judgment for Plaintiff was sent by first-class mail to Philip A. Orsi, P.O. Box 9622, Deerfield Beach, FL 33442, and to Leonard P. Cabral, 212 N. Park Ave., Ste 14, Sanford, FL 32771.

P. Cash
Judicial Assistant

[1] The Plaintiff filed a one Court complaint for "Account Stated". The Defendant has questioned if the "Account Stated" cause of action is applicable in an action to collect a debt of a credit card account because it violates The Federal Truth in Lending Act, 15 U.S.C. §1601 et seq. This issue is moot because the Defendant and her counsel agreed to judgment in the amount of $85.22.

JAMES TOWNSEND,	*	**IN THE**
Petitioner,	*	**COURT OF APPEALS**
v.	*	**OF MARYLAND**
MIDLAND FUNDING, LLC	*	**SEPTEMBER TERM, 2013**
Respondent.	*	**NO. 76**

* * * * * * * * * * * * *

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of November, 2013, two copies of the Brief of the Attorney General of Maryland and Maryland State Collection Agency Licensing Board as Amici Curiae in the above captioned case, were mailed via first class mail, postage prepaid, to the following:

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Counsel for Amici Curiae
AARP, et. al.

W. Thomas Lawrie

RAINFORD G. BARTLETT,	*	**IN THE**
Petitioner,	*	**COURT OF APPEALS**
v.	*	**OF MARYLAND**
PORTFOLIO RECOVERY ASSOCIATES, LLC,	*	**SEPTEMBER TERM, 2013**
	*	**NO. 64**
Respondent.	*	

* * * * * * * * * * * * *

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of November, 2013, two copies of the Brief of the Attorney General of Maryland and Maryland State Collection Agency Licensing Board as Amici Curiae in the above captioned case, were mailed via first class mail, postage prepaid, to the following:

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