Case No. 503411
Greene County Clerk's Index No. 323/05

# Court of Appeals

*of the*

# State of New York

PORTFOLIO RECOVERY ASSOCIATES, LLC,

*Plaintiff-Respondent,*

– against –

JARED KING,

*Defendant-Appellant.*

## JOINT BRIEF FOR *AMICI CURIAE* NEW YORK CITY BAR ASSOCIATION AND THE NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS


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## PRELIMINARY STATEMENT

The Association of the Bar of the City of New York ("Association") and the New York City Department of Consumer Affairs submit this brief to urge reversal of *Portfolio Recovery Associates, LLC v. King,* 55 A.D.3d 1074, 866 N.Y.S.2d 395 (3d Dep't 2008), in which the Appellate Division, Third Department affirmed summary judgment granted in favor of Plaintiff-Respondent ("Plaintiff") and dismissal of Defendant-Appellant's ("Defendant's") statute of limitations defense. This brief will address the failure of the Appellate Division to apply New York's "borrowing statute," CPLR § 202, and to follow prior decisions of this Court in determining the timeliness of this collection action brought by a debt buyer. In addition, the brief will address the failure of the courts below to articulate and follow proper evidentiary standards in granting summary judgment to the plaintiff despite genuine issues of fact concerning its standing to initiate the lawsuit under an alleged assignment.

The issues before the Court in this appeal bear tremendous significance for the residents of New York. The case against the defendant is one of hundreds of thousands of such consumer credit matters filed in this state every year, most of which, lamentably, result in a default judgment against the consumer.

## STATEMENT OF INTEREST

### A. The Association of the Bar of the City of New York

The Association is comprised of attorneys, predominantly based in New York City, who represent clients in both the public and private sectors across a range of law office settings. The Association's Civil Court and Consumer Affairs Committees are comprised of practitioners in the New York City Civil Court, current and former attorneys from federal, state and city consumer protection agencies, including the Federal Trade Commission, the New York State Attorney General's Office and the New York City Department of Consumer Affairs; legal services attorneys; consumer advocates; attorneys from private firms that represent businesses in actions brought by consumer protection agencies; class action attorneys representing consumers and businesses; judges; attorneys affiliated with local law schools and clinics operated by law schools; and others who have expertise in litigation and debt collection matters and in consumer protection issues generally that affect businesses and the public.

The Association has an interest in this appeal arising from its longstanding commitment to fairness and justice in the adjudication of claims involving members of the public, and to the efficient operation of our court system. It is no secret that in recent years the number of collection cases in consumer credit

matters – many of them brought by "debt buyers" – has mushroomed. The volume has flooded the Civil Courts. It is also apparent in many of these cases that the defendants, who are predominantly *pro se*, may have valid statute of limitations defenses, and that the plaintiffs may not possess the evidence that would entitle them to prevail. The Association has expressed its opinion in various forums on the need for measures to ensure that a basic level of fairness is maintained in the adjudication of debt collection claims.

The instant appeal provides an opportunity for the Court to render clarity on these issues, so that debt collector plaintiffs can pursue valid claims and refrain from instituting legal actions that are not sustainable, and to ensure that defendants are aware of their legal rights. This appeal also has important ramifications for an overburdened court system, and for many members of the public, who may no longer be subjected to debt collection lawsuits that cannot withstand scrutiny if this Court reverses the Appellate Division decision.

Given the expertise and experience of the Consumer Affairs and Civil Courts Committees, the Association believes this *amicus curiae* brief will be of special assistance to the Court.

### B. The New York City Department of Consumer Affairs

The New York City Department of Consumer Affairs ("DCA") enforces the City's Consumer Protection Law and other business regulations, and through

its Office of Financial Empowerment ("OFE"), spearheads an array of financial empowerment efforts including public education campaigns, asset-building strategies, and free one-on-one financial counseling and coaching.

The Department currently licenses over 1500 debt collection agencies. Consumer complaints concerning debt collection top DCA's list of consumer complaints; in the past three years, DCA received nearly 3000 debt collection complaints and obtained cancellation of almost 4 million dollars in debt allegedly owed by NYC consumers. In addition to mediating complaints, the Department pursues unlicensed businesses engaged in collecting debts from New York City consumers.

To strengthen the Department's oversight of debt collectors and to better protect consumers, the Department's Licensing Law was amended effective July 2009 to require all debt buyers—whether active or passive—to be licensed by the Department. Prior to the enactment of the amendment, so-called "passive" buyers of delinquent debt exploited a gap in the law to escape DCA's oversight. In the absence of licensing and strict controls, debt buyers avoided responsibility for abusive practices by their agents. Among other abusive practices, debt buyers bought and sought to collect on discharged, invalid and time-barred debts and filed scores of groundless lawsuits to collect on debts without factual substantiation. The amendments address areas of concern, including a prohibition on a debt

collection agency seeking to collect a debt from a consumer on an expired debt unless the agency provides the consumer with information on the statute of limitations.

Given the Department's oversight of the debt collection industry and its mission to protect consumers, the Department has a strong interest in ensuring that the courts in New York City are provided with clear guidance on how to adjudicate the scores of cases brought by debt collection agencies against alleged debtors.

## STATEMENT OF FACTS

In the instant appeal, Plaintiff seeks to collect from Defendant Jared King a debt he allegedly owes on a Discover credit card account, which Plaintiff Portfolio Recovery Associates, LLC alleges was assigned to it. In 1989, Defendant entered into a credit card agreement with Greenwood Trust Company ("Greenwood Trust"), a community bank incorporated in and with its primary place of business in Delaware, which was renamed Discover Bank in 2000. (R. 26, 64.) At the time, Defendant, who admits to having had a credit card with Discover Bank, lived in Connecticut. (R. 7.) Greenwood Trust received Defendant's last payment on the Discover Card account in December 1998. (R. 7.) Defendant made no further payments thereafter. (R. 7.) On January 18, 1999, Defendant made his last

purchase with this Discover Card. (R. 30, 34-39.) On or about January 27, 1999, Defendant cancelled his card by mailing it back, cut in half, with a letter requesting that his account be canceled. (R. 41.) According to Defendant, on or about February 24, 1999, he received a credit card bill and called customer service to complain about fees incurred on a card he had cancelled. (R. 9.) On or about April 18, 1999, Discover credited Defendant's account with a "cashback bonus award" of $35.17. (R. 38.) On or about August 31, 1999, Discover charged off the account. (R. 48.)

Discover subsequently sold Defendant's account, allegedly to Portfolio Recovery Associates. (R. 6.) On or about April 1, 2005, Plaintiff Portfolio Recovery Associates commenced suit against Defendant Jared King in Greene County Supreme Court by filing a Summons and Complaint alleging breach of contract and account stated. (R. 5-6.) Defendant answered the complaint and asserted the following defenses: no relationship with Plaintiff; lack of standing, statute of limitations, and dispute the amount. (R. 7.) Plaintiff filed a motion for summary judgment (R. 19), which Defendant opposed, raising issues of material fact regarding the expiration of the statute of limitations and standing. As part of its motion for summary judgment, Plaintiff included two affidavits to prove ownership of the debt in question. One affidavit, titled "Affidavit of Claim," is dated October 2004 (the day is illegible) and the affiant (whose name is illegible),

states that she[1] is a "Team Leader" at Discover Financial Services. (R. 27.) The affidavit states that, "pursuant to the terms and conditions of the Credit Card Accounts Sale Agreement between Discover Bank and Portfolio Recovery Associates, LLC dated 28 August 2000, all right, title and interest in and to the aforementioned Accounts [sic] and sums due thereto were transferred by Discover Bank to Portfolio Recovery Associates, LLC." (R. 27.) The Credit Card Accounts Sale Agreement was not annexed to the affidavit. The other affidavit Plaintiff submitted to the court is dated May 20, 2005 and is titled an "Affidavit of Facts," by Elaine F. Lark, who identifies herself as a "Legal Specialist" of Portfolio Recovery Associates. (R. 28.) The affiant states, "DISCOVER BANK (the Assignor) assigned account to PORTFOLIO RECOVERY ASSOCIATES, LLC" and also claims that, "I have read the attached affirmation and concur with same." (R. 28.) The only affirmation included with the Affidavit of Facts is the affirmation in support of summary judgment submitted by Plaintiff's attorney which is dated November 15, 2005, nearly six months after the date of the Lark affidavit. (R. 17-22.)

The Court granted Plaintiff's motion for summary judgment. (R. 29.) Defendant appealed the Court's decision to the Appellate Division, Third

[1] The pronoun "she" is used to refer to this affiant because Respondent's brief uses the word "her" when discussing this affiant in its brief. *See* Respondent's Brief at 29.

Department, which affirmed the lower court's finding by decision dated October 23, 2008. (R. 56.) This appeal followed.

## BACKGROUND

The case presently before the Court is only one of hundreds of thousands of cases brought by debt buyers in New York State every year. Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* (Oct. 2007), at 1 ("*Debt Weight*") (noting that in 2006, approximately 320,000 consumer debt cases were filed in the five counties of the New York City Civil Court). In a 2006 report, the Civil Court for the City of New York observed that the number of general civil filings had exploded over the past five years, having increased 300 percent from 2002 to 2006. Report of the Civil Court of the City of New York, January 1, 1997–December 31, 2006, *A Decade of Change and Challenge in "The People's Court"* 1997–2006 at 11–12. "Most of the filings involve consumer credit transactions . . . ." *Id.* at 12.

The surge in consumer debt cases in New York's courts can be explained, in part, by the growth of the debt buying industry. In modern collection practice, debts are typically charged off by an original creditor and sold in bulk to debt buyers, including Plaintiff, who then attempt to collect the debts. Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change, A

Workshop Report 3 (February 2009), *available at* www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf ("FTC Report").

Over 89 percent of the consumer credit cases reviewed in the *Debt Weight* study were initiated by debt buyers, not original creditors. *Debt Weight* at 13. A debt buyer usually pays 5 percent or less of the value of the debts it purchases. *FTC Report* at 3. Once it buys a portfolio of debt, a debt buyer may collect on or sell all or part of the portfolio. *Id.* The Federal Trade Commission has observed that "[m]any accounts are purchased and resold by a number of different debt buyers over a period of years before all collection efforts finally cease." *Id.* at 22–23.

The debt buyer often cannot or does not obtain the underlying proof of the individual debts it purchases. *Id.* at 22–24. The lack of evidence, however, poses little impediment to a debt buyer's ability to obtain a money judgment against a consumer debtor. At least 75 percent of consumer credit cases result in default judgments. *See, e.g.*, *Debt Weight* at 17-18 (finding 80 percent of consumer debt cases brought in New York City resulted in default judgments in favor of the plaintiff); MFY Legal Services, Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York 4 (June 2008), *available at* http://www.mfy.org/Justice_Disserved.pdf (finding that only 10 percent of

defendants in consumer debt cases filed answers in 2007).[2] Because of the high default rate in consumer debt cases, a debt buyer such as Plaintiff rarely needs to present evidence of the debt and its entitlement to a judgment. Significantly, although a default motion must be supported by an affidavit of fact supporting the claim, this evidence is not reviewed by a judge.[3]

Even when a defendant does appear in a consumer debt case, the debt buyer does not anticipate a meaningful challenge because it is highly unlikely the defendant will be represented by an attorney. The plaintiff debt buyer, on the other hand, is always represented. *Debt Weight* at 16–17 (estimating that 0 to 4 percent of defendants in consumer debt cases are represented by counsel, while 100 percent of plaintiffs have attorneys). A consumer debtor without legal training is rarely in a position to meaningfully oppose a debt buyer's lawsuit. For example, as reflected in this appeal, there are complex legal issues involved in determining the applicable statute of limitations. Also, a *pro se* litigant lacks the skill to mount adequate evidentiary challenges in opposition to a motion for summary judgment,

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[2] This report raised numerous concerns about whether defendants in consumer debt cases are properly served with a summons and complaint and supports the view that lack of proper service is a major reason for the high default rate. This view is further reflected in the recent lawsuit commenced by Judge Pfau: *Pfau v. Forster & Garbus,* Index No. 8236/09 (Sup Ct. Erie Co.), which seeks to vacate 100,000 default judgments entered because of questionable service of process.

[3] The New York City Civil Court treats consumer debt cases as proceedings "for a sum certain," which allows defaults to be entered by the clerk, without evaluation of the evidence by a judge. CPLR 3215 (a). *See* Civil Court of the City of New York, DRP-182, Category GP-20, titled "Default Judgments on Purchased Debt," Effective Date May 13, 2009.

and in rare instances, at trial. Indeed, it is not unusual for a *pro se* consumer to be so confused by the court process that she does not even oppose a motion for summary judgment, because of a mistaken belief that because she has a trial date in the future, there will be an opportunity to assert her defenses at a later time. In sum, debt buyer plaintiffs are rarely subject to meaningful challenge or review of their claims and have successfully utilized the New York courts as an effective extension of their debt collection practice, an alarming trend that runs counter to basic principles of fairness.

## ARGUMENT

### POINT I

### SUMMARY JUDGMENT IN THIS CASE WAS IMPROPER BECAUSE THE LOWER COURTS FAILED TO APPLY CPLR § 202 IN DETERMINING WHETHER THE STATUTE OF LIMITATIONS HAD RUN.

The trial court and the Third Department failed to apply or even mention CPLR § 202 in deciding and affirming summary judgment in Plaintiff's favor, which was improper as a matter of law because the statute of limitations had long since run on Plaintiff's claims. In pertinent part, New York State's "borrowing statute" states: "[a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued." Therefore, when an out-of-state plaintiff sues in New York on a cause of action

that accrued outside of the state, "CPLR 202 requires the cause of action to be timely under the limitations periods of both New York and the jurisdiction where the cause of action accrued." *Global Fin. Corp., v. Triarc Corp.*, 93 N.Y.2d 525, 528, 693 N.Y.S.2d 479, 480 (1999). Two elements must be met for CPLR § 202 to apply: (1) the cause of action must have accrued outside the state, and (2) it must have accrued to a nonresident. Weinstein, Korn & Miller, New York Civil Practice ¶ 202.00, at 2-50. When an action is commenced in New York on a cause of action that accrued in another state, "the New York courts will apply either the statute of the state where the cause of action accrued or the New York statute, whichever is shorter." *Id.*

In analyzing where a cause of action accrues, this Court has held that it means "the place of the injury." *Triarc*, 93 N.Y.2d at 529, 693 N.Y.S.2d at 481. When an injury is "purely economic," this Court has held that the place of injury "usually is where the plaintiff resides and sustains the economic impact of the loss." 93 N.Y.2d at 529-30, 693 N.Y.S.2d at 482. *See also* Weinstein, Korn & Miller, New York Civil Practice ¶ 202.00, at 2-63 ("Where the economic injury is suffered by a corporation, a trust or an investment fund, the place of injury is ordinarily the principal place of business of the entity; it is that place in which the economic harm is most directly felt."). Importantly, in debt buyer cases, the residency of the original creditor at the time of the injury is what controls in

deciding which state's statute of limitations applies to a cause of action because an assignee assumes all defenses and counterclaims that can be asserted against the assignor. *TPZ Corp. v. Dabbs*, 25 A.D.3d 787, 789, 808 N.Y.S.2d 746, 749 (2d Dep't 2006) ("[A]n assignee never stands in any better position than his assignor... and takes an assignment subject to any pre-existing liabilities . . . .") (internal quotations and citations omitted).

Plaintiff's cause of action in the instant case accrued when Defendant breached his credit card contract with Greenwood Trust by defaulting on his Discover Card agreement. The breach of contract caused an economic injury to Greenwood Trust, which was incorporated in and had its principal place of business in Delaware. (R. 64.) Thus, Greenwood Trust was injured and sustained the economic impact of the loss in Delaware, and therefore, it was in Delaware that the cause of action accrued.

Delaware's statute of limitations on contract actions is three years. 10 DEL. C. § 8106. Defendant breached his contract with Greenwood Trust/Discover in or about January 1999, therefore, Plaintiff should have commenced this action by January 2002. Instead, Plaintiff did not commence this action until 2005, and thus its claims are time-barred.

Plaintiff argues that CPLR § 202 does not apply because it could not obtain personal jurisdiction over Defendant in Delaware at the time it commenced its suit,

because Defendant lived in New York State. (Plaintiff Brief at 19.) However, personal jurisdiction in the foreign state has no bearing on the analysis. CPLR § 202 simply requires that when a court is presented with a cause of action accruing outside New York, it should apply the statute of limitations of the foreign state if it bars the claim. Further:

> It matters not that jurisdiction is unobtainable over a defendant in the foreign jurisdiction or that the parties have contracted to be venued in this State. There is no inconsistency in applying [CPLR 202] in either of these circumstances.

*Insurance Co. of N. Am. v. ABB Power Generation*, 91 N.Y.2d 180, 188, 668 N.Y.S.2d 143, 147 (1997); *see also GML, Inc. v. Cinque & Cinque*, 9 N.Y.3d 949, 951 (2008) ("[T]he plain and literal meaning of a cause of action accruing without the state means when the cause of action comes into existence, not that a defendant is subject to suit in that other state.").

The Appellate Division erred in finding that the statute of limitations had not run, and never addressed the issues raised under CPLR § 202. It affirmed the erroneous trial court decision which granted summary judgment in favor of Plaintiff without explanation despite the fact that Plaintiff's claims had long since run and Defendant had raised the statute of limitations as an affirmative defense. For the above reasons, amicus urges the court to apply CPLR § 202 to the instant case and to reverse the Appellate Division decision.

## POINT II

## EVEN IF THE COURT FINDS THAT CPLR § 202 DOES NOT APPLY IN THIS CASE, THE APPELLATE DIVISION ERRED IN FINDING THAT PLAINTIFF TIMELY FILED THE INSTANT ACTION UNDER NEW YORK'S SIX-YEAR STATUTE OF LIMITATIONS.

Even if the Court were to find that Plaintiff's claims were not time-barred under Delaware's statute of limitations pursuant to New York's borrowing statute, it should find that the trial court erred in granting summary judgment and finding that Plaintiff's claims were timely under New York's statute of limitations.[4]

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[4] Neither the Supreme Court nor the Third Department specified on which of Plaintiff's two causes of action – breach of contract or account stated – it entered and upheld summary judgment against Defendant. Under either cause of action, summary judgment was improper in this case because Plaintiff's claims were time-barred by New York's statute of limitations.

If the trial court granted summary judgment because the cause of action was timely under a theory that the account was a "mutual, open and current account" pursuant to CPLR § 206(d), that finding is an error of law. CPLR § 206(d) provides that "[i]n an action based on a mutual, open and current account, where there have been reciprocal demands between the parties, the time within which the action must be commenced shall be computed from the time of the last transaction in the account on either side."

This Court defined a "mutual, open and current account" for purposes of CPLR § 206(d) in *Green v. Disbrow*, 79 N.Y. 1 (1879), stating that "there must be an account of mutual dealings -- not an account of items only upon one side, or an account of items upon one side upon which there had been simply payments not within six years upon the other side." In *Simpson v. Mutual of Omaha Insurance Company*, the court noted that an open, mutual and current account exists when "the parties regard the items as constituting one account and as capable of being set off one against the other so that it is only the balance that constitutes the claim," and further stated that such an account exists only "where there is an express or implied agreement between two parties to set off their mutual debts against each other." 2000 U.S. Dist. LEXIS 3814 at *17, 2000 WL 322780, at *6 (S.D.N.Y. Mar. 28, 2000) (citations omitted). The court in *Simpson* found that where the plaintiff admitted that he received monthly account statements, the account between the parties was "a monthly account and it was not therefore mutual, open and current within the meaning of 206(d)." *Id.* Therefore, where there is a revolving credit agreement in which, pursuant to the contract, there is a regular account statement sent to the customer stating an

The statute of limitations on a claim begins to run when the cause of action accrues. CPLR § 203(a). Pursuant to CPLR § 203(a), to determine whether an action has been commenced within the applicable statute of limitations, a court must determine the period of time between the date the cause of action accrued and the date on which the plaintiff interposed the claim. A cause of action accrues when all the facts necessary to allege the cause of action have occurred so that the plaintiff would be entitled to obtain relief in court. *Aetna Life & Cas. Co. v. Nelson*, 67 N.Y.2d 169, 175, 501 N.Y.S.2d 313, 316 (1986); *see also Triarc Corp.*, 93 N.Y.2d at 528, 693 N.Y.S.2d at 484 (finding that the cause of action accrues at the time when . . . plaintiff first had the right to bring the cause of action . . ."). Pursuant to CPLR §§ 203(c) and 304, a claim filed in the Supreme Court of New York State is interposed on the date of the filing of the summons and complaint.

**A. Breach of Contract**

Under CPLR § 213, a breach of contract action must be commenced within six years. The six year statute of limitations begins to run on a contract case when a breach occurs, entitling the plaintiff to relief. *See Victorson v. Bock Laundry Mach. Co.*, 37 N.Y. 2d 395, 373 N.Y.S.2d 39 (1975). Generally, to establish a *prima facie* case of breach of a credit card contract, a plaintiff must establish the existence of a contract and any revisions; that the card was issued to the defendant

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amount owed, that agreement cannot be considered an open, mutual and current account pursuant to CPLR § 206(d).

at his or her address; that the defendant used the card to purchase goods and services; and that the defendant breached that agreement by failing to pay what was owed. *See Citibank (S.D.), N.A. v. Martin*, 11 Misc.3d 219, 223, 807 N.Y.S.2d 284, 289 (Civ. Ct. N.Y. Co. 2005). A defendant to a breach of contract action may raise the expiration of the statute of limitations as an affirmative defense under CPLR § 3018(b).

In this case, the court erred by concluding, based on the record before it, that Plaintiff interposed its breach of contract claim prior to the running of New York's six year statute of limitations. Plaintiff's cause of action for breach of contract accrued on or about January 18, 1999, when Defendant failed to pay his credit card bill, which would mean that Plaintiff's filing of its summons and complaint on April 1, 2005 was more than six years from the date of Defendant's breach, and thus outside of New York's statute of limitations for breach of contract claims.

Plaintiff argued in its motion for summary judgment that its cause of action accrued on August 31, 1999, which is the charge-off date, not the default date.[5] The charge-off date is the wrong date to start the running of a statute of limitations because it is not the default date, but a date approximately six months after the

[5] A charge-off is an accounting mechanism used to remove a defaulted debt from the creditor's books, although the debt is still owed.

default date, and if the court used the charge-off date to determine that Plaintiff's claims were timely, it did so in error. [6]

In the alternative, Plaintiff also argues that the statute of limitations began to run in April 1999 when Discover Bank issued a unilateral "cashback bonus" credit to Defendant's account. (R. 19, 44.) It claims that the cashback bonus credit is "an acknowledgment of the debt which would be the date that the six-year statute of limitations period begins," and that the date of the last payment on the account "is the date that triggers the statute of limitations period." (Plaintiff Brief at 18.) There is no question that the cashback "bonus" was *not* a payment.

Under N.Y. General Obligations Law § 17-101, a debtor may, by a specific written promise, or by partial payment made in a manner consistent with acknowledging the debt, create a new or continuing contract, thus starting the running of the statute of limitations anew. However, this Court has found that partial payments only toll a statute of limitations in cases where the payment was an unqualified acknowledgment by the debtor of an amount due and a promise to pay. *Lew Morris Demolition Co. v. Board of Educ.*, 40 N.Y.2d 516, 521, 387 N.Y.S.2d 409, 411 (1976). Where there is no admissible evidence that payments came either from the alleged debtor or his or her authorized agent, or that the

[6] It is particularly inappropriate to use a charge off date for statute of limitation purposes because this date is peculiarly within the creditor's control, and could be set unfairly to manipulate litigation.

payments came from an account under the debtor's custody and control under circumstances from which an intent to pay may be inferred, courts have found the statute of limitations was not tolled by a partial payment. *See, e.g., Educ. Res. Inst., Inc. v. Piazza*, 17 A.D.3d 513, 514-15, 794 N.Y.S.2d 65, 67 (2d Dep't 2005) (citations omitted).

Accordingly, the Court cannot find that a unilateral credit issued by Discover could amount to evidence of an unqualified acknowledgment of the debt or an express promise to pay which would have tolled the statute of limitations on Plaintiff's breach of contract claim. Discover's unilateral credit to Defendant's account by no means constituted a partial payment or acknowledgment of the debt. Not only had Defendant stopped using the card months before and ceased making payments, he had cancelled the card and sent it back to Discover cut in half. If Plaintiff's position were deemed valid, then any creditor could extend a statute of limitations indefinitely by simply issuing a credit to the debtor once every six years after a missed payment.

**B. Account Stated**

If the trial court granted summary judgment based on an account stated theory, this was also improper. To establish a *prima facie* case of account stated, a plaintiff must prove three elements: (1) the account was presented, (2) by mutual

agreement it was accepted as correct, and (3) the debtor promised to pay the amount stated. *See, e.g., Bank of New York-Delaware v. Santarelli*, 128 Misc. 2d 1003, 1004-1005, 491 N.Y.S.2d 980, 982 (Civ. Ct. Greene Co. 1985).[7] An account stated claim is governed by CPLR § 213(2) and is also subject to a six-year statute of limitations. *Stewart v. Stuart*, 262 A.D.2d 396, 397, 690 N.Y.S.2d 745, 746 (2d Dep't 1999) (citing *Donahue-Halverson, Inc. v. Wissing Construction & Building Services Corp.*, 95 A.D.2d 953, 464 N.Y.S.2d 268 (3d Dep't 1983)). To calculate the date on which the statute of limitations will run on an account stated claim, it is necessary to identify the date on which an account was stated, if at all. When the cause of action for account stated has accrued and the statute of limitations has begun to run, "it is not within the power of the creditor to extend the running of the Statute of Limitations merely by rendering the same account over again from time to time." *Id*; *see also Gaier v. Iveli*, 287 A.D.2d 375, 731 N.Y.S.2d 692, 692-93 (1st Dep't 2001).

A review of the record indicates that the statute of limitations on an account stated claim had already run when the action was commenced. The record indicates that Defendant received account statements in the mail, although it omits the account statements from December 1998 and January 1999, including only

[7] Granting summary judgment on an account stated claim here also was improper because Plaintiff did not submit any proof of mailing of account statements to Defendant by the original creditor.

photocopies of account statements with closing dates from February 17, 1999 to August 31, 1999, when the account was charged off. (R. 34-40.) The record also indicates that on January 27, 1999, Defendant mailed a letter to Discover Card asking that his credit card account be canceled and enclosed in the letter the credit card cut in half. According to Defendant he also telephoned Discover's Customer Service Department on or about February 24, 1999 to dispute additional fees listed in an account statement. (R. 9.) Therefore, according to Defendant, he disputed the balance set forth in the account statement that he received following his January 27, 1999 letter to Discover, and thus no account stated claim could exist as to that or any subsequent account statements. Further, any account statement Defendant received thereafter should have been deemed disputed, because the balance amount would have included the same additional fees that Defendant specifically disputed during his February 24, 1999 phone conversation with Discover. Given that any account stated claim that may have accrued in favor of Plaintiff would have started the applicable statute of limitations running in or about January 1999, Plaintiff's filing of its account stated cause of action on April 1, 2005 was time-barred by the six-year statute of limitations.

It is clear from the record that the statute of limitations had expired at the time the case was commenced, requiring the granting of summary judgment in Defendant's favor.

## POINT III

## SUMMARY JUDGMENT WAS IMPROPER IN THIS CASE BECAUSE PLAINTIFF FAILED TO PROVE STANDING.

### A. Debt Buyers Generally Fail to Adequately Prove Their *Prima Facie* Case

The New York trial courts that have issued written opinions in consumer debt cases have almost uniformly expressed concerns about the quality of evidence produced by debt buyers in actions to collect consumer debts. As one court memorably observed, "With great frequency, courts are presented with summary judgment motions by credit card issuers seeking a balance due from credit card holders which motions fail to meet essential standards of proof and form in one or more particulars." *Martin*, 11 Misc.3d at 220, 807 N.Y.S.2d at 287. While each case stands on its own merits, most of the decisions rendered in this area demonstrate that entities seeking to collect purchased consumer debt rarely possess the basic legal documentation required to make out a *prima facie* case. *See*, *e.g.*, *PRA III, LLC v. Gonzalez*, 54 A.D.3d 917, 864 N.Y.S.2d 140 (2nd Dep't 2008); *CACV of Colorado v. Ramona Santiago* 10/29/09 NYLJ 25:1 (Civ. Ct. N.Y. Co.); *Colorado Capital Investments, Inc. v. Villar*, 6/18/09 N.Y.L.J. 27: 2 (Civ. Ct. N.Y. Co.); *CACV of Colorado Capital Investments v. Pierog*, Index No. 64449/05 (Civ. Ct. N.Y. Co. 9/2/08); *Colorado, LLC v. Chowdhury*, Index No. 94642/07 (Civ. Ct. Bronx Co. 2/19/09); *CACH, LLC v. Cummings*, Index No. 22747/07 (Civ. Ct. N.Y.

Co. 11/10/08 ); *Rushmore Recoveries X, LLC v. Skolnick*, 15 Misc.3d 1139(A), 841 N.Y.S.2d 823, No. 21161/05, 2007 WL 1501643 (Dist. Ct. Nassau Co); *Palisades Collection, LLC v. Haque*, 4/13/06 N.Y.L.J. 20 (Civ. Ct. Queens Co.); *Palisades Collection, LLC v. Gonzalez*, 10 Misc.3d 1058(A), 809 N.Y.S.2d 482, No. 58564/04, 2005 WL 3372971 (Civ. Ct. N.Y. Co.).

Adequate proof is especially important in debt buyer cases because of problems with accurate record-keeping. Viewed in the best light, the frequent sale and resale of debt creates much room for error. As observed by one court: "The Court is aware of how the market for the sale of debt currently works, where large sums of defaulted debt are purchased, by a small number of firms, for between .04 and .06 cents on the dollar. . . . However, during this process mistakes are made, mistakes that may seriously impact consumers and their credit." *MBNA Am. Bank, N.A. v. Nelson*, 15 Misc.3d 1148(A), 841 N.Y.S.2d 826, No. 13777/06, 2007 WL 1704618, *2 (Civ. Ct. Richmond Co.). The same court, specifically addressing issues of assignment, stated:

> Because multiple creditors may make collection efforts for the same underlying debt even after assignment, for any variety of reasons (i.e. mis-communication or clerical error) failure to give notice of an assignment may result in the debtor having to pay the same debt more than once or ignoring a notice because the debtor believes he or she has previously settled the claim. Further, debtors are often left befuddled as they get the run-around from a panoply of potential creditors when inquiring about their defaulted accounts, during which time they lose the ability to negotiate payments with the current debt

> owner (whoever that may be at the time) and therefore incur additional fees and penalties.
>
> 15 Misc.3d 1148(A), 841 N.Y.S.2d 826, 2007 WL 1704618, *5 -6.

As discussed above, there has been an explosion of consumer debt litigation in New York's courts. Given the current economic climate, this trend can be expected to continue. The trial courts, which hear a large volume of consumer debt cases every day, have made sound decisions on matters pertaining to evidence offered in support of debt buyers' cases. Amicus urges the Court to adopt the approach taken by the majority of the trial courts in this state, which holds debt buyers to the same basic evidentiary standards required in other types of civil cases filed in New York State courts.

### B. As A Third-Party Debt Buyer Seeking Summary Judgment, Plaintiff Failed to Establish Standing to Bring Its Case

Because Plaintiff Portfolio Recovery Associates is an assignee, it must prove as part of its *prima facie* case that it actually owns the debt sued upon and therefore has standing to sue Defendant. Where a plaintiff fails to provide competent evidence that it owns a debt, it cannot prevail on summary judgment. *Dabbs*, 25 A.D.3d 787, 789, 808 N.Y.S.2d 746, 749. It is the assignee's burden to prove the assignment, and failure to do so renders the litigation a nullity. *Martin*, 11 Misc.3d at 226, 807 N.Y.S.2d at 291; *see also Copelco Capital v. Packaging Plus Servs.*, 243 A.D.2d 534, 535, 663 N.Y.S.2d 104 (2d Dep't 1997).

In this case, Plaintiff failed to provide the actual assignment and failed to provide sufficient evidence of its alleged assignment or ownership of Defendant's debt with Discover and, therefore, failed to prove that it had standing to sue. As such, summary judgment should not have been granted in its favor and the lower court's affirmance should be reversed.

*1. Plaintiff Failed to Submit an Affidavit from an Individual with Personal Knowledge of the Facts*

The standards for evidence submitted in support of summary judgment are well established. CPLR § 3212(b) requires that, among other things, a party support its motion with an affidavit from "a person having knowledge of the facts." As this Court has explained:

> The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. . . . In this regard, CPLR 3212 [b] provides that a summary judgment motion "shall be supported by affidavit" of a person "having knowledge of the facts" as well as other admissible evidence (see *GTF Mktg. v Colonial Aluminum Sales*, 66 N.Y.2d 965, 967, 489 N.E.2d 755, 498 N.Y.S.2d 786 [1985]). A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden (see e.g. *Vermette v Kenworth Truck Co.*, 68 N.Y.2d 714, 497 N.E.2d 680, 506 N.Y.S.2d 313 [1986]).

*JMD Holding Corp. v. Congress Fin. Corp.*, 4 N.Y.3d 373, 385, 795 N.Y.S.2d 502, 510 (2005).

In determining whether an affiant has personal knowledge, New York courts require that the affiant make some showing of how she came to know the facts stated. An affidavit lacks probative value if it "fail[s] to assert facts from which personal knowledge . . . may be inferred." *Dickerson v. Health Mgt. Corp. of Am.*, 21 A.D.3d 326, 328-29, 800 N.Y.S.2d 391, 394 (1st Dep't 2005). Thus, where the movant's executive vice president submitted an affidavit that "did not indicate the sources (e.g., documents he may have searched or reviewed, or persons he consulted) of his familiarity with the [matter] at issue," the movant did not show entitlement to summary judgment. *Barraillier v. City of New York,* 12 A.D.3d 168, 169, 784 N.Y.S.2d 55, 56 (1st Dep't 2004). Conversely, courts have upheld affidavits that explained the basis of the affiant's knowledge. *See, e..g., Tahini Invs. v. Bobrowsky,* 99 A.D.2d 489, 490, 470 N.Y.S.2d 431, 433 (2d Dep't 1984) (finding affidavit sufficient where "affiant states that she is an agent of plaintiff corporation and that she participated in the negotiations for the [transaction].").

Further, "[w]hen the affiant relies on documents, the documents relied upon must be annexed . . . and the affiant must establish an adequate evidentiary basis for them." *Gonzalez*, 10 Misc.3d 1058(A), 2005 WL at *1 (citations omitted). Where a corporate officer's affidavit stated that he caused a search of the company's records to be conducted, but failed to identify the employees who conducted the search and failed to produce the records themselves, the affidavit

lacked probative value and did not meet CPLR § 3212's requirement that the affiant have knowledge of the facts. *Dempsey v. Intercontinental Hotel Corp.*, 126 A.D.2d 477, 479, 511 N.Y.S.2d 10, 12 (1st Dep't 1987). In short, an affidavit must contain the evidentiary basis for its assertions; if it does not, it lacks foundation. *See Grullon v. City of New York,* 297 A.D.2d 261, 263, 747 N.Y.S.2d 426 (1st Dep't 2002).

Here, Plaintiff offers two affidavits, described above in the Statement of Facts, to support its claim that it is an assignee of the alleged debt that Defendant incurred to the original creditor, Discover: an "Affidavit of Claim" and an "Affidavit of Facts." Both contain serious foundational deficiencies, and do not support Plaintiff's claim of assignment.

The Affidavit of Claim (which contains a date that is only partly legible) is deficient for two reasons. First, the affiant fails to set forth the basis for her knowledge. She does not claim to have personal knowledge of the assignment transaction. Although she states her job title, "Team Leader," she does not provide a description of her employment duties from which the Court could infer that she would be in a position to know whether Defendant's account was assigned. There is nothing about the title "Team Leader" from which one could infer that the affiant participated in the assignment or in the maintenance of records of the assignment. Second, the affiant relies on a document, the August 2000 Sale

Agreement, to assert the facts in her affidavit, but she does not annex this document.

The May 20, 2005 "Affidavit of Facts" by Elaine F. Lark, who identifies herself as a "Legal Specialist" of the Plaintiff, is deficient for three reasons. First, while Ms. Lark blithely asserts that she has "personal knowledge of the facts of this account," she does not set forth any basis for her knowledge. She provides no description of her job duties or any other explanation that would establish the basis of her knowledge. Second, the information she provides does not prove that Defendant's account was assigned to Plaintiff. While Ms. Lark states, "DISCOVER BANK (the Assignor) assigned account to PORTFOLIO RECOVERY ASSOCIATES, LLC." (R. 28.), she does not provide the date, does not refer to a written agreement, and provides no indication, other than her say so, that Defendant's account was actually assigned to Plaintiff. Third, Ms. Lark seems to be adopting some other, unnamed person's affirmation as her own testimony. She states, "I have read the attached affirmation and concur with same." The only affirmation included with the Affidavit of Facts is the affirmation in support of summary judgment submitted by Plaintiff's attorney. This affirmation is dated November 15, 2005, nearly six months after the date of the Lark Affidavit. (R. 17-22, 28.)

Accordingly, both affidavits fail to establish that either affiant has personal knowledge of the assignment, and should not have been relied on by the trial court in granting summary judgment.

*2. Plaintiff Failed to Comply with the Best Evidence Rule*

Plaintiff claims that Discover assigned Defendant's account to Plaintiff through a sale agreement dated August 28, 2000. (R. 27). However, Plaintiff failed to provide the actual assignment and instead argued that the Court should accept derivative proof of the assignment in the form of an "Affidavit of Claim." (Plaintiff Brief at 23.) Plaintiff offered no explanation for the absence of the assignment. Accordingly, allowing Plaintiff to rely on the "Affidavit of Claim" as proof of assignment contravenes the best evidence rule.

An assignment agreement is a contract (*see, e.g., Bank of New York v. Dell-Webster,* 23 Misc.3d 1107(A), 2008 WL 5869117, *2 (Sup. Ct. Bronx Co. 2008)) and the best evidence of a contract is the contract itself. *Matter of the Arbitration between Zurich-American Ins. Co.,* 89 A.D.2d 542, 452 N.Y.S.2d 633 (1st Dep't 1982); *Rukaj v. Roth*, 237 A.D.2d 503, 656 N.Y.S.2d 889 (2d Dep't 1997). To comply with the best evidence rule, an assignee must produce the actual contract of assignment or provide a suitable explanation for the absence of the original document. *See Schozer v. William Penn Life Ins. Co.*, 84 N.Y.2d 639, 620 N.Y.S.2d 797 (1994). "Where the contents of a writing are in issue, the original

document, unless otherwise excused, must be produced." *Mastan Co. v. Weil*, 84 A.D.2d 657, 659, 444 N.Y.S.2d 315, 318 (3d Dep't 1981).

This Court has held that the proponent of secondary evidence of the contents of an unproduced original must sufficiently explain the unavailability of the primary evidence. *Schozer,* 84 N.Y.2d at 644, 620 N.Y.S.2d at 799. The proponent must also establish that it "has not procured [the original writing's] loss or destruction in bad faith." *Id.* The proponent's burden may include "a showing of a diligent search in the location where the document was last known to have been kept . . . and testimony of the person who last had custody of the original." *Id.* This Court has also provided the following guidance for the exception to the best evidence rule:

> Indeed, the more important the document to the resolution of the ultimate issue in the case, "the stricter becomes the requirement of the evidentiary foundation [establishing loss] for the admission of secondary evidence." In other words, the court should give careful consideration to the possible motivation for the nonproduction of the original in determining whether the foundational proof of loss was sufficient.

*Id.* (internal citations omitted).

In this case, Plaintiff failed to produce the actual assignment and failed to offer an explanation for its absence. Under these circumstances, the affidavit submitted instead of the contract cannot legitimately serve as a substitute for the actual contract. In *PRA III, LLC v. Mac Dowell*, 15 Misc.3d 1135(A), 841

N.Y.S.2d 822, No. 40841/04, 2007 WL 1429026 (Civ. Ct. Richmond Co.), the court had before it an "affidavit of ownership and sale of claim" from an officer of Portfolio Recoveries Associates and PRA III that stated that Sears National Bank had sold the debt to PRA III. The court ruled: "This conclusory affidavit fails to demonstrate any evidence of consideration paid or delivery of the assignment." *Id.* *See Martin,* 11 Misc.3d 219, 226, 807 N.Y.S.2d 284, 291; *PRA III, LLC v. Gonzalez*, 54 A.D.3d 917, 864 N.Y.S.2d 140; *V.W. Credit, Inc. v. Alexandrescu*, 13 Misc.3d 1207(A), 824 N.Y.S.2d 759. *See also Gonzalez*, 10 Misc.3d 1058(A), 2005 WL at *1 ("[w]hen the affiant relies on documents, the documents relied upon must be annexed . . . and the affiant must establish an adequate evidentiary basis for them.") As Plaintiff failed to comply with the best evidence rule, the lower court erred in awarding summary judgment.

*3. The Business Records Exception is Inapplicable*

Plaintiff argues that the lower court did not err in granting summary judgment in this case because the Affidavit of Claim was properly admitted as a business record to prove its ownership of the debt. (Plaintiff's Brief at 23.) However, the Affidavit of Claim is not a business record and cannot be used to prove that Plaintiff is the assignee of Defendant's debt.

Plaintiff fails to meet any of the foundational requirements for the business records exception. This Court has articulated the business records exception to the hearsay rule as follows:

> These concepts appear as the foundation requirements of CPLR 4518 (a): first, that the record be made in the regular course of business -- essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business; second, that it be the regular course of such business to make the record (a double requirement of regularity) -- essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record; and third, that the record be made at or about the time of the event being recorded -- essentially, that recollection be fairly accurate and the habit or routine of making the entries assured.

*People v. Kennedy*, 68 N.Y.2d 569, 579-80, 510 N.Y.S.2d 853, 859-60 (1986).

The Affidavit of Claim fails the first requirement because it is plainly a document prepared in anticipation of litigation, and not in the ordinary course of business. *See, e.g., National States Elec. Corp. v. LFO Constr. Corp.*, 203 A.D.2d 49, 50, 609 N.Y.S.2d 900, 901 (1st Dep't 1994).

Similarly, the Affidavit of Claim fails the second prong of the business record rule, as the record is devoid of evidence that it is in the ordinary course of Discover's business to make records such as the "Affidavit of Claim." Although Plaintiff's brief states, "the affiant's knowledge is based upon books and records maintained in the ordinary course of business that are within her control and supervision," no such words are stated by a witness or affiant anywhere in the

record. (Plaintiff's Brief at 29.) An attorney lacking personal knowledge of her client's practices for maintaining business records cannot lay a foundation for the client's business records, even by affirmation. *Midborough Acupuncture, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 13 Misc.3d 132(A), 2006 WL 2829993 (App. Term 2d & 11th Jud Dists 2006) (finding affirmation by an attorney who lacked personal knowledge was insufficient to lay a foundation for a determination that his clients' documents were admissible as business records).

The third criterion – that the record be made at or about the time of the event being recorded – is flatly contradicted by the affidavit itself. The affidavit is dated October 2004, but states that the account was assigned as part of a Sale Agreement dated August 28, 2000 – more than four years before the affiant made the affidavit. Because the affidavit was not made contemporaneously with the assignment, it cannot be admitted as a business record. *People v. Mertz*, 68 N.Y.2d 136, 506 N.Y.S.2d 290 (1986). Indeed, records made eight months after a business transaction have been found to fail this foundational requirement of the business records rule. *Standard Textile Co. v. Nat'l Equip. Rental, Ltd.*, 80 A.D.2d 911, 437 N.Y.S.2d 398 (2d Dep't 1981). *See also Matter of Gregory M.*, 184 A.D.2d 252, 585 N.Y.S.2d 193 (1st Dep't 1992), *aff'd* 82 N.Y.2d 588, 606 N.Y.S.2d 579 (1993). Surely, four years is well beyond the scope required.

In sum, Plaintiff's evidence that it is the actual assignee of Defendant's alleged debt to Discover Bank fails to meet basic evidentiary standards for summary judgment for three reasons: (1) the affidavits submitted in support of Plaintiff's motion lack foundation; (2) Plaintiff's proof of assignment does not comply with the best evidence rule; and (3) Plaintiff's proof of assignment does not qualify as a business records exception to the hearsay rule. For these reasons, the Court should reverse the Appellate Division's affirmance of the Supreme Court's order granting summary judgment in favor of Plaintiff.

## CONCLUSION

The Appellate Division decision affirming the trial court's grant of summary judgment to Plaintiff should be reversed for the following reasons:

(1) Pursuant to CPLR § 202, the action was time-barred, because the trial court should have applied Delaware's three-year statute of limitations;

(2) Under New York State's six-year statute of limitations, the lawsuit was untimely, because Discover Bank's unilateral "cashback bonus" issued to Defendant after he had cancelled the card did not extend the time in which to commence the action;

(3) Plaintiff failed to establish standing to commence the lawsuit because it failed to prove that it owns the debt on which it sued.

For these reasons, the decision of the Appellate Division affirming the trial court should be reversed.

Respectfully submitted,

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CIVIL COURT COMMITTEE
CONSUMER AFFAIRS COMMIITEE

By: Janet Ray Kalson

NEW YORK CITY DEPARTMENT OF
CONSUMER AFFAIRS

By: Marla Tepper

Dated: December 22, 2009

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

**AFFIDAVIT OF SERVICE BY MAIL**

BARRY BARON
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STATEN ISLAND, NY 10303, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

**On** DEC 2 3 2009 DEC 23 2009

deponent served the within: **Joint Brief for *Amici Curiae* New York City Bar Association and The New York City Department of Consumer Affairs**

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

**Sworn to before me on** DEC 2 3 2009

Maria Maisonet

**MARIA MAISONET**
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