NEW YORK STATE BAR ASSOCIATION

WORKSHOP D.

Moving Towards Civil Gideon

2014 Legal Assistance Partnership Conference

Hosted by:
The New York State Bar Association
and The Committee on Legal Aid

NYSBA

NEW YORK STATE BAR ASSOCIATION
2014 PARTNERSHIP CONFERENCE

D. DEFENDING AND ASSISTING CONSUMERS IN DEBT COLLECTION LAWSUITS

AGENDA

September 12, 2014
1:30 p.m. – 3:00 p.m.

1.5 Transitional CLE Credits in Skills.
Under New York's MCLE rule, this program has been approved for all attorneys, including newly admitted.

Panelists:
Carolyn E. Coffey, Esq., Supervising Attorney, MFY Legal Services, Inc.
Evan Denerstein, Esq., Staff Attorney, MFY Legal Services, Inc.
Adam Friedl, Esq., Program and Special Initiatives Manager, Pro Bono Net
Matthew Parham, Esq., Staff Attorney, Western New York Law Center

I. Welcome and Introduction	**1:30 pm – 1:35 pm**
II. Vacating Default Judgments	**1:35 pm – 2:00 pm**
III. Evaluating Defenses and Preparing Answers	**2:00 pm – 2:25 pm**
IV. Legal Services Programs for Consumer Debtors and Innovative Use of Technology	**2:25 pm – 2:50 pm**
V. Question & Answer	**2:50 pm – 3:00 pm**

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Substantive Outline

D. DEFENDING AND ASSISTING CONSUMERS IN DEBT COLLECTION LAWSUITS

OUTLINE

I. VACATING DEFAULT JUDGMENTS (*See Appendix 1* for Additional Materials)

A. Procedure

1. Order to Show Cause

   a. It is appropriate to proceed by Order to Show Cause rather than on notice of motion, because C.P.L.R. 5015(a) provides that the Court will direct the form of notice of that shall be provided to the Plaintiff. "This means that the moving party should serve an order to show cause, in which the court may dictate the notice, rather than an ordinary notice of motion. *See* CPLR 2214." 1-24 Weinstein, Korn & Miller, CPLR Manual § 24.05 n.1.

2. Lower Courts

   a. There are no motion fees. Check with the civil clerk about the procedure for return dates and getting the OTSC signed, picked up, and served.

   b. Supreme and County Courts

      i. There is a motion fee ($45) and, assuming (as is usually the case where it is a default judgment being vacated) that no judge has been assigned, a Request for Judicial Intervention (RJI) must be filed with fee paid ($95). Thus, the total cost to make the motion to vacate is $140. For legal services clients these fees can be waived by filing a certification under CPLR 1101(e). Pro se defendants can file a motion for fee waiver, which requires a showing of indigency and merit.

      ii. Check with local attorneys or clerks about the procedure for picking a return date, filing and getting the OTSC signed, returned, and served. The procedure will vary also if the case is E-filed.

B. Grounds

1. Lack of Jurisdiction - CPLR 5015(a)(4)

   a. **Improper Service**

      i. Where service has not been properly made, C.P.L.R. 5015(a)(4) requires that the judgment be unconditionally vacated with no further showing required from the Defendant. The Court has no discretion in the matter. The Court has no discretion in the matter. *See Taylor v. Jones*, 172 A.D.2d 745, 746, 569 N.Y.S.2d 131, 133 (2d Dep't 1991) ("in the event the Supreme Court ultimately determines that jurisdiction over the person of the defendant was not obtained, all of the proceedings would be rendered nullities and the defendant would be entitled to an unconditional vacatur of the default judgment"); *Hitchcock v. Pyramid Cents. of Empire State Co.*, 151 A.D.2d 837, 839, 542 N.Y.S.2d 813, 815 (3d Dep't 1989) ("On a motion to vacate a judgment upon the ground of lack of jurisdiction pursuant to CPLR 5015(a)(4), the court is required to vacate the judgment absolutely and may not impose terms or conditions upon the

vacatur."); *Citibank, N.A. v. Keller*, 133 A.D.2d 63, 64-65, 518 N.Y.S.2d 409, 410-11 (2d Dep't 1987) ("If service had not been duly effected, the court would have no jurisdiction over the defendant and the default judgments would be nullities. Once a movant demonstrates the lack of jurisdiction, a default judgment must be unconditionally vacated."); *Shaw v. Shaw*, 97 A.D.2d 403, 404, 467 N.Y.S.2d 231, 233 (2d Dep't 1983); *see also*, e.g., *2837 Bailey Corp. v. Gould*, 143 A.D.2d 523, 523-24, 533 N.Y.S.2d 34, 35 (4th Dep't 1988) ("Absent proper service to achieve jurisdiction, [a] default judgment is a nullity and must be vacated."); *Ariowitsch v. Johnson*, 114 A.D.2d 184, 185-86, 498 N.Y.S.2d 891, 893 (3d Dep't 1986) ("[T]he issue of whether a defendant has a meritorious defense is irrelevant to the question of whether a judgment should be vacated for lack of jurisdiction."); 10-5015 OSCAR G. CHASE, NEW YORK CIVIL PRACTICE: CPLR para. 5015.10 ("No issue of discretion arises in such an application; a judgment or order granted in the absence of jurisdiction over the defendant is a nullity which must be set aside unconditionally.").

ii. Creditors often reflexively argue that motions to vacate for lack of jurisdiction should be denied for various reasons that clearly apply only to motions made under other CPLRs and not to motions made for lack of jurisdiction. The Defendant is not required to establish a reasonable excuse or a meritorious defense to be entitled to vacatur under C.P.L.R. 5015(a)(4). *See* C.P.L.R. 5015(a)(1) (imposing these requirements only on (a)(1) motions); *Keller*, 133 A.D.2d at 64, 518 N.Y.S.2d at 410 (Supreme Court committed error by addressing issue of reasonable excuse under C.P.L.R. 5015(a)(1) before first having resolved the jurisdictional question under C.P.L.R. 5015(a)(4), which alone required vacatur); *Mayers v. Cadman Towers, Inc.*, 89 A.D.2d 844, 845, 453 N.Y.S.2d 25, 26 (2d Dep't 1985) ("Special Term thus could not properly rule on the excusable nature of defendant's default until it had determined the jurisdictional question."). The Third Department has explained: "the issue of whether a defendant has a meritorious defense is irrelevant to the question of whether a judgment should be vacated for lack of jurisdiction." *Ariowitsch v. Johnson*, 114 A.D.2d 184, 185-86, 498 N.Y.S.2d 891, 893 (3d Dep't 1986); *accord Chase Manhattan Bank, N.A. v. Carlson*, 113 A.D.2d 734, 735, 493 N.Y.S.2d 339, 340 (2d Dep't 1985); *see Shaw v. Shaw*, 97 A.D.2d 403, 404, 467 N.Y.S.2d 231, 233 (2d Dep't 1983) ("The existence of a meritorious defense only becomes significant in determining whether to open a default once it is clear that service has properly been made.").

iii. Similarly, the statute clearly imposes no time limit on a motion based on lack of jurisdiction, and cases hold that where jurisdiction was lacking,

the judgment was a nullity from the beginning and the defendant was "free to 'ignore the judgment, resist it or assert its invalidity *at any and all times*'." *Ross v. Eveready Ins. Co.*, 156 A.D.2d 657, 657, 549 N.Y.S.2d 151, 152 (2d Dep't 1989) (quoting *McMullen v. Armone*, 79 A.D.2d 496, 499, 437 N.Y.S.2d 373, 375 (2d Dep't 1981)); *see State of N.Y. Higher Educ. Servs. Corp. v. Sparozic*, 35 A.D.3d 1069, 1070, 826 N.Y.S.2d 493, 494 (3d Dep't 2006) ("defendant's argument that the judgment is a nullity because personal jurisdiction was never obtained over her must be entertained even at this late juncture" more than 20 years after entry of judgment); *Onondaga County Dep't of Soc. Servs. ex rel. Patricia L. v. Junior L.C.*, 296 A.D.2d 845, 744 N.Y.S.2d 788 (4th Dep't 2002) (reversing denial of motion to vacate nine-year-old default judgment); 10-5015 Oscar G. Chase, New York Civil Practice: CPLR para. 5015.16 ("There is no time limitation in the case of a judgment that is void for lack of jurisdiction."); *see also Berlin v. Sordillo*, 179 A.D.2d 717, 720, 578 N.Y.S.2d 617, 619 (2d Dep't 1992) (laches is no defense to vacatur of default judgment void for lack of jurisdiction); *Federal Nat'l Mortgage Ass'n v. Rick Mar Constr. Corp.*, 138 Misc. 2d 316, 317-20, 523 N.Y.S.2d 963, 964-66 (Sup. Ct. Kings County 1988) (same); 10-5015 Oscar G. Chase, New York Civil Practice: CPLR para. 5015.16 ("There is no time limitation in the case of a judgment that is void for lack of jurisdiction.").

iv. Creditors also often raise other "red herring" arguments, such as that the Plaintiff "substantially complied" with the C.P.L.R. on service, or that the Defendant, even if not properly served, had "actual notice" of the existence of the lawsuit. These are totally irrelevant points as the Court can only obtain jurisdiction through proper service and has no choice but to vacate in the absence of jurisdiction. *.E.g., Saxon Mortgage Servs., Inc. v. Bell*, 63 A.D.3d 1029, 1029, 880 N.Y.S.2d 573, 573 (2d Dep't 2009). It is well established that, "[i]n a challenge to service of process, the fact that a defendant has received prompt notice of the action is of no moment . . . . Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court." *Hartloff v. Hartloff*, 296 A.D.2d 849, 850, 745 N.Y.S.2d 363, 364 (4th Dep't 2002); *see also Parker v. Mack*, 61 N.Y.2d 114, 118-19, 472 N.Y.S.2d 882, 884, 460 N.E.2d 1316, 1318 (1984). And service at an improper location cannot vest the Court with jurisdiction even if the Plaintiff used the utmost diligence in trying, but failing, to properly serve the Defendant. *Burkhardt v. Cuccuzza*, 81 A.D.2d 821, 823, 438 N.Y.S.2d 594, 595 (2d Dep't 1981).

v. Plaintiffs will also often ask that the Court impose conditions on vacatur for lack of jurisdiction, such as payment of a bond. This is patently improper. Where jurisdiction is lacking the Court simply has no power to impose any condition whatsoever on its vacatur. *See Gager v.*

White, 53 N.Y.2d 475, 487, 442 N.Y.S.2d 463, 468, 425 N.E.2d 851, 856 (1981) (where jurisdiction is lacking, "there just is no power to condition the dismissal"); *Hitchcock*, 151 A.D.2d at 839, 542 N.Y.S.2d at 815 ("On a motion to vacate a judgment upon the ground of lack of jurisdiction pursuant to CPLR 5015(a)(4), the court is required to vacate the judgment absolutely and may not impose terms or conditions upon the vacatur."); *McMullen v. Arnone*, 79 A.D.2d 496, 499, 437 N.Y.S.2d 373, 375-76 (2d Dep't 1981) ("On a motion to vacate such a judgment for want of jurisdiction, the court, upon finding as in the instant case that service of process was not made, must vacate the judgment absolutely, and may not impose terms or conditions upon the vacatur."; reversing Supreme Court's order that vacated default on condition that judgment stand as security pending resolution of merits).

vi. **Background – Prevalence of "Sewer Service"**

a) So-called "sewer service" has long been a well-known phenomenon in consumer matters, disproportionately affecting the urban poor. *See, e.g.*, Congress of Racial Equality Legal Department, *Default Judgments in the New York County Civil Court* (1965); James T. Ellis, *Sewer Service and Confessed Judgments: New Protection for Low-Income Consumers*, 6 Harv. C.R.-C.L. L. Rev. 414 (1971) (discussing several federal criminal indictments of process servers for violating defendants' civil rights through sewer service); Stephen L. Dreyfuss, *Due Process Denied: Consumer Default Judgments in New York City*, 10 Colum. J. L. & Soc. Probs. 370 (1974) (same); *New York Hous. Auth. v. Fountain*, 172 Misc. 2d 784 n.9, 792 n.9, 660 N.Y.S.2d 247 n.9, 253 n.9 (N.Y.C. Civ. Ct. 1997) (discussing continued prevalence of "sewer service"); MFY Legal Services, Inc., *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*, June 2008 (same); *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers*, May 2010, at 6 (same).

vii. **Threshold Issues for Any Service**

a) Some process servers are known to have systematically fabricated affidavits of service, e.g. American Legal Process, We Serve It For You Process Serving. It can be useful to Google the company name, and search the NY Attorney General and NYC Department of Consumer Affairs websites.

b) Process served on a Sunday is a nullity (check a calendar!). N.Y. Gen. Bus. Law § 11. Process served on a nonexistent day such as April 31 should probably also be treated as a nullity.

viii. **Challenging CPLR 308(1) Service**

a) Service claimed under C.P.L.R. 308(1) (hand delivery directly to the Defendant) is, for obvious reasons, the most difficult to challenge. Look for discrepancies in the affidavit of service: a description that clearly does not match the Defendant; a vague description combined with other proof that the Defendant was not present (e.g. stamps in passport, employer records) or that the assertion they were present is inherently questionable (e.g. claimed individual service but at defunct address where the person would have no reason to be present). The description may match someone else at the location who was served - this is not proper service.

ix. **Challenging CPLR 308(2) Service**

a) C.P.L.R. 308(2) "substitute" service requires service at a proper location on a proper substitute, combined with timely mailing to a last known address and filing of the affidavit of service. It is often subject to challenge. Furthermore, nowadays C.P.L.R. 308(2) service on a fabricated substitute is probably the most common form of sewer service.

b) Nonexistent Substitute

1)Process servers sometimes swear to have served a fictional person. For example, a defendant who lives alone in an apartment or house will find that the affidavit states that “Jane Doe” his “Co-Tenant” or “Relative” was served. Or a defendant named John Smith may find that, allegedly, “Rebecca Smith,” his nonexistent “Relative,” was served. Often what is really happening is that the server left the papers in the door or on the porch but claimed substitute service instead of affixing because he or she did not have sufficient service attempts.

2)This is nefarious because it is difficult to prove a negative. In addition to the defendant’s affidavit, submit affidavits of the landlord, neighbors, or other tenants of the building stating that there is no such “Co-Tenant” or "Relative," no such person was present at all on the day in question or ever, and the description matches nobody they have seen at the property. Where an alleged “Relative” received service, submit affidavits of actual relatives to the effect that no relative of that name or fitting the description exists. It is probably not enough to just submit a Defendant's affidavit stating that no relative was residing at the property. *Roberts v. Anka*, 45 A.D.3d 752, 846

N.Y.S.2d 280 (2d Dep't 2007) (motion denied because this was a mere conclusory denial insufficient to rebut the affidavit of service).

c) Improper Substitute

1)To be adequate substitute service under C.P.L.R. 308(2), the substitute served must be of "suitable age and discretion." "Suitable age" is not present where a small child is served, but there is no rule against serving a minor and service has been approved on teenagers, the question being whether the child is mature enough to understand the importance of transmitting court papers. *MacGregor v. Piontkowski*, 13 A.D.2d 263, 518 N.Y.S.2d 820 (2d Dep't 1987) (plaintiff failed to sustain burden at traverse hearing to prove that 8- and 13-year old children were of "suitable age and discretion"); *Wells Fargo Bank Minn. v. Roman*, Index No. 12086/04, 2006 N.Y. Misc. LEXIS 110 (Sup. Ct. Richmond County Jan. 11, 2006) (youngest person ever declared suitable substitute was 12 years old; holding 10-year old not of sufficient age for 308(2) service).

2)A sufficient substitute should be capable of understanding the situation and requirement to transmit papers. Some factors could obviously refute this, such as a mental disorder. It has also been held that inability to understand English may support a finding that suitable discretion was lacking. *Nuez v. Diaz*, 101 Misc. 2d 399, 406, 421 N.Y.S.2d 770, 774 (Sup. Ct. Monroe County 1979).

3)Beyond sufficient maturity and understanding, "suitable discretion" further requires that the person to whom process is delivered have a *relationship* of sufficient trust with the Defendant that he or she would be expected to deliver legal process to him or her. *See 50 Court St. Assocs. v. Mendelson & Mendelson*, 151 Misc. 2d 87, 90, 572 N.Y.S.2d 997, 998-99 (N.Y.C. Civ. Ct. 1991) ("Suitable discretion" requires that "the nature of [the substitute's] relationship with the person to be served makes it more likely than not that they will deliver process to the named party. In applying this principle, the courts search for indications that the person served can be counted on to inform the named party of the proceeding.").

4)Thus, if the defendant does not know or has only a tangential relationship with the person served, such as if

process is delivered to a workman doing work in the same apartment building, service is not proper. *See, e.g.*, *Pickman Brokerage v. Bevona*, 184 A.D.2d 226, 226, 584 N.Y.S.2d 807, 807 (1st Dep't 1992) (building porter not of "suitable age and discretion" under C.P.L.R. 308(2)). Moreover, even with a strong relationship between the defendant and the person receiving service, if the relationship is adverse, such as between estranged spouses, service may be held improper because trust was lacking. *See N.Y. v. Chem. Bank*, 122 Misc. 2d 104, 470 N.Y.S.2d 280 (Sup. Ct. N.Y. County 1983) (substitute service on husband did not confer jurisdiction on wife because the two had adverse interests in the matter); *Home Props., L.P. v. Kalter*, 24 Misc. 3d 391, 876 N.Y.S.2d 623 (Dist. Ct. Nassau County 2009) (one spouse could not be substitute served for the other where an order of protection kept them from communicating).

d) Improper Location

1) To be proper service under C.P.L.R. 308(2), service must have been accomplished at the "actual place of business, dwelling place, or usual place of abode" of the Defendant. Even if a proper substitute was served, if the location was improper, there is no jurisdiction over the Defendant.

2) A "last known residence" is not the same thing as a "dwelling place or usual place of abode." It is very common for service to be made at the last address on file with the creditor, even if the Defendant has long since moved from that address. *See, e.g., Federal Home Loan Mortgage Corp. v. Venticinque*, 230 A.D.2d 412, 413, 658 N.Y.S.2d 689, 690 (2d Dep't 1997) (where defendant moved out of prior residence two years earlier, never to return, her new residence has become her "usual place of abode," and substitute service at the former residence is invalid).

3) The closer calls come when the Defendant continues to have some connection to the former address, but no longer resides there. The Court of Appeals held in *Feinstein v. Bergner*, 48 N.Y.2d 234, 239 n.3, 422 N.Y.S.2d 356, 358 n.3, 397 N.E.2d 1161, 1163 n.3 (1979), that process served at the defendant's "last known residence" was invalid absent evidence of the defendant's continuing "permanent and stable" presence at that former residence. There the

defendant had moved from his parent's house to his own residence more than a year before service was putatively made at his parents' house. The Court held that jurisdiction was lacking and the judgment had to be vacated. *Id*. at 241, 422 N.Y.S.2d at 359-60, 397 N.E.2d at 1164.

4)Where the Defendant owns, but does not reside in, the property where service was made, the service is improper. Indeed, the Fourth Department reversed denial of a motion to vacate where the defendant owned, but rented out and did not reside in, the property where plaintiff made substitute service. *Fulton Sav. Bank v. Rebeor*, 175 A.D.2d 580, 580, 572 N.Y.S.2d 245, 245 (4th Dep't 1991) ("The record reveals that defendant leased his residence to tenants two months prior to any attempt to serve him there and that he was not residing there on the date the process server attempted substituted service."). Under such circumstances, affidavits of the new tenants and their leases might be submitted.

5)You should collect as much evidence as possible of the person's actual address at the time of service and, if applicable, of when the person moved from the service address (e.g. leases, deeds, mortgage documents, utility bills or other mail addressed to the Defendant, as well as affidavits of family members or people living at the former and current addresses).

e) Improper Follow Up Mailing

1)The mailing under either C.P.L.R. 308(2) or (4) must be made to the Defendant's "last known address." Failure to do so is a jurisdictional defect. *See*, e.g., *Foster v. Cranin*, 180 A.D.2d 712, 712-13, 579 N.Y.S.2d 742, 742 (2d Dep't 1992) (service not proper where mailing was to incorrect address). Furthermore, the mailing and service must be made within 20 days of each other and failure to do so is a jurisdictional defect. *R.L.C. Investors, Inc. v. Zabski*, 109 A.D.2d 1053, 487 N.Y.S.2d 201 (4th Dep't 1985)

2)The mailing requirement of C.P.L.R. 308(2) is to be "strictly construed" and thus must be strictly complied with. *See*, e.g., *Booth v. Lipton*, 87 A.D.2d 856, 856-57, 449 N.Y.S.2d 289, 290 (2d Dep't 1982) ("[T]his court has repeatedly held that the 'mailing' requirement of CPLR 308 (subd 2) is to be strictly construed . . . ."); *O'Heaney v. O'Heaney*, 80 A.D.2d 46, 48, 437 N.Y.S.2d 811, 812-13

(4th Dep't 1981) ("[A] statute which permits service of process other than by personal service must be strictly construed and faithfully followed.").

3)Where the Plaintiff made some error in addressing the mailing, but asserts that the mailing would have been delivered notwithstanding the error, it is not sufficient to make merely that bald assertion. Rather, the Plaintiff must obtain evidence to this effect from the postal service and present it. Otherwise, a traverse hearing must at the least be held. *See U.S. Bank, N.A. v. VanVliet*, 24 A.D.3d 906, 908, 805 N.Y.S.2d 459, 462 (3d Dep't 2005); *Taft v. Lesko*, 182 A.D.2d 1008, 1008-09, 583 N.Y.S.2d 530, 531 (3d Dep't 1992) (finding jurisdiction only after holding traverse hearing to take testimony from letter carrier); *Brownell v. Feingold*, 82 A.D.2d 844, 844, 440 N.Y.S.2d 57, 58 (2d Dep't 1981) (relying on affidavit of Postmaster in denying motion).

x. **Challenging CPLR 308(4) Service**

a) Insufficient Due Diligence

1)To be proper service under C.P.L.R. 308(4), affixing may be performed only after personal or substitute service under C.P.L.R. 308(1) and (2) has been attempted with due diligence to no avail. New York courts rigidly enforce the requirement of "due diligence." *See, e.g., Scott v. Knoblock*, 204 A.D.2d 299, 300, 611 N.Y.S.2d 265 (2d Dep't 1994); *Fulton Sav. Bank* v.*Rebeor*, 175 A.D.2d 580, 580, 572 N.Y.S.2d 245, 245 (4th Dep't 1991). Indeed, the "due diligence" requirement must be strictly observed because of the reduced likelihood that "nail and mail" service will actually be received. *McSorley v. Spear*, 50 A.D.3d 652, 653, 854 N.Y.S.2d 759, 760-61 (2d Dep't 2008); *State Higher Educ. Servs. Corp. v. Cacia*, 235 A.D.2d 986, 987, 652 N.Y.S.2d 883, 883 (3d Dep't 1997).

2)To satisfy the requirement of "due diligence," the process server must attempt personal or substitute service on a variety of days and at variety of times, sufficiently to render successful service likely regardless of the defendant's habits or schedule. *See, e.g., Austin v. Tri-County Mem. Hosp.*, 39 A.D.3d 1223, 1224, 834 N.Y.S.2d 419, 420 (4th Dep't 2007) (where attempts were on three successive weekdays and all during the afternoon, "due diligence" not shown); *Leviton*, 56 A.D.3d at 732, 868

N.Y.S.2d at 127 ("due diligence" lacking where all three attempts at service were during working hours on various weekdays); *Smith v. Wilson*, 130 A.D.2d 821, 515 N.Y.S.2d 146 (2d Dep't 1987) (due diligence lacking where all attempts were on weekdays, none on weekends, two of three during working hours, and no attempt made to inquire regarding schedule or other locations for service).

3) As a general matter, where three attempts at service are made on consecutive permissible service days, all during business hours, this will not be sufficient due diligence unless the process server made some inquiry that suggested the defendant would be home at those times. *See Austin*, 39 A.D.3d at 1224, 834 N.Y.S.2d at 420. In *Austin*, the attempts at service took place on a Friday and the following Monday and Tuesday, all during working hours. *Id*. The court held that this did not make out the required due diligence. *Cf, e.g., Hanover New England v. MacDougall*, 202 A.D.2d 724, 725, 608 N.Y.S.2d 561, 562 (3d Dep't 1994) (due diligence shown when process server attempted both early morning and early evening service, and spoke with neighbor to ascertain defendant's schedule); *New York State Higher Educ. Servs. Corp. v. Upshur*, 252 A.D.2d 333, 337, 686 N.Y.S.2d 233, 235 (3d Dep't 1999) (due diligence shown where process server attempted service on two weekdays and Saturday, in early morning, mid-day, and early evening, and spoke with a neighbor to ascertain defendant's schedule).

4) Courts have reached different conclusions over the significance of attempts at service being made on a holiday or weekend. Some courts reason that people are most likely to be home then, others note that people are most likely to be out of town or recreating away from home then. Where the only attempts at service occurred either on a holiday weekend or during weekday working hours, some courts have found "due diligence" to be lacking. *Scott v. Knoblock*, 204 A.D.2d 299, 300, 611 N.Y.S.2d 265, 265 (2d Dep't 1994); *Faculty Practice Plan of Long Island Jewish Med. Ctr. v. Guarneri*, 13 Misc. 3d 302, 304-05, 822 N.Y.S.2d 389, 391 (N.Y.C. Civ. Ct. 2006) ("[T]he process server's attempts to serve the defendant during business hours and on a holiday weekend, the absence of any effort or inquiry as to whether defendant was employed

or the location of his place of employment, and the resulting lack of an attempt to serve defendant at his place of employment clearly demonstrate a lack of the exercise of due diligence."); *see also Walker v. Manning*, 209 A.D.2d 691, 691-92, 619 N.Y.S.2d 137, 138 (2d Dep't 1994) (vacating judgment where, *inter alia*, one of three attempts at service was during holiday weekend and another was during weekday working hours). But compare *Dunleavy v. Moya*, 237 A.D.2d 176, 655 N.Y.S.2d 371 (1st Dep't 1997), where the court found due diligence shown where all attempts at service were made on consecutive days over the same holiday weekend (though at various times). *Cf. also, e.g., New York State Higher Educ. Servs. Corp. v. Upshur*, 252 A.D.2d 333, 337, 686 N.Y.S.2d 233, 235 (3d Dep't 1999) (due diligence shown where process server attempted service on two weekdays and Saturday, in early morning, mid-day, and early evening, and spoke with a neighbor to ascertain defendant's schedule).

5) Cases (primarily in the Second and Fourth Departments and not in the First) also hold that the process server should attempt, through inquiry of neighbors or otherwise, to obtain information about the defendant's habits and schedule so as to enable him or her to target a time to attempt service where success is probable. *See Rebeor*, 175 A.D.2d at 580, 572 N.Y.S.2d at 245 (because process server "fail[ed] to make any inquiry of neighbors or others regarding defendant's habits and employment" and failed to attempt service at defendant's place of business, process server "did not exercise due diligence in attempting to serve defendant").

6) There is authority holding that due diligence is lacking if the process server affixes process at a location without having looked for the Defendant at other known locations where he or she might be found. *Burkhardt*, 81 A.D.2d at 823, 438 N.Y.S.2d at 595 (failure to look for defendant at known location where he might be found—his mother's address—rendered service under C.P.L.R. 308(4) improper and required that judgment be vacated). Thus, when a Plaintiff or process server does a background check and obtains various potential addresses for a Defendant, but selects only one at which to attempt service, there may be a

strong argument that any subsequent affixing was improper because not preceded by due diligence.

b) Improper Location

1) As with C.P.L.R. 308(2) service, affixing at a prior, last-known residence as opposed to a dwelling place or usual place of abode is not sufficient to vest the Court with jurisdiction. *Commissioners of State Ins. Fund v. Khondoker*, 55 A.D.3d 525,526, 865 N.Y.S.2d 287, 288 (2d Dep't 2008) ("Since the summons was affixed to the door of the defendant's last known residence rather than his usual place of abode, the purported 'nail and mail' service was ineffective and personal jurisdiction was not acquired over the defendant."); *Tetro v. Tizov*, 184 A.D.2d 633, 635, 584 N.Y.S.2d 893, 894 (2d Dep't 1992); *Fulton Sav. Bank v. Rebeor*, 175 A.D.2d 580, 580, 572 N.Y.S.2d 245, 245 (4th Dep't 1991) (reversing denial of motion to vacate judgment where "[t]he record reveals that defendant leased his residence to tenants two months prior to any attempt to serve him there and that he was not residing there on the date the process server attempted substituted service"); *2837 Bailey Corp.*, 143 A.D.2d at 523, 533 N.Y.S.2d at 35 ("The term 'usual place of abode' may not be equated with the 'last known residence' of the defendant.").

c) Improper Follow Up Mailing

1) Same as 308(2), see above.

d) Nonadhesive Affixing

1) Process must actually be affixed, i.e. nailed, taped, or otherwise attached by an adhesive device. It is a jurisdictional defect if it is found wedged into the door or between the doorway and door, etc.. *PacAmOr Bearings, Inc. v. Foley*, 92 A.D.2d 959, 460 N.Y.S.2d 662 (3d Dep't 1983); *Moran v. Harting*, 161 Misc. 2d 728, 615 N.Y.S.2d 225 (Sup. Ct. Westchester County 1994).

xi. **Traverse Hearings**

a) When Vacatur Must Be Granted without a Traverse Hearing

1) Where the papers alone leave no question that proper service did not occur, such as if the affidavit of service on its face does not make out adequate "due diligence," the judgment should be vacated on the papers alone, and it would be error to order a hearing. *Schwarz v. Margie*, 62 A.D.3d 780, 781, 878 N.Y.S.2d 459, 460 (2d Dep't 2009);

Leviton v. Unger, 56 A.D.3d 731, 732, 868 N.Y.S.2d 126, 127 (2d Cir. 2008).

b) When a Traverse Hearing Must Be Held

1)Where the Defendant and his or her witnesses have specifically (i.e. not just a conclusory statement) refuted material information in the affidavit of service, placing facts affecting the sufficiency of service in dispute, it would be error to deny the motion without at the least holding a traverse hearing. *See Bart-Rich Enters., Inc. v. Boyce-Canandaigua, Inc.*, 8 A.D.3d 1119, 1120, 776 N.Y.S.2d 818, 819 (4th Dep't 2004) ("[T]he court 'improperly resolved the issue of service of process on the basis of conflicting affidavits when a traverse hearing was required.'" (quoting *Ananda Capital P's, Inc. v. Stav Elec. Sys. (1994) Ltd.*, 301 A.D.2d 430, 430, 763 N.Y.S.2d 488, 489 (1st Dep't 2003))); *see also 650 Fifth Ave. Co. v. Travers Jewelry Corp.*, Index No. L&T 75766/10, 2010 N.Y. Misc. LEXIS 5165, at *9-10 (N.Y.C. Civ. Ct. Oct. 21, 2010) ("To warrant a traverse hearing when the process server's affidavit contains the elements of proper service, the rebutting affidavit must specifically contradict something contained in the process server's affidavit."); *LePatner & Assocs. v. Horowitz*, 24 Misc. 3d 187, 192, 882 N.Y.S.2d 829, 833-34 (Sup. Ct. N.Y. County 2009) (traverse hearing held where defendant asserted that at time of purported service defendant was at home and wife supposedly served as substitute was at work and not at home; holding "these specific denials of receipt of service . . . raised issues of fact regarding the validity of service requiring a traverse hearing").

c) Traverse Hearing Procedure

1)Burden of Proof on Plaintiff

(a) At a traverse hearing, the Plaintiff bears the burden to prove by a preponderance of the credible evidence that service was, in fact, made. See *Chaudry Constr. Corp. v. James G. Kalpakis & Assocs.*, 60 A.D.3d 544, 544, 875 N.Y.S.2d 78, 79 (1st Dep't 2009); *Continental Hosts, Ltd. v. Levine*, 170 A.D.2d 430, 430, 565 N.Y.S.2d 222, 222 (2d Dep't 1991); *Stanton v. Velis*, 172 A.D.2d 415, 415, 568 N.Y.S.2d 789, 789 (1st Dep't 1991); *Frankel v. Schilling*, 149 A.D.2d 657, 659, 540 N.Y.S.2d 469,

470-71 (2d Dep't 1989); *Kulpa v. Jackson*, 3 Misc. 3d 227, 324, 773 N.Y.S.2d 235, 241 (Sup. Ct. Oneida County 2004); *Master Navigation Co. v. Great Circle Shipping Corp.*, 86 Misc. 2d 829, 830, 383 N.Y.S.2d 826, 827 (N.Y.C. Civ. Ct. 1976).

2) Affidavit of Service Generally Inadmissible

(a) Absent very limited exceptions, the Plaintiff may not rely on the affidavit of service to bear any part of its burden at the hearing, but rather must present live witness testimony from its process server. CPLR 4531 (affidavit of service admissible only if process server is "dead, mentally ill or cannot be compelled with due diligence to attend"); *Gordon v. Nemeroff Realty Corp.*, 139 A.D.2d 492, 492-93, 526 N.Y.S.2d 595, 596 (2d Dep't 1988).

b. **Other Jurisdictional Defects**

i. **Noncompliance with CPLR 3215**

a) Jurisdictional or Nonjurisdictional Nature of Defect

1) For a long time courts outside the Second Department held that defects in the "proof" of facts submitted to comply with CPLR 3215(f) were jurisdictional in nature, requiring vacatur of judgment and restoration of the action to the calendar for an answer to be served. However, the Court of Appeals in *Manhattan Telecomms. Corp. v. H & A Locksmith, Inc.*, 21 N.Y.3d 200 (2013), held that this was not a jurisdictional defect (siding with the Second Department). This is thus no longer a basis to vacate and obtain permission to answer.

b) Not in Default

1) C.P.L.R. 3215(a) permits entry of a default judgment where "a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed." If the Defendant did not fail to appear, plead or proceed, and so was not actually in default, then the Court lacked jurisdiction to enter a default judgment under C.P.L.R. 3215. *Cooper Lumber Co. v. Masone*, 286 A.D. 879, 879, 142 N.Y.S.2d 562, 563 (2d Dep't 1955) (where default judgment entered before time to answer had expired, "the clerk acted without jurisdiction, [and so] the judgment rendered herein is void."); *see also Geer, Du Bois & Co. v. O.M. Scott & Sons Co.*, 25 A.D.2d 423, 423, 266 N.Y.S.2d

580, 582 (1st Dep't 1966) (where judgment is not "encompassed by [CPLR 3215(a)], . . . the Clerk is without power to act" and so "the judgment thus entered was a nullity and the application to vacate the judgment and open the default should have been granted unconditionally."). *Manhattan Telecom.* is focused only on the 3215(f) issue and does not appear to modify this longstanding rule.

2) A Defendant who serves an answer that is timely or, if untimely, is not rejected, is not in default. With pro se litigants, courts are liberal in construing what constitutes an "answer." For example, where a defendant sends a letter to Plaintiff's counsel or the court that suggests a pro se litigant's perhaps inartful attempt to comply with the obligations imposed by service of the summons, such a letter absolutely must be treated as an answer. *Meyer v. A & B America, Ltd.*, 160 A.D.2d 688, 688, 553 N.Y.S.2d 462, 463 (2d Dep't 1990) (letter must be treated as answer where it was the defendant's "pro se attempt to participate in the action.").

3) A Defendant who misses the deadline to answer may still not be held in default if the Plaintiff retained, and failed to timely reject, the late answer. "Physical retention of a pleading for an extended period of time will almost invariably constitute a waiver of its late service." *Minogue v. Monette*, 138 A.D.2d 851, 852, 525 N.Y.S.2d 961, 962 (3d Dep't 1988) (holding Plaintiff waived the right to reject a late-filed Answer by waiting 45 days to provide written notice of its rejection; collecting authorities); *see also Wittlin v. Schapiro's Wine Co.*, 178 A.D.2d 160, 576 N.Y.S.2d 580 (1st Dep't 1991) (following *Minogue*). As little as three weeks has been held long enough that retention of the late answer for this period waived the right to hold the Defendant in default. *Ruppert v. Ruppert*, 192 A.D.2d 925, 926, 597 N.Y.S.2d 196, 197-98 (3d Dep't 1993) (retention of the answer for "three weeks" (i.e., 21 days) "constituted a waiver of any objection to the late service of the answer."); *see also Lehrer McGovern Bovis, Inc. v. Component Assembly Sys., Inc.*, 266 A.D.2d 94, 95, 698 N.Y.S.2d 648, 649 (1st Dep't 1999) (five weeks retention waived right to hold defendant in default).

ii. **Subject Matter Jurisdiction**

a) A judgment must be set aside unconditionally where the court lacked subject matter jurisdiction to render it. *See Editorial Photocolor Archives, Inc. v. Granger Collection*, 61 N.Y.2d 517, 523, 474 N.Y.S.2d 964, 967, 463 N.E.2d 365, 368 (1984); 10-5015 Oscar G. Chase, New York Civil Practice: CPLR para. 5015.10 ("A judgment or order must also be vacated unconditionally on motion if the issuing court lacked jurisdiction over the subject matter of the action.").

b) This is rare to see in a consumer credit context. A complaint may fall outside the jurisdiction set forth in a court's governing Act (the Uniform City Court Act or New York City Civil Court Act, for example). For example, City Courts outside New York City lack jurisdiction over claims exceeding $15,000. UCCA § 202. The venue provision, UCCA § 213, provides an affirmative defense where neither party has a residence, employment, or office in the City, or residence in a contiguous town, but the statute provides that is not a jurisdictional defect that deprives the court of power to act but, rather, is a defense subject to waiver if not pled or asserted by motion.

c) Specific venue rules applicable to actions on consumer debts are best read as limiting New York courts' subject matter jurisdiction. C.P.L.R. 503(f) provides that in an action arising out of a consumer credit transaction where the alleged debtor is a defendant, venue is proper only in the defendant's county of residence, if the defendant resides within New York State. That this venue defect is actually jurisdictional is made clear by C.P.L.R. 513, which provides that the clerk of court is required to reject, and not accept for filing, a summons and complaint where that filing would violate the venue provision of C.P.L.R. 503(f). *See* 3-513 David L. Ferstendig, New York Civil Practice: CPLR para. 513.00 ("Absent the enactment of CPLR 513, were venue incorrectly designated in an action arising out of a consumer credit transaction, the defendant would have been required to undergo the trouble and expense of making an appearance to contest the propriety of the stated venue. Such a result would frustrate the policy objectives of CPLR 503(f), especially if the plaintiff improperly brought suit in a county far removed from the consumer's place of residence." (internal citation omitted)). The mandatory language of the statute (filing "shall" be rejected) indicates that the rule actually goes to the court's subject-matter jurisdiction. As the Court of Appeals has explained, subject-matter jurisdiction is lacking in circumstances where the Legislature has

declared that a specific court *cannot* entertain an action. *Lacks v. Lacks*, 41 N.Y.2d 71, 75, 390 N.Y.S.2d 875, 878, 359 N.E.2d 384, 387 (1976) (construing *Thrasher v. United States*, 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503 (1967)).

d) The rejection requirement applies where the summons *on its face* fails to comply with the venue provision for consumer credit transactions. This is especially likely to happen near county borders when either a Town or Village spans two counties or where postal mailing addresses use a place name that spans two counties. Even where the violation does not appear on the face of the summons (because an incorrect address, within the county of filing, is given for the defendant), subject matter jurisdiction may be present, but courts have held that the statute requires that the default be vacated and the defendant allowed to answer. *See Empire Nat'l Bank (Bank Americard Division) v. Olori*, 87 Misc. 2d 320, 321, 384 N.Y.S.2d 948, 949 (Sup. Ct. Orange County 1976) ("The foregoing statute is remedial in nature, and vindication of its salutary purpose dictates that defendant be relieved of her default and afforded the opportunity to defend the action on the merits.").

2. **Motions to Vacate That Have Time Limits and Require a Defense - CPLR 5015(a)(1) and 317**

a. Under C.P.L.R. 5015(a)(1), the Court may vacate a default judgment on the ground of "excusable default." This is especially likely to be available where the delay has been brief, the Defendant has substantive defenses, and the Defendant has a plausible explanation for the default.

b. A motion under C.P.L.R. 5015(a)(1) must be brought "within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party." Though commonly described as a "one year from the judgment" rule, the actual language depends on when notice of entry was served, which will always provide more time than this.

c. A motion under C.P.L.R. 317 is timely if brought within five years of entry of judgment and within one year after the defendant learned of the judgment. On a timely motion, C.P.L.R. 317 permits vacatur of a default judgment "upon a finding of the court that [defendant] did not personally receive notice of the summons in time to defend and has a meritorious defense." As the Fourth Department has explained, C.P.L.R. 317's requirement of a lack of personal notice is satisfied any time service was putatively made by means other than hand delivery under C.P.L.R. 308(1), such as where substitute service was purportedly made. *National Bank of N. N.Y. v. Grasso*, 79 A.D.2d 871, 871, 434 N.Y.S.2d 553, 554 (4th Dep't 1980) ("Personal delivery means 'in-hand delivery' and a

default judgment based upon any other form of service of the summons is subject to the ameliorative provisions of CPLR 317." (internal citation omitted)).

d. Both CPLR 5015(a)(1) and 317 require that the Defendant make some showing that he or she is prepared to plead a meritorious defense; and a proposed answer should be submitted with the motion. The Defendant does not have to prove her defense on the motion to vacate. Rather, he or she need only raise and provide factual allegations in support of a defense that would be meritorious if proved. The proof, if necessary, is to come on defense of the merits of the action after vacatur. *See Evolution Impressions, Inc. v. Lewandowski*, 59 A.D.3d 1039, 1040, 873 N.Y.S.2d 405, 406 (4th Dep't 2009); *Chaudry Constr. Corp.*, 60 A.D.3d at 544, 875 N.Y.S.2d at 79.

e. New York courts liberally grant motions to vacate under C.P.L.R. 5015(a)(1) and 317 "because of the strong public policy favoring dispositions on the merits . . . ." *Home Ins. Co. v. Meyers Parking Sys., Inc.*, 186 A.D.2d 497, 498, 589 N.Y.S.2d 322, 323 (1st Dep't 1992); 10-5015 Oscar G. Chase, New York Civil Practice: CPLR ¶ 5015.02 ("New York courts have always been extremely permissive in granting relief from judgments and orders.").

f. There are few hard and fast rules concerning what is and is not a sufficient excuse. The court has broad discretion to make this determination. Generally, a reasonable excuse will be present where the plaintiff, its counsel, or court personnel gave information or advice to the Defendant that led him or her astray into believing that answering was not necessary. Hospitalization covering the period of the delay, or much of it. *State v. Kama*, 267 A.D.2d 225, 699 N.Y.S.2d 472 (2d Dep't 1999).

g. Other situations are less clear cut, and the strength of excuse will be weighed against the length of delay and any prejudice to the plaintiff. Pendency of other actions leading to confusion about which had been answered may be an excuse. *Nemetsky v. Banque Dev. de la Republique du Niger*, 59 A.D.2d 527, 397 N.Y.S.2d 353 (2d Dep't 1977). Being actively engaged in settlement discussions with plaintiff's counsel during the delay, with the latter not seeking to hold the defendant in default until discussions broke down, may be a sufficient excuse. *Emigrant Mort. Co. v. Abbey*, Index No. 4199/2010, 2011 N.Y. Misc. LEXIS 1033 (Sup. Ct. Queens County Mar. 14, 2011). Under some circumstances, a genuine belief that the allegations of the complaint did not relate to the defendant may be a reasonable excuse. *Eisenberg v. Gerald R. Michaels, Inc.*, 58 A.D.2d 641, 396 N.Y.S.2d 48 (2d Dep't 1977). Old age and poor health generally may excuse a brief delay. *Joshua Assocs. v. Klein*, 104 A.D.2d 792, 48- N.Y.S.2d 133 (2d Dep't 1984).

h. Lack of actual notice is clearly a sufficient excuse. Thus where service was technically proper and so conferred jurisdiction, the judgment may be reopened where the Defendant did nto receive actual notice. *See, e.g., Louis Milona & Sons, Inc. v. Marshall*, 159 A.D.2d 279, 552 N.Y.S.2d 281 (1st Dep't 1990);

Charmer Indus., Inc. v. 71 Grand Liquor Corp., 128 A.D.2d 825, 513 N.Y.S.2d 747 (2d Dep't 1987).

3. **Fraud, Mistake, or Other Misconduct**

a. Under C.P.L.R. 5015(a)(3) a judgment or order may be vacated for "fraud, misrepresentation, or other misconduct" of Plaintiff. One circumstance where this provision may certainly be invoked is where the Plaintiff obtains a default judgment against a Defendant who has answered. Plaintiff will inevitably state in papers filed with the court that no answer has been served.

b. Lesser misrepresentations, such as misrepresentations concerning the underlying debt or its status, might support vacatur. If Plaintiff was aware, for example, that a debt was created by an identity thief, such a motion could be made. A party's failure to reveal material information to the Court constitutes misconduct justifying vacatur under C.P.L.R. 5015(a)(3). *Oppenheimer v. Westcott*, 47 N.Y.2d 595, 604, 419 N.Y.S.2d 908, 912, 393 N.E.2d 982, 986 (1979).

c. This motion is akin to a 5015(a)(4) motion in that because the judgment was a nullity from the beginning, no further showing is required and there is no time limit. *Shaw v. Shaw*, 97 A.D.2d 404, 403, 467 N.Y.S.2d 231, 234 (2d Dep't 1983) ("The court will have no part in enforcing a judgment which was procured by a fraud practiced on it. . . . [A] default judgment obtained through extrinsic fraud should be vacated without any requirement that the movant show a meritorious defense. Such a judgment is a nullity, irrespective of the question of merit." (internal citations omitted)).

4. **Good Cause/Interest of Justice**

a. In addition to grounds expressly enumerated in C.P.L.R. 5015, New York courts continue to have the inherent discretionary authority to vacate judgments "for sufficient reason, and in the interest of substantial justice." *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 68, 760 N.Y.S.2d 727, 731, 790 N.E.2d 1156, 1160 (2003).

b. Courts have (rarely) invoked this proposition to hold that a combination of elements none of which alone supported vacatur, taken together, supported vacatur. For example, one court held that where the complaint was legally deficient, the default application failed to comply with C.P.L.R. 3215(f), and the defendant had colorable defenses, the interests of justice supported vacatur. *Rodriguez*, 2006 N.Y. Misc. LEXIS 1517, at *2.

5. **Other Relief**

a. **Stay of Enforcement**

i. It is standard practice to include in the OTSC bringing on a motion to vacate a provision staying all proceedings to collect or enforce the judgment pending determination of the motion. Judges have generally signed off on these provisions and not applied any heightened scrutiny or notice requirements that might accompany a request for a TRO or stay in

other circumstances. *Cf*. 22 N.Y.C.R.R. § 202.7(f) (presumptively requiring advance notice to opposing counsel when seeking a TRO in Supreme or County Court).

b. **Restitution**

i. Under C.P.L.R. 5015(d), where a judgment is vacated, the Court may order the plaintiff to make restitution of amounts obtained through enforcement of the vacated judgment. Otherwise, the plaintiff would be unjustly enriched through retention of moneys collected from the defendant without authority or jurisdiction.

c. **Dismissal Where Jurisdiction Lacking**

i. Where there is a jurisdictional defect and vacatur is appropriate under C.P.L.R. 5015(a)(4), unless the Plaintiff is still within the 120 day period after filing during which service can be made under C.P.L.R. 306-b, the complaint should be dismissed for lack of jurisdiction under C.P.L.R. 3211(a)(8). *See David v. Total Identity Corp.*, 50 A.D.3d 1484, 1485, 857 N.Y.S.2d 380, 382 (4th Dep't 2008) (reversing denial of motion to dismiss for lack of jurisdiction where corporate defendant not served with process, despite defendant's having received notice of the action); *Austin v. Tri-County Memorial Hosp.*, 39 A.D.3d 1223, 1223-24, 834 N.Y.S.2d 419, 420 (4th Dep't 2007) (reversing denial of motion to dismiss where service under C.P.L.R. 308(4) was not proper because there were not due diligence efforts at prior personal or substitute service).

ii. Thus, courts routinely grant motions to dismiss under C.P.L.R. 3211(a)(8) in conjunction with vacating a default judgment for lack of jurisdiction under C.P.L.R. 5015(a)(4). *See Commissioners of State Ins. Fund v. Khondoker*, 55 A.D.3d 525, 526, 865 N.Y.S.2d 287, 288 (2d Dep't 2008) (reversing denial of pro se defendant's motion to vacate and dismiss where location of service under C.P.L.R. 308(4) was improper); *In Ja Kim v. Dong Hee Han*, 37 A.D.3d 662, 662, 830 N.Y.S.2d 345, 346 (2d Dep't 2007) (reversing denial of motion to vacate and dismiss where putative service under C.P.L.R. 308(4) done somewhere where defendant had never lived).

d. **Deemed Service of Answer**

i. Where the relief sought is restoration of the action to the calendar, ask that the proposed answer submitted with the OTSC be deemed filed and served, rather than asking that the defendant be given time to answer. The latter just imposes another meaningless procedural hurdle on the consumer.

II. EVALUATING DEFENSES AND PREPARING ANSWERS (*See Appendix 2* for Additional Materials)

A. Timing for Filing and Answer

1. Served Personally
   a. Defendant has 20 days to file an answer if defendant was personally served. N.Y. C.P.L.R. §§ 3012(a) ("Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds.").
   b. In City Courts outside New York City, a defendant has 10 days to answer if the defendant was personally served. Uniform City Court Act 402(a).
2. Served in another manner
   a. Defendant has 30 days if service was by either delivery to a person of suitable age and discretion or by nail and mail. N.Y. C.P.L.R. §§ 3012(c) ("[I]f service of the summons and complaint is made pursuant to . . . paragraphs two [or] four . . . of section 308 [i.e., "deliver and mail" or "nail and mail"] . . . service of an answer shall be made within thirty days after service is complete."); *see also* N.Y. C.P.L.R. § 308(4) (noting that, for "nail and mail" service, the affixing and nailing must be effected within twenty days of each other, that proof of such service shall be filed with the clerk within twenty days of either such affixing or mailing, whichever is effected later, and that "service shall be complete ten days ofter such filing").
3. Not served, but received notice
   a. Defendant should go to the clerk's office at the court at which he or she is being sued to obtain the summons and complaint and, if possible, the affidavit of service, to determine when the answer or pre-answer motion to dismiss is due.

B. How to Serve and File the Answer

1. A copy of the Answer must be served on the plaintiff's attorneys.
2. If the litigant is *pro se,* this can be done by regular mail, with proof of mailing.
3. The original Answer and proof of service must be filed with the Clerk of the Court.

C. Substance of the Answer: Responding to Allegations in the Complaint

1. **General Denial**
   a. The *pro se* litigant may mark off "general denial" on the answer form.
   b. If the litigant is represented, the attorney may want to go through each paragraph of the complaint and state whether the defendant:
      i. Admits the allegation
      ii. Denies the allegation
      iii. Lacks the knowledge or information sufficient to form a belief as to the truth of the allegation. This has the effect of a denial. In other words, the plaintiff would have to prove any of these allegations if the matter went to trial.
2. **No Personal Jurisdiction – Improper Service**
   a. N.Y. C.P.L.R. § 308 governs service requirements.

b. If service is improper, the defendant can choose to make a pre-answer motion (or Order to Show Cause) or file an Answer containing a personal jurisdiction defense. If an Answer is filed, the defendant must then make a motion to dismiss the case within 60 days of the Answer or the defense is waived. N.Y. C.P.L.R. § 3211 (a)(8),(e).

c. The defense of lack of personal jurisdiction must be raised in the first instance, with the first Answer, or is otherwise waived.

d. It is also possible for the defendant to file an Answer and a motion to dismiss based on lack of personal jurisdiction at the same time.

3. **Identity Theft – Not My Credit Card**

a. It is an affirmative defense that a person being sued did not apply for, receive or use the credit card account in question.

b. New York General Business Law § 514 makes it a statutory defense to a claim of credit card use that such use arose out of the unauthorized use of a credit card that was not delivered to the defendant or that such use arose after the creditor was notified of the unauthorized use.

c. Sometimes in identity theft/mistaken identity situations, the plaintiff will ask the defendant to fill out an "Affidavit of Fraud" so it can confirm that it has the wrong person. It is permissible to have a defendant complete such an affidavit, but is advisable that the defendant not include his or her entire social security number. Also, you should consider agreeing to have the defendant fill out the affidavit only in exchange for a dismissal with prejudice and a promise not to resell the debt.

4. **Mistaken Identity – Similar or Same Name, Different Person**

a. It is an affirmative defense that the person being sued is not the right person, for example, someone else with the same name or someone with a similar name as the defendant.

b. N.Y. G.B.L. § 514 applies here as well.

5. **Disputes the Amount of the Debt**

a. A defendant can assert this defense if he or she believes he or she may owe a debt to the plaintiff, but the amount being sued for is different than what the defendant recalls owing, which is almost always the case.

b. It is permissible to raise this defense even if the defendant thinks the amount being sued on increased because of fees and interest, or if the defendant simply does not remember the exact amount of the debt.

6. **No Debtor/Creditor Relationship – No Credit Card/Contract with Plaintiff**

a. This defense only applies if plaintiff is not the original creditor.

b. More often than not, an "assignee" is suing on an account that it allegedly purchased from the original creditor or another assignee. Where this is the case, the litigant can allege that he or she has no relationship with the party filing the suit. At trial, the creditor would be required to prove (with admissible evidence) that it purchased the account in question, and therefore has standing to bring suit.

c. This is often the strongest defense for defendants in debt buyer cases. If you think it is possible that the plaintiff lacks standing, the defendant can assert this as a defense and request discovery to prove it.

7. **Plaintiff is Not Licensed by the Department of Consumer Affairs as a Debt Collector (For NYC & Buffalo)**

a. N.Y.C. Administrative Code § 20-490 requires every "debt collection agency" to be licensed. Without a license, such an agency cannot lawfully act as a debt collection agency.

b. Buffalo Code § 140.1 requires all collection agencies to obtain a license. Without a license, such an agency cannot lawfully act as a debt collection agency.

8. **Plaintiff Does Not Allege its License Number in the Complaint (For NYC)**

a. Under N.Y. C.P.L.R. § 3015(e), a plaintiff required to be licensed by the New York City Department of Consumer Affairs "shall allege, as part of the cause of action, that plaintiff is duly licensed and shall contain the name and number, if any, of such license and the governmental agency which issued such license."

b. If it is not, the defendant can use this as an affirmative defense. However, this is curable – which means the court can allow a plaintiff to simply serve a new Complaint with the number or to even become licensed while the case is pending.

9. **Statute of Limitations – Claim is Time-Barred**

a. Most credit card and cell phone debt is based in contract law, consequently the statute of limitations ("SOL") generally starts to run from the time of the first missed payment by the defendant. N.Y. C.P.L.R. § 203(a) (2008); *Benson v. Boston Old Colony Ins. Co*., 134 A.D.2d 214 (N.Y.A.D. 1st Dep't 1987) (The general rule is that the statute of limitations in an action on a contract begins to run at the time of breach of the agreement.)

b. As a general rule, if a debtor fails to pay and then makes a payment the SOL will be revived or start to run again. *Lew Morris Demolition Co. v. Board of Education*, 40 N.Y.2d 516, 521 (1976) ("In order that a part payment shall have the effect of tolling a time-limitation period, under the statute or pursuant to contract, it must be shown that there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder").

c. The statute of limitations can vary tremendously based on the type of debt, the underlying contract, and the law of the state under which the cause of action accrued. Often, it can be difficult to tell at the outset of the case what statute of limitations applies. Here are some general guidelines:

i. In New York State, the cause of action on a breach of contract is six years. CPLR § 213. Credit card debts may fall into this category, but a shorter statute of limitations often applies, as explained below.

ii. Contracts for the sale of goods (computers, cars, and some store cards) are governed by the UCC, which has a four year statute of limitations. U.C.C. § 2-725(1) (2004).

iii. Cellular telephone contracts may be governed by the 2-year statute of limitations contained in the federal Telecommunications Act. 47 USC § 415(a).

d. New York State law, C.P.L.R. 202, also provides that when a foreign corporation sues a New York State resident on a claim that accrued outside the state of New York, courts must apply the foreign state's statute of limitations if it bars the claim. Many credit card companies are located in other states, and many of these states have shorter statutes of limitations that would bar the debt. Delaware has a three-year statute of limitations on written contract claims. 10 Del. C. § 8106 (2008). Debts that accrue to a foreign corporation are deemed to accrue in the state where the creditor resides and sustains economic injury. *Portfolio Recovery Associates, LLC v. King*, 14 N.Y.3d 410, 901 N.Y.S.2d 575 (N.Y. 2010). A corporation is said to reside in the state of its principal place of business or its state of incorporation. *Global Financial Corp. v. Triarc Corp*., 93 N.Y.2d 525, 530, 693 N.Y.S.2d 479, 485 (N.Y. 1999).

10. **<u>This Debt Has Been Discharged In Bankruptcy</u>**

a. If the defendant previously declared bankruptcy and this debt was discharged in the bankruptcy, he or she can assert this as a defense. CPLR § 3211(a)(5).

b. A bankruptcy discharge voids any judgment to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt. 11 U.S.C. § 524 (a)(1).

c. It also "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524 (a)(2).

11. **<u>The Collateral (Property) Was Not Sold at a Commercially Reasonable Price</u>**

a. This defense applies where the plaintiff is suing on the deficiency (the difference between the amount the bank sold the collateral for and the value of the collateral), and the plaintiff failed to sell the item (most commonly a car) at a commercially reasonable price. U.C.C. § 9-610.

b. "Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." N.Y. U.C.C. § 9–610(b). "A disposition of collateral is made in a commercially reasonable manner if the disposition is made ... in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." N.Y. U.C.C. § 9–627(b)(3).

c. When a secured party is seeking a deficiency from the debtor, the secured party bears the burden of proving the sale was commercially reasonable. N.Y. U.C.C. § 9–626(a)(2).

d. "The fact that a greater amount could have been obtained by a . . . disposition . . . at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the ... disposition ... was made in a commercially reasonable manner." N.Y. U.C.C. § 9–627(a).

12. **Failure to Provide Proper Notice Before Selling Collateral (Property)**

a. This defense applies where the plaintiff is suing on the deficiency (the difference between the amount the bank sold the collateral for and the value of the collateral), and the plaintiff failed to provide debtor proper notice before selling the collateral (most commonly a car).

b. N.Y. U.C.C. 9-611 requires a secured party who wishes to dispose of collateral under Section 9-610 to send "a reasonable authenticated notification of disposition" to the debtor. The notification must be reasonable as to the manner in which it is sent, its timeliness, and its content. *See also,* Sections 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in consumer-goods transactions).

13. **Failure to Mitigate Damages (Plaintiff Did Not Take Reasonable Steps to Limit Damages)**

a. A party's failure to make reasonable efforts to minimize its damages may be used as a total or partial defense to its requested breach of contract damages.

b. This defense may apply where a landlord is suing for rent arrears and the landlord failed to take reasonable steps to re-let the premises.

c. However, the Court of Appeals has held that there is no duty to mitigate damages, at least in the commercial landlord/tenant context. *Holy Properties Ltd., L.P. v. Kenneth Cole Prods., Inc*., 87 N.Y.2d 130, 133, 661 N.E.2d 694, 696 (1995)

d. Courts since then have generally held that a landlord has no duty to mitigate damages even in a residential context. *See Whitehouse Estates, Inc. v. Post,* 173 Misc.2d 558, 662 N.Y.S.2d 982 (App.Term, 1st Dep't.1997); *Rios v. Carrillo*, 53 A.D.3d 111, 112, 861 N.Y.S.2d 129 (App. Div. 2d Dep't 2008); *Duda v. Thompson*, 169 Misc. 2d 649, 647 N.Y.S.2d 401 (Sup. Ct. Westchester Cty. 1996); but *cf. 29 Holding Corp. v. Diaz*, 3 Misc. 3d 808 (Sup. Ct. Bronx Cty. 2004) ("The concept that a landlord can hold a residential tenant hostage to the terms of a lease, doing nothing and permitting damages to accrue when leased premises are readily marketable, is clearly contrary to common sense, the reasonable expectations of the public, and notion of justice and equity.").

14. **Unjust Enrichment (The Amount Demanded Is Excessive Compared With The Original Debt)**

a. This defense applies where a person receives something of value that he or she does not deserve, at the expense of someone else. *See Citibank, N.A. v. Walker*, 12 A.D.3d 480, 481, 787 N.Y.S.2d 48, 50 (App. Div. 2d Dep't 2004). This defense might apply where the amount of money demanded in the complaint

is much more than the original debt, or where the debtor has already made payments that exceed the amount of the original debt.

15. **Violation of the Duty of Good Faith and Fair Dealing**

    a. There is a duty of good faith and fair dealing implied in every contract in New York. *See Dalton v. Educ. Testing Serv*., 87 N.Y.2d 384, 389, 639 N.Y.S.2d 977, 979 (1995). If the plaintiff breached the contract it is suing on, it is likely the plaintiff also breached its duty of good faith and fair dealing

16. **Unconscionability (The Contract Is Unfair)**

    a. This fact-specific defense applies where the formation of a contract is unfair or oppressive to one party, or where the actual terms of the contract are extremely unfair. *See King v. Fox*, 7 N.Y.3d 181, 191, 818 N.Y.S.2d 833, 840 (2006).

17. **Laches (Plaintiff Has Excessively Delayed In Bringing This Lawsuit To My Disadvantage)**

    a. The laches defense applies if the plaintiff waits an unreasonable amount of time before suing a defendant for the claim, even if within the statute of limitations, which prejudiced or which affected the defendant negatively in some way. *See Saratoga County Chamber of Commerce, Inc. v. Pata*ki, 100 N.Y.2d 801, 816, 766 N.Y.S.2d 654, 662 (2003). The mere lapse of time, without a showing of prejudice, will not sustain a defense of laches. *Id.*

18. **Lack of Personal Jurisdiction under Uniform City Court Act § 213**

    a. Lack of personal jurisdiction under Uniform City Court Act § 213 applies if the defendant does not work in the city where the case was filed and he or she is not a resident of that city or (for all counties except Westchester and Nassau counties), he or she is not a resident of a town next to that city within the same county.

D. Other Considerations

1. Defendant Is In The Military

    a. If the person being sued is in the military, the court will stay the proceedings or appoint counsel to avoid entry of judgment. NY Mil Law §§ 303, 304; 50 USCS § 521.

2. Exempt Income

    a. Whether this is technically a defense is arguable. The wording of 42 U.S.C. § 407 protects benefits provided under the Social Security Act from being "subject to . . . other legal process." It is arguable that a collection action is "other legal process" and should be discontinued if the court makes a determination that the client's sole source of income is exempt under 42 U.S.C. § 407.

    b. However, if it is true, it is worth putting this in the Answer as "additional information." Advise the defendant that even if the debt collector wins, it will not be able to collect on the judgment as long as the defendant's source of income continues to be exempt. Be sure to advise defendants that a judgment is valid for 20 years and that the judgment will affect his or her credit. Note that the Exempt Income Protection Act and federal Treasury Rule protect low-income New

Yorkers who subsist on exempt income directly deposited from having their bank accounts "frozen."

c. Following is a partial list of sources of income that are exempt from most collection efforts:

i. Social Security Benefits (42 U.S.C. § 407)
ii. Social Security Disability Benefits (SSD) (42 U.S.C. § 407)
iii. Supplemental Security Income (SSI) (42 U.S.C. § 407)
iv. Wages of SSI recipients (NY Social Servs. Law § 137-a)
v. Veterans Benefits (38 U.S.C. § 5301(a))
vi. Public Assistance (N.Y. Social Services Law § 137(a))
vii. Wages of Public Assistance recipients (NY Social Servs. Law § 137-a)
viii. Workers Compensation Benefits (NY Workers Comp. Law § 33)
ix. Child Support (CPLR § 5205(d)(3))
x. Unemployment Benefits (N.Y. Lab. Law § 595 (2))
xi. Maintenance (Alimony) (CPLR § 5205(d)(3))
xii. Pensions (CPLR § 5205(c), (d)(1); NYC Admin Code § 13-375).

E. <u>Counterclaims</u>

1. Fair Debt Collection Practices Act

a. There are a number of protections under the FDCPA, which can be found at 15 U.S.C. § 1692a-1692o.

i. 15 U.S.C. § 1692c(b): prohibiting contact with third parties (if a litigant's neighbor, family member, etc. were contacted and informed about the litigant's debt)

ii. 15 U.S.C. § 1692d: prohibiting harassment or abuse (threat of violence, obscene language, causing telephone to ring incessantly with intent to annoy, abuse, harass)

iii. 15 U.S.C. § 1692e: prohibiting false, deceptive or misleading representations (if the debt is older than six years and the collector sues on it, if the collector threatened arrest or imprisonment, false representation that documents do not require action)

b. The court can award actual and statutory damages. Statutory damages are capped at $1,000.

2. General Business Law § 349

a. New York General Business Law § 349 states: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."

b. The litigant can recover actual damages or $50, whichever is greater, or both. The court can also triple the damages up to $1000 if it "finds the defendant willfully or knowingly violated this section." *Id.* There is also a provision for attorney's fees.

III. LEGAL SERVICES PROGRAMS FOR CONSUMER DEBTORS AND INNOVATIVE USE OF TECHNOLOGY (*See Appendix 3* for Additional Materials)

A. Legal Services Programs for Consumer Debtors

1. CLARO (http://claronyc.org)

   a. The Civil Legal Advice and Resource Office (CLARO) program is a limited, legal advice project for unrepresented consumer. The first program started in Brooklyn in 2006, and now operates in Bronx, Erie, Kings, New York, Richmond, Queens, and Westchester counties. Volunteer attorneys and volunteer students at CLARO respond to the needs of *pro se* consumers in consumer credit cases by advising litigants on self-representation strategies and drafting legal papers for them. The CLARO programs operate through the court, bar associations, academic institutions, and legal services organizations.

2. VLFD

   a. Through the Volunteer Lawyer for a Day (VLFD) program, volunteer attorneys provide limited representation for unrepresented consumers in Civil Court in Bronx, Kings, New York, and Queens counties in settlement negotiations and hearings to vacate default judgments. The program is supervised by on-site coordinating attorneys with expertise in consumer law and conducted by the court in partnership with New York County Lawyers' Association, New York Legal Assistance Group and the Brooklyn Bar Association Volunteer Lawyers Program.

B. Overview of Technology and Consumer Law

1. Debt collection is a large volume business in which collectors and attorneys use technology to easily send bulk mailings, file cases and collect on judgments en masse. The growth of the debt collection and debt buying industries has fueled a corresponding explosion in the volume of debt collection litigation, which is overwhelming legal services offices and small claims courts across the country. *See, e.g.*, National Consumer Law Center, *The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts*, 12-16 (July 2010), *available at* http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf; New Economy Project, *The Debt Collection Racket in New York* (June 2013) (hereinafter "Debt Collection Racket"), *available at* http://www.nedap.org/resources/documents/DebtCollectionRacketNY.pdf.

2. As Chief Judge Lippman said in his 2014 Law Day speech: "in the wake of the foreclosure crisis, there is another issue of great importance to the lives of New Yorkers that must be addressed by the justice system – that is the adjudication of well over 100,000 consumer credit lawsuits filed in our state courts every year totaling hundreds of millions of dollars." Speech, Chief Judge of the State of New York Jonathan Lippman, Law Day Remarks: Consumer Credit Reforms, April 30, 2014, at 1-2. Technology has an important role to play in helping to ease this burden on both courts and legal services offices, and to connect consumers directly with valuable resources.

3. **Innovative Use of Technology for *Pro se* Litigants**

   a. Consumers who are sued in debt collection cases tend to be disabled and unsophisticated and overwhelmingly live in low-income neighborhoods. *See,*

e.g., *Debt Deception* at 10 (finding, based on sample of 365 debt buyer lawsuits filed in New York City, that 91% of people sued by debt buyers and 95% of people with default judgments entered against them lived in low- or moderate-income communities). Most consumers cannot afford to hire counsel and are in desperate need of *pro se* assistance. "It is estimated that, at best, no more than twenty percent of low-income New Yorkers' legal needs are met because civil legal services providers lack resources to meet their needs. The chronic lack of free or low-cost legal services has contributed to a crisis of unrepresented litigants in the New York State (NYS) courts." Rochelle Klempner, *The Case for Court-Based Document Assembly Programs: A Review of the New York State Court System's "DIY" Forms*, 41 Fordham Urb. L.J. 1189, 1189 (2014).

b. Different states have taken different approaches to implementing technology solutions to help stretch limited resources and to help the high numbers of unrepresented litigants who need assistance. These solutions range from implementing e-filing in Minnesota to creating a statewide online "triage tool" in New Mexico. *See* James J. Sandman and Glenn Rawdon, *Technology Solutions to Increased Self-Representation*. Legal Services Corporation, 2013. The area of consumer law in particular lends itself to technological solutions, as explained more fully below.

4. **Consumer Website** (http://lawhelpny.org/consumer)

a. One simple way to harness technology is to use the Internet to enhance the availability and accessibility of resources for *pro se* litigants. Because many consumer problems, while potentially devastating, are not overly complicated, fact sheets and guides can be immensely helpful to consumers. These resources educate consumers about their rights, may prevent problems like identity theft, and can assist people with resolving problems. People in New York struggling with consumer problems can visit the dedicated consumer page on lawhelpny.org to access consumer rights videos, do-it-yourself forms, guides, and CLARO clinic information.

5. **Document Assembly**

a. "Do It Yourself" (DIY) programs, which are online document assembly applications help litigants prepare personalized, ready-to-file forms by leading them through a series of simple questions. LawHelp Interactive. New York Courts Enhance Access to Justice for Unrepresented Litigants with LawHelp Interactive. Case Study, 2011. "Technology's exponential growth, its enhanced accessibility and its decreasing costs, has made self-help Document Assembly Programs an ideal mechanism for serving the unrepresented public. Both access to justice and court operations are greatly improved through their use." Document Assembly Programs Best Practices Guide for Court System Development and Implementation Using A2J Author (June 2013) at iii, available at http://www.nycourts.gov/ip/nya2j/pdfs/BestPractices_courtsystemdocument_assemblyprograms.pdf. For example, South Carolina standardized and automated

court-approved child support modification forms and as a result, is "giving parents faster access to the judicial system." LawHelp Interactive. South Carolina Saves Time and Lowers Access Barriers for Parents in Child Support Cases. Case Study, 2013.

6. **Document Assembly in New York State**

   a. Since it implemented online document services in 2009, the New York State Unified Court System has been at the forefront of using DIY programs to generate various legal forms for *pro se* litigants. The court has developed 24 DIY Form programs in various subject areas, including child support, custody, visitation, paternity, estates, guardianship, name changes and housing. *See* Klempner, 41 Fordham Urb. L.J. at 1210. Astonishingly, in 2012, litigants in New York created over *100,000* court documents throughout the state from the programs available. Klempner, 41 Fordham Urb. L.J. at 1204.

7. **Consumer Document Assembly Forms in New York**

   a. In addition to the court's DIY Order to Show Cause to Vacate a Default Judgment in debt collection cases, MFY and Probono.net have developed user-friendly and helpful forms for *pro se* consumers that are tied to early intervention. They include: a debt verification letter; debt collection answer; and a demand for documents. "Fillable forms are an improvement over paper forms because they furnish the user and the court with a legible and neat finished product." Klempner, 41 Fordham Urb. L.J. at 1196.

   b. The online forms are generated based on a person's personal circumstances, and can be tailored to their needs. For example, the content of the debt verification letter is different depending on the consumer's residence because the rules for what is required for verification in New York City are different than the rest of the state. As another example, informing a creditor that one receives exempt income might deter continued collection efforts or even a lawsuit. Although the court has a useful answer form that includes defenses to check off, the DIY Answer form is particularly helpful for *pro se* litigants because many consumers do not understand the defenses listed on the answer form and some do not understand they can mark more than one. Because the program prompts certain answers, a *pro se* litigant can be assured of raising all viable defenses, even without consulting an attorney. In an effort to promote early intervention, the tool is structured to generate a demand for documents relevant to the consumer's case with the answer form, along with instructions for what to do next with the documents.

8. **Consumer Videos** (http://clarovideo.org)

   a. In July 2014, the Feerick Center for Social Justice and New Media Advocacy Project, with help from Probono.net and MFY, launched an innovative animated video for *pro se* consumers facing debt collection lawsuits in New York City Civil Court. The video provides information in an engaging and easy-to-understand multimedia format without legal jargon. The video was designed to be

"modular," meaning that after a short survey, the website generates a series of videos that correlate to the stage of the consumer's case. The videos are intended to provide information on a large scale in a non-intimidating way.

9. **Innovative Use of Technology for Advocates**
   a. NYC Consumer Debt Defense Website (http://probono.net/ny/consumer)
      i. The NYC Consumer Debt Defense website is another collaboration between Pro Bono Net and MFY. It provides news on developing topics, and features a calendar of events, decisions of interest, and podcasts on relevant topics, which are accessible to the public. Portions of the site are only accessible to pre-approved consumer advocates, and feature a centralized location for practice resources, CLE-approved training videos on consumer topics, which are particularly useful for volunteers, and it also houses the informative and helpful New York Consumer Law listserv.
   b. Advocate Consumer Forms
      i. Consumer debt clinics, including the CLARO clinics, serve a critical role in assisting low-income New Yorkers facing consumer debt litigation, with limited resources in the face of growing demand for their services. Using technology to generate letters and legal documents for *pro se* litigants can increase capacity to assist consumers who are further along in the litigation process or who may be facing more complicated substantive or procedural issues. Rather than reinvent the wheel each time, advocates use the program to generate multiple documents; there is a uniformity in what is produced; and for advocates or volunteers who may not be as familiar with consumer law, there is helpful contextual information along the way. Structured court form templates provide a clear structure and workflow for generating documents that allows clinics to confidently deploy volunteers who may lack the experience of a full-time legal services staff attorney. And because the documents that are generated are standardized, they are faster and easier to review.
      ii. The documents that Probono.net and MFY have drafted so far include: an *Answer*, *Demand for Documents*, *Debt Verification Letter*, and *Opposition to Summary Judgment*. Because not all advocates are familiar with all the nuances of consumer law, the program provides streamlined questions, includes built-in red flags, and offers helpful explanations along the way. The program generates a stand-alone Word document that can be reviewed and signed by the consumer as is, or the advocate can edit the document to expand on unique facts or clarify information relevant to the consumer's case. The opposition to summary judgment in particular alleviates the burden on volunteer attorneys of laboriously creating an opposition from scratch—often by hand—and allows them to spend more time helping more consumers.

Appendices

Appendices Table of Contents

Appendix 1

Materials Submitted by

Matthew Parham

Western New York Law Center

Law Offices
Cohen & Slamowitz, LLP

(516) 364-6006
Fax (516) 908-7993

199 Crossways Park Drive
P.O. Box 9004
Woodbury, NY 11797-9004
NYC DCA License No. 1160860

August 19, 2010

CITY COURT OF THE CITY OF BUFFALO
COUNTY OF ERIE
50 DELAWARE AVE
BUFFALO, NY 14202

Re: Original Creditor: SEI/AARON'S INC
Creditor: NORFOLK FINANCIAL CORP.
Alleged Debto[redacted]
Index Numbe[redacted]
C&S File Number: C298536

Dear Sir/Madam:

Please note that we represent the plaintiff in connection with the above referenced matter. Enclosed please find a proposed judgment, in duplicate, an Affidavit of Facts and an attorney affirmation supporting same, for entry with your office.

If the enclosed documents meet with your approval, please enter the judgment on our client's behalf and issue a Transcript of Judgment for filing with the County Clerk's office. We are enclosing a check to cover the costs of issuing the Transcript. Kindly return a copy of the judgment marked "Filed" along with the Transcript to this office. A business reply envelope is enclosed for your convenience.

Your assistance regarding this matter is greatly appreciated.

Very truly yours,

Cohen & Slamowitz, LLP

Encl.
lcjtcov

Buffalo City Court
Civil Judgment

Plaintiff(s):
Norfolk Finanacial Corp.

vs.

Defendant(s):
[redacted]

Index Number: [redacted]

Judgment Issued: On Default

On Motion of:

Cohen & Slamowitz, LLP
199 Crossways Park Drive, PO Box 9004,
Woodbury, NY 11797-9004

Amount claimed	$4,047.50	Index Number Fee	$45.00	Transcript Fee	$6.00
Less Payments made	$0.00	Consumer Credit Fee	$95.00	County Clerk Fee	$10.00
Less Counterclaim Offset	$0.00	Service Fee	$30.00	Enforcement Fee	$86.00
Interest 02/17/2005 at 9%	$2,044.94	Non-Military Fee	$0.00	Other Disbursements	$0.00
Attorney Fees	$0.00	Notice of Trial Fee	$0.00	Other Costs	$0.00
Cost By Statute	$50.00	Jury Demand Fee	$0.00		
Total Damages	$6,092.44	Total Costs & Disbursements	$322.00	Judgment Total	$6,414.44

The following named parties, addressed and identified as creditors below:

Plaintiff creditor(s) and address

(1) Norfolk Finanacial Corp.
1208 VFW Parkway Suite 201, Boston, MA 02132-

Shall recover of the following parties, addresses and identified as debtors below:

Defendant debtor(s) and address

(1) [redacted]
(Mailing) [redacted] Buffalo, NY 14211-

Judgment entered at the Buffalo City Court, Buffalo City Court Building, 50 Delaware Avenue, Buffalo, NY 14202, in the STATE OF NEW YORK in the total amount of **$6,414.44 on 09/29/2010 at 09:40 AM.**

Judgment sequence 1

S. Banks-Williams

Sonia Banks William

Page 1 of 1

CITY COURT OF CITY OF BUFFALO
COUNTY OF ERIE, STATE OF NEW YORK

NORFOLK FINANCIAL CORP.
PLAINTIFF,

-AGAINST-

[redacted]
DEFENDANT.

INDEX NUMBER [redacted]
FILE NO. C298536

DEFAULT JUDGMENT

AMOUNT CLAIMED IN COMPLAINT LESS CREDITS ON ACCOUNT ($0.00)...		$4,047.50
PLUS INTEREST AT 9% FROM February 17, 2005		$2,005.01
		$6,052.51
Costs by Statute	$20.00	
Service of Summons and Complaint	$25.00	
Fee for Index Number	$140.00	
Prospective Execution Fee	$25.00	
Costs taxed at		$210.00
		Total.....$6,262.51

STATE OF NEW YORK, COUNTY OF NASSAU

The undersigned, an attorney at law of the State of New York, the attorney of record for the Plaintiff herein, subscribes and affirms under penalties of perjury, that the disbursements above specified are correct and true and have been or will necessarily be made or incurred herein and are reasonable in amount; that pursuant to the Affidavit of Service of the process server on the file herein, the defendant was served, but have since failed to appear, answer or move herein, and the time to do so has expired so that Plaintiff is entitled to a judgment by default. Pursuant to affidavits of service on file herein, deponent affirms that defendant is not in the military service.

Dated: August 19, 2010

DAVID A. COHEN, ESQ./MITCHELL G. SLAMOWITZ, ESQ.
COHEN & SLAMOWITZ, LLP
199 CROSSWAYS PARK DRIVE, WOODBURY, NY 11797
(516) 364-6006

JUDGMENT ENTERED ON: _____

ADJUDGED that NORFOLK FINANCIAL CORP., Plaintiff, with offices at 20 MCKENNA TERRACE FL 2 BOSTON, MA 02132, recover of [redacted] defendant, residing [redacted] BUFFALO, NY 14211, the sum of $4,047.50 with interest of $2,005.01, making a total of $6,052.51, together with costs and disbursements of $210.00, amounting in all to the sum of $6,262.51 and that the Plaintiff has execution therefor.

_____
CLERK

ID: 87235

CITY COURT OF CITY OF BUFFALO
COUNTY OF ERIE, STATE OF NEW YORK

NORFOLK FINANCIAL CORP.
PLAINTIFF,

-AGAINST-

[redacted]
DEFENDANT.

INDEX NUMBER [redacted]
FILE NO. C298536

AFFIRMATION IN SUPPORT OF ENTRY OF JUDGMENT

David A. Cohen/Mitchell G. Slamowitz, an attorney duly admitted to the practice of law in the State of New York, hereby affirms the following to be true pursuant to CPLR § 2106 and under the penalties of perjury states that:

1. I am a member of Cohen & Slamowitz, LLP, attorneys for the Plaintiff, and I am fully familiar with the facts and circumstances herein.
2. I make this affirmation in additional support of Plaintiff's request for the entry of judgment again[redacted]hereinafter the "Defendant").

ADDITIONAL MAILING

3. On **November 11, 2009**, Deponent caused to be mailed a copy of the summons in separate post-paid envelopes in an official depository of the U.S. Postal Service addressed to each defaulting defendant's last known residence address as set forth below, by first class mail in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof that the communication was from an attorney or concerns an alleged debt. More than 20 days have elapsed and the same has not been returned as undeliverable by the U.S. Postal Service; if same was returned, the copy of the summons was re-mailed to the defendant'(s) last known residence.

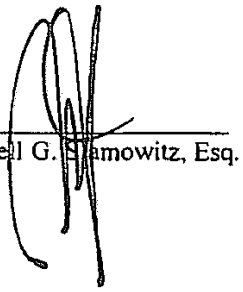
[redacted]
[redacted]UFFALO, NY 14211

STATUTE OF LIMITATIONS

4. Based upon a reasonable inquiry, I have reason to believe that the Statute of Limitations did not expire at the time when this action was commenced.

WHEREFORE, Plaintiff respectfully requests the entry of a default judgment against the Defendant(s).

Dated: August 19, 2010



David A. Cohen, Esq./Mitchell G. Stamowitz, Esq.

CITY COURT OF CITY OF BUFFALO
COUNTY OF ERIE, STATE OF NEW YORK
----------X
NORFOLK FINANCIAL CORP.

PLAINTIFF,

-AGAINST-

[redacted]

DEFENDANT(S).
----------X

INDEX NUMBER [redacted]
FILE NO. C298536

AFFIDAVIT OF FACTS/ NON-MILITARY AFFIDAVIT

STATE OF Massachusetts)
SS:
COUNTY OF Suffolk)

Lenia Driscoll, being duly sworn, deposes and says that:

1. I am an employee of Plaintiff's recovery division. Based upon my personal review of the Plaintiff's records, including electronic data, pertaining to the account referred to herein, I have personal knowledge of the facts and circumstances surrounding this matter. I am authorized to execute this affidavit.
2. My job responsibilities include reviewing and analyzing records of delinquent accounts purchased by Plaintiff. Based upon my personal review of the Plaintiff's records, including electronic data, pertaining to the account referred to herein, I have personal knowledge of the facts and circumstances surrounding this matter.
3. Plaintiff's books and records, including its computer records, were made in the regular course of business, and it is the regular course of Plaintiff's business to make, use, and rely upon said records.
4. Defendant executed and delivered a written credit agreement (the "Note") to Plaintiff's assignor, SEI/AARON'S INC . The Plaintiff thereafter took by assignment from SEI/AARON'S INC all the rights, title and interest to receive the monies due pursuant to and in accordance with the Note.
5. Plaintiff and Plaintiff's assignor, SEI/AARON'S INC , duly performed all conditions on its part pursuant to the Note.
6. Defendant(s) defaulted in payment by failing to make payments pursuant to the Note.
7. The Plaintiff and its assignor, SEI/AARON'S INC , demanded payment from the Defendant, but to date Defendant has failed and continues to fail to pay the balance due.
8. Based upon telephone conversations and business dealings with the Defendant(s), the Defendant(s) are not in the military service.

Wherefore, Plaintiff respectfully requests judgment against Defendant(s) in the amount of $4,047.50 as of February 17, 2005, plus interest from February 17, 2005, together with the costs and disbursements incurred in connection with this action.

Lenia Driscoll
Name: Lenia Driscoll

Sworn to before me on
the 21 day of August, 2009.

1312 French Road, Ste. D
Depew, NY 14043

716-668-2711

DATE	INVOICE #
11/4/2009	20626

BILL TO

Cohen & Slamowitz
Attn: CHRIS PATTERSON
199 Crossways Park Drive
Woodbury, NY 11797-2016

Buffalo	Service on [redacted]	C298536	137399 11/02/09	25.00

CITY COURT OF CITY OF BUFFALO
COUNTY OF ERIE, STATE OF NEW YORK

----------X

NORFOLK FINANCIAL CORP.

PLAINTIFF,

-AGAINST-

[redacted]

DEFENDANT(S).

----------X

CONSUMER CREDIT TRANSACTION

INDEX NUMBER:
C&S FILE NO. C298536 [redacted]

SUMMONS

PLAINTIFF'S ADDRESS:
1208 VFW PARKWAY STE. 201
BOSTON, MA 02132

TO THE ABOVE NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED AND REQUIRED TO APPEAR IN THE CITY COURT OF THE CITY OF BUFFALO, LOCATED AT 50 DELAWARE AVE, BUFFALO, NY 14202, IN SAID CITY, COUNTY OF ERIE, STATE OF NEW YORK, BY SERVING AN ANSWER* TO THE ANNEXED COMPLAINT UPON PLAINTIFF'S ATTORNEY, AT THE ADDRESS STATED BELOW, OR IF THERE IS NO ATTORNEY, UPON THE PLAINTIFF AT THE ADDRESS STATED ABOVE, WITHIN THE TIME PROVIDED BY LAW AS NOTED BELOW;

UPON YOUR FAILURE TO SO ANSWER, JUDGMENT WILL BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT, TOGETHER WITH COSTS OF THIS ACTION.

DATED: August 10, 2009

COHEN & SLAMOWITZ, LLP
ATTORNEYS FOR PLAINTIFF
P.O. BOX 9004, 199 CROSSWAYS PARK DR., WOODBURY, NY 11797-9004
(516) 686-8988; (800) 293-6006 ext. 8988; Refer to C&S File No. C298536

NOTE: THE LAW PROVIDES THAT:
A) IF THIS SUMMONS IS SERVED BY ITS DELIVERY TO YOU PERSONALLY WITHIN THE COUNTY OF ERIE, YOU MUST ANSWER WITHIN TEN (10) DAYS AFTER SUCH SERVICE; OR
B) IF THIS SUMMONS IS SERVED BY DELIVERY TO ANY PERSON OTHER THAN YOU PERSONALLY OR IS SERVED OUTSIDE THE COUNTY OF ERIE, OR BY PUBLICATION, OR BY ANY MEANS OTHER THAN PERSONAL DELIVERY TO YOU WITHIN THE COUNTY OF ERIE, YOU ARE ALLOWED THIRTY (30) DAYS AFTER SERVICE IS COMPLETE WITHIN WHICH TO ANSWER.

* YOU NEED NOT PHYSICALLY GO TO THE COURT TO SERVE AN ANSWER

DEFENDANTS TO BE SERVED:
[redacted] UFFALO NY 14215-1008

THIS COMMUNICATION IS FROM A DEBT COLLECTOR AND IS AN ATTEMPT TO COLLECT A DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

[redacted] ID3465299 PS:SMART SERVE PROCESS SERVING

CITY COURT OF CITY OF BUFFALO
COUNTY OF ERIE, STATE OF NEW YORK

----------X

NORFOLK FINANCIAL CORP.

PLAINTIFF,

-AGAINST-

DEFENDANT(S).

----------X

INDEX NUMBER
C&S FILE NO. C298536

COMPLAINT

PLAINTIFF, BY ITS ATTORNEYS, COMPLAINING OF THE DEFENDANT(S), RESPECTFULLY ALLEGES THAT:

1. PLAINTIFF IS A FOREIGN CORPORATION.

2. UPON INFORMATION AND BELIEF, THE DEFENDANT(S) RESIDES OR HAS AN OFFICE IN THE COUNTY IN WHICH THIS ACTION IS BROUGHT, OR THE DEFENDANT(S) TRANSACTED BUSINESS WITHIN THE COUNTY IN WHICH THIS ACTION IS BROUGHT, EITHER IN PERSON OR THROUGH AN AGENT AND THE INSTANT CAUSE OF ACTION AROSE OUT OF SAID TRANSACTION.

AS AND FOR A FIRST CAUSE OF ACTION

3. PLAINTIFF REPEATS AND REALLEGES EACH AND EVERY ALLEGATION CONTAINED IN THE FOREGOING PARAGRAPHS AS IF MORE FULLY SET FORTH HEREIN.

4. PLAINTIFF'S ASSIGNOR, SEI/AARON'S INC , AND DEFENDANT ENTERED INTO A WRITTEN CREDIT AGREEMENT (HEREINAFTER THE "CONTRACT").

5. THE PLAINTIFF THEREAFTER TOOK BY ASSIGNMENT FROM SEI/AARON'S INC ALL THE RIGHTS, TITLE AND INTEREST IN AND TO THE CONTRACT.

6. PLAINTIFF AND PLAINTIFF'S ASSIGNOR, SEI/AARON'S INC , DULY PERFORMED ALL CONDITIONS ON ITS PART PURSUANT TO THE CONTRACT.

7. DEFENDANT(S) FAILED TO MAKE PAYMENTS AS REQUIRED BY THE CONTRACT.

8. THE PLAINTIFF DEMANDED PAYMENT FROM THE DEFENDANT, BUT TO DATE DEFENDANT HAS FAILED AND CONTINUES TO FAIL TO PAY THE BALANCE DUE.

9. DEFENDANT(S) NOW OWE A BALANCE OF $4,047.50, WITH INTEREST FROM February 17, 2005, NO PART OF WHICH HAS BEEN PAID DESPITE DUE DEMAND THEREFOR.

AS AND FOR A SECOND CAUSE OF ACTION

10. PLAINTIFF REPEATS AND REALLEGES EACH AND EVERY ALLEGATION CONTAINED IN THE FOREGOING PARAGRAPHS AS IF MORE FULLY SET FORTH HEREIN.

11. THAT HERETOFORE, PLAINTIFF OR PLAINTIFF'S PREDECESSOR IN INTEREST RENDERED TO DEFENDANT(S) A FULL AND TRUE ACCOUNT OF THE INDEBTEDNESS OWING BY THE DEFENDANT(S) AS A RESULT OF THE WRITTEN PROMISSORY OBLIGATION, IN AN AMOUNT AS HEREINABOVE SET FORTH, WHICH ACCOUNT STATEMENT WAS DELIVERED TO AND ACCEPTED WITHOUT OBJECTION BY THE DEFENDANT(S) RESULTING IN AN ACCOUNT STATED IN THE SUM OF $4,047.50.

WHEREFORE, PLAINTIFF DEMANDS JUDGMENT AGAINST DEFENDANT(S) IN THE SUM OF $4,047.50 WITH INTEREST FROM February 17, 2005 TOGETHER WITH COSTS AND DISBURSEMENTS.

THE UNDERSIGNED ATTORNEY HEREBY CERTIFIES THAT, TO THE BEST OF HIS/HER KNOWLEDGE, INFORMATION AND BELIEF, FORMED AFTER AN INQUIRY REASONABLE UNDER THE CIRCUMSTANCES, THE PRESENTATION OF THE WITHIN COMPLAINT AND THE CONTENTIONS THEREIN ARE NOT FRIVOLOUS AS DEFINED IN PART 130-1.1 OF THE RULES OF THE CHIEF ADMINISTRATOR.

DATED: AUGUST 10, 2009

YOURS, ETC.
COHEN & SLAMOWITZ, LLP

BY: _____

D. COHEN/M. SLAMOWITZ/L. JOHN, ESQS.
ATTORNEYS FOR PLAINTIFF
P.O. BOX 9004, 199 CROSSWAYS PARK DRIVE, WOODBURY, NY 11797-9004
(516) 686-8988; (800) 293-6006 ext. 8988;
Refer to C&S File No. C298536

SMART SERVE PROCESS SERVING - 1312 FRENCH RD., STE. D., DEPEW, NY 14043 (716) 668-2711

ATTORNEY UCS C298536

BUFFALO CITY COURT

ERIE COUNTY

INDEX # [redacted]

D/O/F 8/21/2009

NORFOLK FINANCIAL CORP.

PLAINTIFF PETITIONER

AFFIDAVIT OF SERVICE

[redacted]

DEFENDANT RESPONDENT

Erie County, New York State; LYNDON YAPLE being sworn,

says: Deponent is not a party herein, is over the age of 18 years and resides in the State of New York.

on 10/28/2009 at 02:13 PM at [redacted] BUFFALO, NY 14211

Deponent served the within SUMMONS AND COMPLAINT BEARING INDEX NO & FILING DATE

On [redacted] DEFENDANT

(Herein after called the recipient) therein named.

SUBSTITUTED SERVICE

By delivering thereat a true copy of each to "JOHN DOE" (CO-TENANT)

a person of suitable age and discretion. Said premesis is defendants actual place of residence within the State.

MAILING

Within 20 days of such delivery, or affixing, deponent enclosed a copy of same in a postpaid envelope properly addressed to defendant at

[redacted] BUFFALO, NY 14211 On 10/30/09

and deposited said envelope in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State. The envelope bore the legend "personal and confidential" and did not indicate on the outside, thereof by return address or otherwise that the communication was from an attorney or concerned an action against the defendant.

2009 NOV -2 PM 12:51

BUFFALO CITY COURT

PHYSICAL DESCRIPTION AS FOLLOWS

MALE	BLACK SKIN	BROWN HAIR	21-35 YRS	5'9-6'0	161-200 LBS

OTHER IDENTIFYING FEATURES BALDING

I asked the person spoken to spoken whether defendant was in active military service of the United States or the State of New York in any capacity whatever and received a negative reply. Defendant wore ordinary civilian clothes and no military uniform. The source of my information and the grounds of my belief are the conversations and observations above narrated.

Sworn to before me on Friday, October 30, 2009

Jillina A. Kwiatkowski
Notary Public - State of New York
Qualified in Erie County
Reg. # 01KW6057316
My Commission Expires 04/16/11

LYNDON YAPLE
AFF. # 137899

FILED:

MAY 0 9 2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

----------X

CITIBANK (SOUTH DAKOTA), N.A.

PLAINTIFF,

-AGAINST-

[redacted]

DEFENDANT(S).

----------X

INDEX NUMBER [redacted]
C&S FILE NO. P016594

COMPLAINT

PLAINTIFF, BY ITS ATTORNEYS, COMPLAINING OF THE DEFENDANT(S), RESPECTFULLY ALLEGES THAT:

1. PLAINTIFF IS A NATIONAL BANKING ASSOCIATION ORGANIZED PURSUANT TO FEDERAL LAW.

2. UPON INFORMATION AND BELIEF, THE DEFENDANT(S) RESIDES OR HAS AN OFFICE IN THE COUNTY IN WHICH THIS ACTION IS BROUGHT, OR THE DEFENDANT(S) TRANSACTED BUSINESS WITHIN THE COUNTY IN WHICH THIS ACTION IS BROUGHT, EITHER IN PERSON OR THROUGH AN AGENT AND THE INSTANT CAUSE OF ACTION AROSE OUT OF SAID TRANSACTION.

AS AND FOR A FIRST CAUSE OF ACTION

3. PLAINTIFF REPEATS AND REALLEGES EACH AND EVERY ALLEGATION CONTAINED IN THE FOREGOING PARAGRAPHS AS IF MORE FULLY SET FORTH HEREIN.

4. PLAINTIFF OFFERED TO OPEN A CREDIT ACCOUNT, ACCOUNT NO. XXXXXXXXXXXX6505 (HEREINAFTER THE "ACCOUNT"), IN DEFENDANT'S NAME.

5. DEFENDANT ACCEPTED THE OFFER BY USING THE ACCOUNT.

6. DEFENDANT DEFAULTED BY FAILING TO MAKE PAYMENTS WHEN DUE.

7. DEMAND FOR PAYMENT OF THE ACCOUNT WAS MADE ON DEFENDANT, BUT DEFENDANT FAILED TO MAKE ALL THE REQUESTED PAYMENTS.

8. AFTER CREDITING DEFENDANT FOR ALL PAYMENTS AND CREDITS, THERE IS NOW DUE AND OWING BY DEFENDANT TO PLAINTIFF THE SUM OF $24,006.10, NO PART OF WHICH HAS BEEN PAID DESPITE DUE DEMAND THEREFOR.

AS AND FOR A SECOND CAUSE OF ACTION

9. PLAINTIFF REPEATS AND REALLEGES EACH AND EVERY ALLEGATION CONTAINED IN THE FOREGOING PARAGRAPHS AS IF MORE FULLY SET FORTH HEREIN.

10. THAT HERETOFORE, PLAINTIFF RENDERED TO DEFENDANT(S) A FULL AND TRUE ACCOUNT OF THE INDEBTEDNESS OWING BY THE DEFENDANT(S) AS A RESULT OF THE ABOVE AGREEMENT, IN AN AMOUNT AS HEREINABOVE SET FORTH WHICH ACCOUNT STATEMENT WAS DELIVERED TO AND ACCEPTED WITHOUT OBJECTION BY THE DEFENDANT(S) RESULTING IN AN ACCOUNT STATED IN THE SUM OF $24,006.10, NO PART OF WHICH HAS BEEN PAID DESPITE DUE DEMAND THEREFOR.

WHEREFORE, PLAINTIFF DEMANDS JUDGMENT AGAINST DEFENDANT(S) IN THE SUM OF $24,006.10 TOGETHER WITH COSTS AND DISBURSEMENTS.

THE UNDERSIGNED ATTORNEY HEREBY CERTIFIES THAT, TO THE BEST OF HIS/HER KNOWLEDGE, INFORMATION AND BELIEF, FORMED AFTER AN INQUIRY REASONABLE UNDER THE CIRCUMSTANCES, THE PRESENTATION OF THE WITHIN COMPLAINT AND THE CONTENTIONS THEREIN ARE NOT FRIVOLOUS AS DEFINED IN PART 130-1.1 OF THE RULES OF THE CHIEF ADMINISTRATOR.

DATED: APRIL 21, 2011

YOURS, ETC.
COHEN & SLAMOWITZ, LLP

BY: _____

D. Cohen/M. Slamowitz/L. John ESQS.
ATTORNEYS FOR PLAINTIFF
P.O. BOX 9004, 199 CROSSWAYS PARK DRIVE, WOODBURY, NY 11797-9004
(516) 686-8983; (800) 293-6006 ext. 8983;
Refer to C&S File No. P016594

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

FORMAL COMPLAINT

CAPITAL ONE BANK (USA), N.A.

PLAINTIFF,

- AGAINST -

[redacted]

DEFENDANT(S).

PLAINTIFF, BY ITS ATTORNEY(S), COMPLAINING OF THE DEFENDANT(S), UPON INFORMATION AND BELIEF, ALLEGES:

1. THAT THE DEFENDANT(S) RESIDES IN THE COUNTY IN WHICH THIS ACTION IS BROUGHT; OR THAT THE DEFENDANT(S) TRANSACTED BUSINESS WITHIN THE COUNTY IN WHICH THIS ACTION IS BROUGHT IN PERSON OR THROUGH HIS AGENT AND THAT THE INSTANT CAUSE OF ACTION AROSE OUT OF SAID TRANSACTION
2. PLAINTIFF IS A NATIONAL BANKING ASSOCIATION.

3. ON INFORMATION AND BELIEF DEFENDANT IN PERSON OR BY AGENT MADE CREDIT CARD PURCHASES AND/OR TOOK MONEY ADVANCES UNDER A CREDIT AGREEMENT AT DEFENDANTS' REQUEST; A COPY OF WHICH AGREEMENT WAS FURNISHED TO DEFENDANT AT THE TIME THE ACCOUNT WAS OPENED.
4. THERE REMAINS AN AGREED BALANCE ON SAID ACCOUNT OF $ 4,210.70

5. DEFENDANT(S) IS IN DEFAULT AND DEMAND FOR PAYMENT HAS BEEN MADE.

INTEREST IS AT THE CONTRACT RATE OF:.0900.

2ND CAUSE/ACTION:PLAINTIFF STATED AN ACCOUNT TO DEFENDANT WITHOUT OBJECTION THAT THERE IS NOW DUE PLAINTIFF FROM DEFENDANT(S) THE AMOUNT SET FORTH IN THE COMPLAINT, NO PART OF WHICH HAS BEEN PAID, ALTHOUGH DULY DEMANDED.

WHEREFORE, PLAINTIFF DEMANDS JUDGMENT AGAINST DEFENDANT(S) FOR THE SUM OF 4,210.70 WITH INTEREST THEREON FROM THE 8 DAY OF JANUARY , 2011, TOGETHER WITH THE COSTS AND DISBURSEMENTS OF THIS ACTION

WE ARE DEBT COLLECTORS; ANY INFORMATION OBTAINED WILL BE USED IN ATTEMPTING TO COLLECT THIS DEBT.

FORSTER & GARBUS LLP
ATTORNEY(S) FOR PLAINTIFF
60 MOTOR PARKWAY
COMMACK, NY 11725

DATED: THE 18 DAY OF JULY , 2011

GLENN S. GARBUS / JOEL D. LEIDERMAN

PURSUANT TO PART 130-1.1-a OF THE RULES OF THE CHIEF ADMINISTRATOR THIS SIGNATURE APPLIES TO THE ATTACHED SUMMONS AND COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

FORMAL COMPLAINT

DISCOVER BANK

PLAINTIFF,

- AGAINST -

[redacted]

DEFENDANT(S).

PLAINTIFF, BY ITS ATTORNEY(S), COMPLAINING OF THE DEFENDANT(S), UPON INFORMATION AND BELIEF, ALLEGES:

1. THAT THE DEFENDANT(S) RESIDES IN THE COUNTY IN WHICH THIS ACTION IS BROUGHT; OR THAT THE DEFENDANT(S) TRANSACTED BUSINESS WITHIN THE COUNTY IN WHICH THIS ACTION IS BROUGHT IN PERSON OR THROUGH HIS AGENT AND THAT THE INSTANT CAUSE OF ACTION AROSE OUT OF SAID TRANSACTION
2. ON INFORMATION AND BELIEF DEFENDANT IN PERSON OR BY AGENT MADE CREDIT CARD PURCHASES AND/OR TOOK MONEY ADVANCES UNDER A CREDIT AGREEMENT - AT DEFENDANTS REQUEST; A COPY OF WHICH AGREEMENT WAS FURNISHED TO DEFENDANT AT THE TIME THE ACCOUNT WAS OPENED.
3. THERE REMAINS AN AGREED BALANCE ON SAID ACCOUNT OF $ 16,926.44
4. PLAINTIFF IS A CORPORATION.
5. DEFENDANT(S) IS IN DEFAULT AND DEMAND FOR PAYMENT HAS BEEN MADE.

2ND CAUSE/ACTION: PLAINTIFF STATED AN ACCOUNT TO DEFENDANT WITHOUT OBJECTION THAT THERE IS NOW DUE PLAINTIFF FROM DEFENDANT(S) THE AMOUNT SET FORTH IN THE COMPLAINT, NO PART OF WHICH HAS BEEN PAID, ALTHOUGH DULY DEMANDED.

WHEREFORE, PLAINTIFF DEMANDS JUDGMENT AGAINST DEFENDANT(S) FOR THE SUM OF 16,926.44 WITH INTEREST THEREON FROM THE 31 DAY OF JANUARY , 2011, TOGETHER WITH THE COSTS AND DISBURSEMENTS OF THIS ACTION

WE ARE DEBT COLLECTORS; ANY INFORMATION OBTAINED WILL BE USED IN ATTEMPTING TO COLLECT THIS DEBT.

FORSTER & GARBUS LLP
ATTORNEY(S) FOR PLAINTIFF
60 MOTOR PARKWAY
COMMACK, NY 11725

DATED: THE 18 DAY OF APRIL , 2011

GLENN S. GARBUS / JOEL D. LEIDERMAN

PURSUANT TO PART 130-1.1-a OF THE RULES OF THE CHIEF ADMINISTRATOR THIS SIGNATURE APPLIES TO THE ATTACHED SUMMONS AND COMPLAINT

JAMESTOWN CITY COURT OF THE COUNTY OF CHAUTAUQUA
STATE OF NEW YORK

DISCOVER BANK,
Index No.

Plaintiff,

vs [redacted]

COMPLAINT

Defendant(s).

PLAINTIFF, by and through its attorneys, Zwicker & Associates P.C., complaining of Defendant(s), respectfully alleges upon information and belief.

FOR A FIRST CAUSE OF ACTION

1. Plaintiff is a FDIC-insured Delaware State Bank.

2. That upon information and belief the Defendant(s) is/are and at all times hereinafter mentioned was a resident of the county where this action is brought.

3. That the Defendant(s) entered into a credit agreement with the Plaintiff consisting of account ending in 9751.

4. That the Defendant(s) breached the terms of the aforementioned agreement.

5. That there is now due and owing to the Plaintiff from the Defendant(s) as a result of the aforementioned breach of the agreement by the Defendant(s), the sum of $8,409.13.

6. That pursuant to the terms of the agreement, Defendant(s) agreed to pay the Plaintiff's reasonable attorney fees if the Defendant(s) breached the aforementioned agreement.

FOR A SECOND CAUSE OF ACTION

7. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "6".

8. That the Plaintiff duly stated an account to the Defendant(s) in the above amount and the same was retained without objection.

9. That by reason thereof, an account was taken and stated between the parties hereto.

FOR A THIRD CAUSE OF ACTION

10. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "9".

11. That the Defendant(s) accepted and retained the goods and or services from the Plaintiff without paying for them.

12. That the Defendant(s) has been unjustly enriched by such acceptance and retaining of goods and services from the Plaintiff without paying for them.

WHEREFORE the Plaintiff, DISCOVER BANK, demands judgment against the Defendant(s) [redacted] for the sum of $8,409.13, plus reasonable attorney fees as allowed for by contract and determined by the court, the costs and disbursements of this action, and for such other and further relief as the Court deems just and proper.

Dated: MAY 0 2 2012

STEVEN P. BANN, ESQ.
JONATHAN P. CAWLEY, ESQ.
ZWICKER &ASSOCIATES, P.C.
Attorneys for Plaintiff
120 ALLENS CREEK ROAD
ROCHESTER, NY 14618
(585)506-9850

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

FORMAL COMPLAINT

CITIBANK (SOUTH DAKOTA), N.A.

PLAINTIFF,

- AGAINST -

[redacted]

DEFENDANT(S).

PLAINTIFF, BY ITS ATTORNEY(S), COMPLAINING OF THE DEFENDANT(S), UPON INFORMATION AND BELIEF, ALLEGES:

1. THAT THE DEFENDANT(S) RESIDES IN THE COUNTY IN WHICH THIS ACTION IS BROUGHT; OR THAT THE DEFENDANT(S) TRANSACTED BUSINESS WITHIN THE COUNTY IN WHICH THIS ACTION IS BROUGHT IN PERSON OR THROUGH HIS AGENT AND THAT THE INSTANT CAUSE OF ACTION AROSE OUT OF SAID TRANSACTION
2. PLAINTIFF IS A NATIONAL BANKING ASSOCIATION.

3. ON INFORMATION AND BELIEF DEFENDANT IN PERSON OR BY AGENT MADE CREDIT CARD PURCHASES AND/OR TOOK MONEY ADVANCES UNDER A CREDIT AGREEMENT AT DEFENDANTS' REQUEST; A COPY OF WHICH AGREEMENT WAS FURNISHED TO DEFENDANT AT THE TIME THE ACCOUNT WAS OPENED.
4. THERE REMAINS AN AGREED BALANCE ON SAID ACCOUNT OF $ 3,887.88

5. DEFENDANT(S) IS IN DEFAULT AND DEMAND FOR PAYMENT HAS BEEN MADE.

2ND CAUSE/ACTION: PLAINTIFF STATED AN ACCOUNT TO DEFENDANT WITHOUT OBJECTION THAT THERE IS NOW DUE PLAINTIFF FROM DEFENDANT(S) THE AMOUNT SET FORTH IN THE COMPLAINT, NO PART OF WHICH HAS BEEN PAID, ALTHOUGH DULY DEMANDED.

WHEREFORE, PLAINTIFF DEMANDS JUDGMENT AGAINST DEFENDANT(S) FOR THE SUM OF 3,887.88
TOGETHER WITH THE COSTS AND DISBURSEMENTS OF THIS ACTION

WE ARE DEBT COLLECTORS; ANY INFORMATION OBTAINED WILL BE USED IN ATTEMPTING TO COLLECT THIS DEBT.

FORSTER & GARBUS LLP
ATTORNEY(S) FOR PLAINTIFF
60 MOTOR PARKWAY
COMMACK, NY 11725

DATED: THE 17 DAY OF MARCH , 2011

GLENN S. GARBUS / JOEL D. LEIDERMAN

PURSUANT TO PART 130-1.1-a OF THE RULES OF THE CHIEF ADMINISTRATOR THIS SIGNATURE APPLIES TO THE ATTACHED SUMMONS AND COMPLAINT

p.3 [redacted] [redacted] Apr 13 11 11:24a

CITY COURT OF THE CITY OF BUFFALO Index No.
COUNTY OF ERIE

CITIBANK (SOUTH DAKOTA) N.A

Plaintiff

[redacted] -against- COMPLAINT (COPY)

Defendant(s)

Plaintiff, by its attorneys, complaining of the defendant(s), alleges:

AS AND FOR A FIRST CAUSE OF ACTION

1. Defendant(s) resides in the county in which this action is brought; or transacted business in the county in which this action is brought in person or through an agent, or this cause of action arose out of said transaction. Plaintiff is not required to be licensed by the NYC Dept of Consumer Affairs because it is a passive debt buyer or the original creditor.
2. Plaintiff is a national bank located in South Dakota.
3. Defendant(s) used a credit card issued by plaintiff and agreed to make payments for goods and services charged and/or cash advances made upon such card.
4. Defendant(s) failed to make the payments due pursuant to such agreement, and $ 7,278.32 is now due and owing to plaintiff from defendant(s), together with interest on $ 7,278.32 from 11/17/10 at the rate of .00 % per annum.

AS AND FOR A SECOND CAUSE OF ACTION

5. Defendant(s) accepted plaintiff's statements without objection.
6. By reason thereof, an account was stated between plaintiff and defendant(s) in the aforesaid amount.

WHEREFORE, plaintiff demands judgment against defendant(s) in the sum of $ 7,278.32, with interest on $ 7,278.32 from 11/17/10 at the rate of .00 % per annum and the costs and disbursements of this action.

Dated: Islandia, New York
DECEMBER 17, 2010

RUBIN & ROTHMAN, LLC
Attorneys for Plaintiff
1787 Veterans Highway
Islandia, N.Y. 11749
(631) 234-1500

Deponent is an attorney associated with Rubin & Rothman, LLC. To the best of deponent's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the summons and complaint or the contentions therein are not frivolous as defined in section 130-1.-(c) of the Rules of the Chief Adm. and the matter was not obtained through illegal conduct or in violation of 22 NYCRR 1200.41-a (DR 7-111).

Dated: DECEMBER 17, 2010 /S/ ADAM V. ACUFF KATHRYN N. ANDREOLLI

WE ARE ATTEMPTING TO COLLECT A DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. THIS COMMUNICATION IS FROM A DEBT COLLECTOR.
NYC DCA LIC. 1249720

Our File No. 0909983 356 44719- 38 F SZA

AFFIDAVIT OF SERVICE

Attorney: KIRSCHENBAUM & PHILLIPS, P.C., 106 East Jericho Turnpike, Mineola NY, 11501, 5167461144 Index No: [redacted]
Court: CITY COURT OF THE CITY OF BUFFALO: COUNTY OF ERIE Date Filed: 11/13/2006

Plaintiff/Petitioner: VELOCITY INVESTMENTS, LLC
Defendant/Respondent: [redacted]

STATE OF NY : COUNTY OF NASSAU ss.:

I, **DIANA LENTZ**, being duly sworn according to law upon my oath, deposes and says, that deponent is not a party to this action, is over 18 years of age and resides in reside in NY State.

On **Nov, 27 2006** at **11:27 AM** at [redacted]**PRIVATE HOUSE), WEST SENECA, NY, 14224**, deponent served the **SUMMONS AND COMPLAINT** upon [redacted] defendant herein known as Recipient.

Said service was effected in the following manner;

[X] AFFIXING TO DOOR. By affixing and taping a true copy of each to the entrance door of said property, which is Recipient's **PLACE OF RESIDENCE** within the state. Deponent was unable, with due diligence to find Recipient or a person of suitable age and discretion thereat, having attempted service at said address on the following notations;

1.) ON 11/24/2006 AT 07:41 AM, 2.) ON 11/25/2006 AT 05:58 PM
3.) ON 11/27/2006 AT 11:27 AM

[X] MAIL COPY. On **THU, Nov, 30 2006,**
after delivery of process was effected, deponent enclosed an additional true and attested copy of same in postpaid envelope addressed to the Recipient at Recipient's **PLACE OF RESIDENCE** in an official depository under the exclusive care of the United States Postal Service within NY State. The envelope bore the Legend "Personal & Confidential" and did not indicate on the outside thereof, by return address or otherwise, that the communication was from an attorney or concerned an action against the Recipient.

[X] NON-MILITARY. I asked the person spoken to if the defendant and/or present occupant was in active military service of the United States or the State of New York in any capacity and received a negative reply. The source of my information and the grounds of my belief are the conversations and observations above narrated. Upon information and belief I aver that the defendant and/or present occupant is not in the military service of New York State or the United States as that term is defined in the statues of New York State or the Federal Soldiers and Sailors Civil Relief Act.

Address confirmed by a neighbor, Jane Doe at [redacted]**WEST SENECA, NY 14224 ERIE .**

I certify that the foregoing statements made by me are true, correct and my free act and deed. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

x Annette Forte
Sworn to before me on **THU, Nov, 30 2006**
ANNETTE FORTE
Notary Public, State of NY
No. 01F06103141, Qualified in MONROE
Commission Expires December 15, 2007

x
DIANA LENTZ
Process Service Agency: American Legal Process
Attorney File#: C702374

CN 45198 CN 45198 CN % 5 % 46461 % 46461

STATE OF NEW YORK
BUFFALO CITY COURT COUNTY OF ERIE
FIA Card Services, N.A.
1000 Samoset Drive
Wilmington, Delaware 19884

Plaintiff,

VERIFIED
COMPLAINT

vs.

[redacted]
Williamsville, New York 14221

Defendant(s).

THIS IS AN ATTEMPT TO COLLECT A DEBT, ANY INFORMATION ACQUIRED WILL BE USED FOR THIS PURPOSE.

Plaintiff for its complaint against the defendant(s) herein, alleges as follows:

FIRST: Plaintiff is a corporation, having a place of business in the County of New Castle, State of Delaware. Plaintiff is a wholly owned subsidiary of Bank of America, N.A.

SECOND: Upon information and belief, the defendant(s) is a resident of the County of ERIE, State of New York.

AS AND FOR A FIRST CAUSE OF ACTION, PLAINTIFF ALLEGES:

THIRD: Upon information and belief, that heretofore and within six years last past, at the specific instance and request of the defendant(s), plaintiff loaned certain monies to defendant(s) amounting to the sum of $6,925.68, and although duly demanded, no part of said sum has been paid by defendant(s) to plaintiff.

BUFFALO
CITY COURT
MAR 22 AM 9:

AS AND FOR A SECOND CAUSE OF ACTION, PLAINTIFF ALLEGES:

FOURTH: Repeats and re-alleges the allegations contained in paragraphs "FIRST" through "THIRD" above

FIFTH: An account has been stated between the parties; the plaintiff has rendered a true and accurate account to the defendant, who has received and retained same without due objection

WHEREFORE, plaintiff demands judgment against the defendant(s) in the sum of $6,925.68 with interest in the amount of $515.64, together with the costs and disbursements of this action.

Dated: January 31, 2011

Relin, Goldstein & Crane, LLP
Adam J. Karns, Esq.
Attorneys for Plaintiff
Office & P. O. Box Address
28 East Main Street, Suite 1800
Rochester, NY 14614
(585) 325-6202

ATTORNEY'S VERIFICATION BY AFFIRMATION

STATE OF NEW YORK
COUNTY OF MONROE) SS:

I, the undersigned, am an attorney admitted to practice in the courts of New York and that: I am the attorney of record, or of counsel with the attorney(s) of record for plaintiff.

I have read the annexed Complaint and know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to alleged on information and belief, and as to those matters, I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following: Correspondence, memoranda and statements of account in deponent's possession.

The reason I make this affirmation instead of plaintiff is because an officer of plaintiff is not within the County of Monroe and deponent is one of the attorneys for said corporation.

I affirm that the foregoing statements are true under penalties of perjury.

Date: January 31, 2011

Adam J. Karns, Esq.
Relin, Goldstein & Crane, LLP
Attorneys at Law
28 East Main Street, Suite 1800
Rochester, New York 14614
(585) 325-6202

SUPREME COURT
COUNTY OF JEFFERSON STATE OF NEW YORK

HOUSEHOLD FINANCE CORPORATION III,

Plaintiff,

vs.

[redacted]

Defendant.

COMPLAINT

Index No.: [redacted]

Plaintiff, as its Complaint against Defendant, alleges that:

1. Plaintiff is a foreign Corporation, licensed to do business as a licensed lender under Banking Law Article 9.

2. Upon information and belief, Defendant resides in the County of Jefferson, State of New York.

3. Plaintiff is a licensed lender under Section 351 of the New York Banking Law and is authorized thereby to charge, contract for and receive interest at the rate set forth in this complaint.

4. On or about July 3, 2007, for good and valuable consideration, Defendant executed and delivered to Plaintiff a Personal Credit Line Account Agreement ("Agreement"), pursuant to which Defendant agreed to pay Plaintiff monthly installments on amounts borrowed under the Agreement plus interest at the contractual rate of 18.5% per annum.

5. Thereafter Defendant took advances under the Agreement.

6. Defendant defaulted under the Agreement by failing to consistently make minimum regular monthly installments due to the Plaintiff. The last payment made by Defendant was on July 16, 2010.

{1191807:}

7. After application of all credits, the principal sum of $8,994.41, together with the accrued interest of $754.33 through November 11, 2010 plus interest on the principal balance from November 12, 2010 at a per diem rate of $4.55, remains due and owing from Defendant to Plaintiff.

WHEREFORE, Plaintiff demands Judgment against Defendant in the principal sum of $8,994.41, together with the accrued interest of $754.33 through N[redacted] interest on the principal balance from November 12, 2010 at a per diem rate of $4.55, plus the costs and disbursements of this action.

Dated: December 28, 2010

By: _____

Jaime Michelle Andrews, Esq.
WOODS OVIATT GILMAN LLP
Attorneys for Plaintiff
Office and Post Office Address:
700 Crossroads Building
2 State Street
Rochester, New York 14614
Tel: 1.888.757.7553 Ext. 8

(1191807:)

RECEIVED
BUFFALO CITY COURT

STATE OF NEW YORK
COUNTY OF ERIE : BUFFALO CITY COURT

2005 DEC -2 AM 10: 47

CONSUMER CREDIT TRANSACTION

THE INSTITUTE OF THE SISTERS OF ST. JOSEPH OF THE DIOCESE OF BUFFALO
c/o 4975 Strickler Rd
Clarence, NY 14031-,

Plaintiff,

vs.

[redacted]
Buffalo, NY 14223,

Defendant(s).

SUMMONS

Index No. [redacted]

TO THE ABOVE-NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED and required to appear in the Buffalo City Court located at 50 Delaware Avenue, Buffalo, NY 14202-, in said City, County of Erie, State of New York, by **serving an answer*** to the annexed complaint **upon Plaintiff's attorney** at the address stated below, or if there is no attorney, upon the Plaintiff at the address stated above, within the time provided by law as noted below; upon your failure to so answer, judgment will be taken against you for the relief demanded in the Complaint, together with the costs of this action.

DATED: November 8, 2005
Williamsville, New York

WILLIAM ILECKI
HORWITZ AND ILECKI
Attorney(s) for Plaintiff
1321 MILLERSPORT HWY STE 101
WILLIAMSVILLE, NY 14221
Erie: (716) 838-4300
Niagara: (716) 693-4529
Fax: (716) 204-9728

NOTE: The law provides that:

(1) If this summons is served by its delivery to you personally within the County of Erie, you must answer within 10 days after such service; or

(2) If this summons is served by delivery to any person other than you personally, or is served outside the County of Erie, or by publication, or by any means other than personal delivery to you within the County of Erie, you are allowed 30 days after service is complete within which to answer.

*You need not physically go to the Court to serve an answer.

This advice pertains to your dealings with me as a debt collector. It does not affect your dealings with the court, and in particular it does not change the time at which you must answer the complaint. The summons is a command from the court, not from me, and you must follow its instructions even if you dispute the validity or amount of the debt. The advice in this portion of the document also does not affect my relations with the court. As a lawyer, I may file papers in the suit according to the court's rules and the judge's instructions. Unless you notify us within thirty (30) days after receipt of this document that the validity of the debt, or any portion of it, is disputed, we will assume that the debt is valid. If you do notify us of a dispute we will obtain verification of the debt and mail it to you. Also, upon your written request within the thirty (30) day period, we will provide you with the name and address of the original creditor if different from the current creditor. The law does not require us to wait until the end of the thirty-day period following first contact with you before suing you to collect the debt. Even though the law provides that your answer to the Complaint may be required to be served in this action within twenty days, no request will be made to the Court for a judgment until the expiration of thirty days after your receipt of this summons. However, if, you request proof of the debt or the name and address of the original creditor within the thirty-day period that begins with your receipt of this summons, the law requires us to cease efforts (through litigation or otherwise) to collect the debt until we mail the requested information to you. Nevertheless, this request may not constitute an Answer under law. You should consult an attorney for advice concerning your rights and obligations in this suit. This is an attempt to collect a debt by a debt collector, and any information obtained will be used for that purpose.

Our file number- 22052479©

STATE OF NEW YORK
COUNTY OF ERIE : BUFFALO CITY COURT

CONSUMER CREDIT TRANSACTION

THE INSTITUTE OF THE SISTERS OF ST. JOSEPH OF THE DIOCESE OF BUFFALO,

Plaintiff,

vs.

[redacted]

Defendant(s).

COMPLAINT

Index No.

ASSIGNED JUDGE:
Hon.

Plaintiff, by Plaintiff's attorneys, HORWITZ AND ILECKI, complaining of the Defendant(s), herein alleges:

FIRST CAUSE OF ACTION

FIRST COUNT

1. Plaintiff is a(n) New York State Corporation with an address as shown in the Summons.

2. Defendant(s) owe Plaintiff the sum of $756.26, together with interest at 9.00% from April 14, 2005, which is the reasonable value and agreed price for certain work, labor and services provided, and/or certain goods, wares and merchandise sold and delivered, to the Defendant(s) by Plaintiff pursuant to the contract or special request or obligation of the Defendant(s) on or about May 31, 2004.

3. Plaintiff has incurred legal expenses including attorneys' fees by the default of the Defendant(s), and is entitled to recover attorneys' fees from the Defendant(s) as provided by the aforementioned agreement.

SECOND COUNT

4. That an account was taken and stated via invoices/statements forwarded from

the Plaintiff to Defendant(s) which showed a balance for the aforementioned debt(s) due and owing by the Defendant(s) to the Plaintiff.

5. The Defendant(s) received and retained said invoices/statements without objection.

WHEREFORE, Plaintiff demands judgment against Defendant(s) as follows:

a. for the sum of $756.26, together with interest at 9.00% from April 14, 2005;

b. for reasonable attorney's fees; and

c. for the costs and disbursements of this action, and for such further relief as this court deems proper.

DATED: November 8, 2005
Williamsville, New York

WILLIAM ILECKI
HORWITZ AND ILECKI
Attorneys for Plaintiff

Our file number- 220524790

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

MFY LEGAL SERVICES, INC.
Consumer Rights Project
June 2008

Summary of Findings and Recommendations

As the third party debt collection industry has grown, the number of Civil Court cases filed in Civil Courts in New York City has skyrocketed. In 2007, 597,912 civil cases were filed, almost three times the number filed in 2000.

MFY Legal Services, Inc. reviewed available computer data on civil court cases filed in the Bronx, Brooklyn, Queens, and Staten Island in 2007. Troubling trends emerged:

- Seven law firms filed 180,177 cases in the four boroughs studied, 30% of the total cases filed
- Of the 180,177 cases filed, only 15,443 (8.57%) defendants appeared in court
- Nine creditors that frequently sue in the Civil Court (comprising 122,166 cases) were reviewed: the percentage of defendants appearing in court ranged from 5.41% to 9.46%
- A review of a random sample of 91 court cases raised serious questions about the propriety of service by process servers hired by plaintiff debt collectors and the accuracy of their records.

In 2007, MFY Legal Services provided advice, counsel and representation to more than 350 clients who were being sued in debt collection cases. Of these, none had been served properly with a summons and complaint and most did not know that a lawsuit had been filed against them until their bank accounts had been restrained.

Default judgments due to improper service wreak havoc on the lives of many of MFY's clients, most of whom have low-income wages or rely solely on Social Security, SSI, Veterans Benefits or pensions for support.

The civil justice system is based on the principle that defendants will have an opportunity to be heard in court before a judgment and action to collect on a purported debt is taken against them. It appears that nine out ten New Yorkers who are sued in the Civil Court of the City of New York are being denied their right to be heard because of possibly illegal process serving practices.

Based on our findings, MFY Legal Services recommends that the New York City Department of Consumer Affairs (DCA), which licenses process servers, strengthen its oversight of process servers by implementing the following policies and practices:

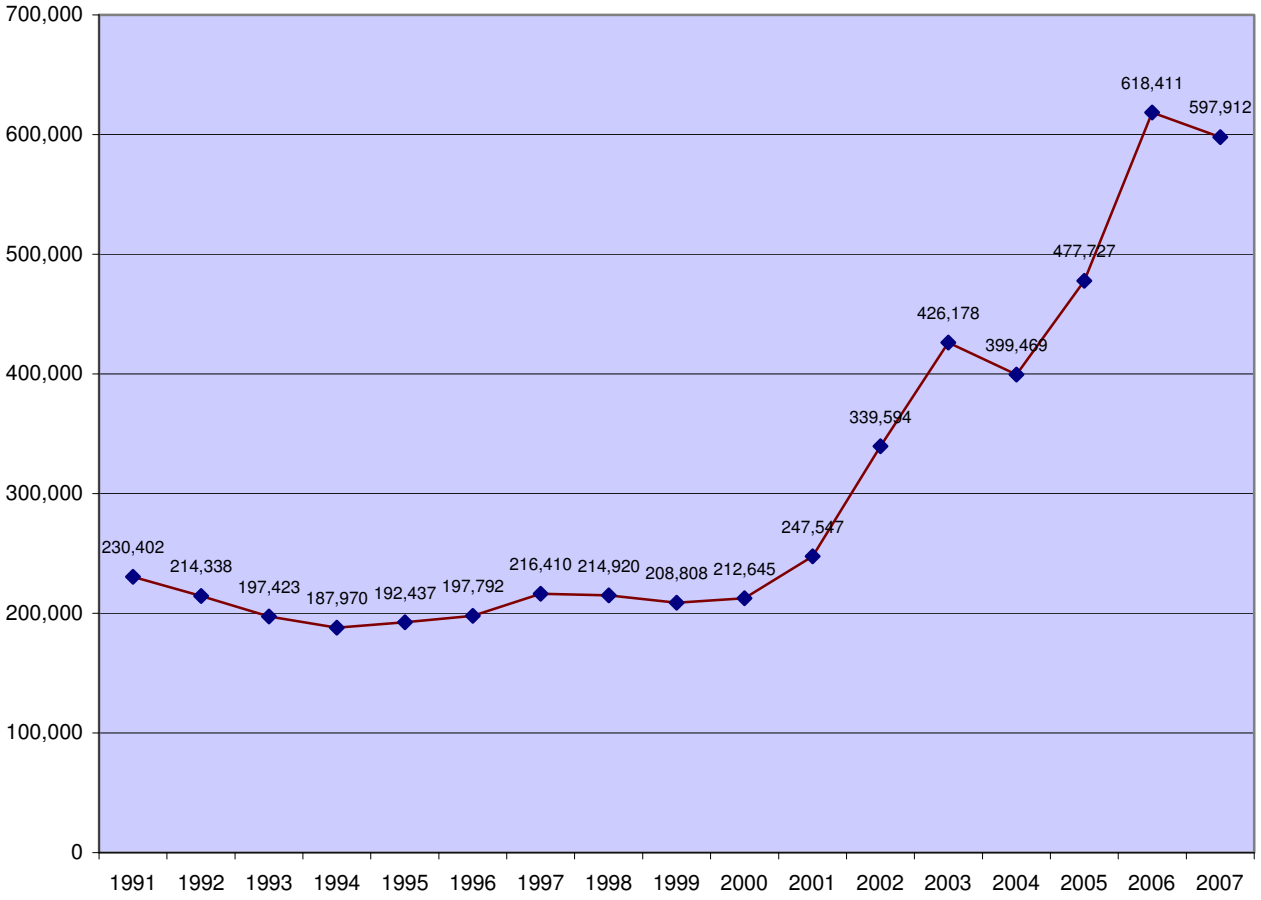
- Conduct comprehensive audits of process server companies and licensed individuals prior to renewal of their license every two years.
- Require process servers to designate DCA as agent for service pursuant to CPLR 318.
- Require record keeping for seven years rather than two years.
- Require process servers to record in their record book how they determined the residence served is the actual residence of a defendant.
- Immediately establish a joint task force with representatives of the Civil Court, DCA, consumer advocates, debt collectors and the process servicing industry to investigate the scope of the problem identified in this Report and to recommend additional solutions.
- Examine the results of the recent amendment to the Uniform Rules for the New York City Civil Court requiring additional notice to defendants in consumer credit transaction cases, and compare those results to affidavits of service filed in those cases.

1. The Data

Growth of Debt Collection Industry

Debt collection is a major growth industry. Debt collectors buy billions of dollars in debt from credit card companies and others each year for pennies on the dollar. Debt collectors earn huge profits even if they collect on only a small percentage of the debt they have purchased. Traditional debt collection practices—contacting the debtor by mail and phone, negotiating and monitoring a payment plan—are labor intensive and time consuming. Over the past five years debt collectors have opted for a quicker approach—filing tens of thousands of lawsuits against alleged debtors. The following chart shows the increase in Civil Court filings in New York City, a large number of which is attributable to consumer debt collection filings:

Cases Filed in the Civil Court of the City of New York
(excluding Landlord/Tenant and Small Claims Court Actions)



Concentration of the Debt Collection Industry in New York City

Close to one-third of all cases filed in Civil Court of the City of New York in 2007 were handled by seven law firms, based on MFY's review of cases filed in Bronx, Kings, Queens and Richmond counties:

Law Firm	Total Cases Filed
Mel S. Harris & Assoc., LLC	43,506
Cohen & Slamowitz, LLP	41,480
Rubin & Rothman,LLC	31,661
Forster & Garbus	30,032
Wolpoff & Abramson, LLP	19,028
Pressler & Pressler	8,647
Eltman, Eltman & Cooper	5,823
Total	**180,177**

Rate of Response by Defendants to Debt Lawsuits

Based on a review of seven law firms and nine creditors MFY commonly encounters in debt collection cases, an appallingly small percentage of defendants appeared in court in response to these lawsuits:

Seven Law Firms Reviewed

Law Firm	Total No. of Cases Filed	Total No. of Defendants Appearing in Court	Percentage of Defendants Appearing in Court
Pressler & Pressler	8,647	519	6.00%
Cohen & Slamowitz, LLP	41,480	2,836	6.84%
Eltman, Eltman & Cooper	5,823	454	7.80%
Mel S. Harris & Assoc., LLC	43,506	3,808	8.75%
Rubin & Rothman, LLC	31,661	2,941	9.29%
Forster & Garbus	30,032	2,866	9.54%
Wolpoff & Abramson, LLP	19,028	2,019	10.61%
Total	**180,177**	**15,443**	**8.57%**

Nine Creditors Reviewed

Creditor	Total No. of Cases Filed	Total No. of Defendants Appearing in Court	Percentage of Defendants Appearing in Court
Metro Portfolio	2,700	146	5.41%
Midland Funding	26,998	1,698	6.29%
Crown Asset	399	28	7.02%
Capital One Bank	32,088	2,360	7.35%
Erin Capital	6,011	452	7.52%
RJM Acquisitions	1,340	103	7.69%
LR Credit	30,635	2,525	8.24%
Palisades	10,376	884	8.52%
LVNV Funding LLC	11,619	1,099	9.46%
Total	**122,166**	**9,295**	**7.61%**

How a Defendant Is Served with the Summons and Complaint Appears to Depend on the Process Serving Company

A review by MFY of court files from the Civil Court in Queens and Kings counties show questionable patterns in the way process servers allegedly serve summons and complaints in consumer debt collection cases:

Process Serving Company	No. of Defendants in Sample Who were Allegedly Served	Service by "Nail and Mail"	Service Upon a Person of Suitable Age and Discretion	Service Upon the Defendant by Personal Delivery to Him or Her
Company No. 1	30	17%	83%	0%
Company No. 2	27	93%	7%	0%
Company No. 3	34	18%	64%	18%

The Courts Are Conducting Few Hearings to Test Improper Service by Process Servers

When defendants appear in court and say they were not properly served with the summons and complaint, the court must conduct a hearing to determine whether it has "jurisdiction" to proceed with the lawsuit. This hearing is called a "traverse hearing." While defendants may waive a traverse hearing and proceed in court to defend their case, MFY has assisted clients who say they were discouraged either by plaintiffs' attorneys or others from asserting their right to a hearing. Because many debt collection cases concern disputes that are past the statute of limitations, MFY has observed that many plaintiffs with old lawsuits would be permanently barred from re-filing their cases if defendants in these cases had asserted their right to a traverse hearing and won. The number of traverse hearings conducted in the Civil Court, in light of the apparent low rate of proper service of the summons and complaint by process servers, is surprisingly low.

County	No. of Traverse Hearings Scheduled by the Court
Bronx (September 24, 2007 to May 22, 2008)	0
Kings (March 13, 2007 to May 22, 2008)	90
Queens (June 4, 2007 to May 22, 2008)	53
Richmond (November 13, 2007 to May 22, 2008)	0

The exceptionally low rate of response by defendants to debt lawsuits raises serious questions. Do over 90% of New Yorkers being sued for debt simply ignore legal notices? While a handful of defendants might inadvertently ignore a legal notice, after 45 years of practice, MFY Legal Services has found that New Yorkers take legal notices seriously and respond by going to court or contacting an attorney for advice and assistance. MFY's own experience in the consumer law arena shows that the defendants do not appear in court because they are unaware of the lawsuit due to improper service.

2. Process Serving

New York State's Statute Regarding Service

CPLR § 308 states the various methods that personal service of a summons upon a natural person may be effected. Specifically, service may be made by:

- Personal Service CPLR § 308(1): "by delivering the summons within the state to the person to be served;" or
- Substitute Service CPLR § 308(2): "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served," and by mailing the summons to the person to be served at his or her last known residence or actual place of business; or by
- "Nail and Mail" CPLR § 308(4): where service under the first two options cannot be made with "due diligence," service may be effected by "affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode" of the person to be served, and by mailing the summons by first class mail.

Process Servers Rarely Make Personal Service

In order to understand the cause of the exceptionally low rate of response by defendants to lawsuits, MFY staff examined a random sample of 91 consumer debt collection court files to determine the method of service. In a preliminary test, we reviewed court files of cases filed in Queens and Kings counties. Because collection companies tend to purchase a large number of index numbers at a time, we attempted to look at multiple cases handled by the same process serving company. MFY picked three process serving companies at random. The files indicate that personal service was rarely made. Service to a person of suitable age and discretion accounted for 54 percent of the cases, while "nail and mail" service was the standard practice in 40 percent of the cases, and personal service comprised only 6 percent.

Notably, process servers for two of the companies did not make personal service on any defendants, while one company managed to do so only in 18 percent of cases. Further, the type of service effected by one company in 93 percent of its cases was by "nail and mail," while another process server company served defendants by leaving the summons and complaint with a person of suitable age and discretion in 83 percent of cases.

MFY doubts the accuracy of many of the 91 affidavits it reviewed. For example, one process server almost exclusively served papers by delivering them to a person of suitable age and discretion rather than to the defendant, and in 90% of the cases the person allegedly accepting the papers was a woman. This suggests that some of the 91 affidavits of service were false. Further, in cases handled by MFY almost none of our clients ever were served with a summons and complaint in their debt collection lawsuits. In these cases, our clients provided us with convincing evidence that the process server affidavits were false. A very small fraction of MFY's consumer clients are served personally. Many defendants are served at former addresses, or addresses at which they have never lived, while others, for whom the process servers have the correct address, never received court papers through substituted service or even via the mail. Time and time again, consumers are notified of lawsuits when their bank accounts are frozen, or when they check the public records section of their credit reports and find out a default judgment has been entered against them. A review of the affidavits of service in these cases reveals service effected at former addresses, or on

individuals of suitable age and discretion, who are alleged "co-tenants" or "relatives" of the defendant, but who are not people the defendant knows.

The legal solution to challenge process server affidavits is for judges to conduct traverse hearings. However, often when a defendant files a motion to dismiss the action based on lack of personal jurisdiction due to improper service—and almost always when the defendant is represented by MFY— plaintiff creditors choose to dismiss or discontinue the case, rather than defend service. In fact, according to the Office of Court Administration, only 90 traverse hearings were scheduled from March of 2007 through May of 2008 in Kings County, and 53 hearings were scheduled in Queens from June of 2007 through May of 2008. Even more surprising, there were no reported traverse hearings in the Bronx from September 2007 through May 2008, and no hearings scheduled in Richmond County from November of 2007 through May of 2008. Further, even when scheduled, the vast majority of these hearings did not take place.

The Civil Court should be commended for recently amending the Uniform Rules for the New York City Civil Court to improve notice of lawsuits to defendants in consumer credit transaction cases before default judgments are entered. When they file proof of service, plaintiff creditors now must also submit to the clerk a notice and a pre-printed, stamped envelope addressed to the defendant, with the return address of the Court where the case is filed. The notice, in English and Spanish, states that a summons and complaint have been filed, and that judgment may be granted against the defendant if he or she does not appear in court. MFY's experience with this new initiative is so far positive, as several of our clients have reported receiving the notice, alerting them to the fact that a lawsuit has been filed. However, additional notice is not a substitute for proper service as required by law, and the rule change provides no remedy to the court's lack of personal jurisdiction over defendants when they are improperly served, or not served at all.

3. Case Studies

MFY's consumer debt cases follow a predictable pattern: a client only learns that a lawsuit has been filed and a default judgment issued when he or she attempts to withdraw money from a bank or use a debit card. Debt collection companies employ sophisticated technology to quickly issue information subpoenas to all banks in the city in order to find the bank account of the defaulted defendant. A frozen bank account wreaks havoc on the lives of low-income New Yorkers, and in many cases their bank accounts contain only Social Security income or other monies that are not even collectable. The following cases illustrate the trauma and hardship caused when improper service unleashes a devastating chain of events.

Victor A., 68, of Manhattan, is a blind, disabled senior citizen whose only source of income is Social Security and SSI. His first notice of a lawsuit against him by a debt buyer was when he attempted to withdraw money from an ATM to pay for medication and learned that two of his bank accounts had been frozen. He was unable to buy the medication, which he needed for a follow-up procedure to an operation for colon cancer. He also was unable to pay his rent for the month, and could not pay his bills. The affidavit of service stated that a person of suitable age and discretion, "John Doe- co-tenant," had been served at his address. Mr. A lives alone and only leaves the house with the help of a home attendant, and knows nobody who fit the description of the "co-tenant" supposedly served. His bank account was frozen for weeks until MFY convinced the debt collection attorney to release his account by sending them proof of his only source of income.

Jane X., 39, of Manhattan, is a slight, Caucasian woman of Eastern European ancestry who lives on the Upper West Side. She first learned of a lawsuit against her by a debt buyer when her bank account was frozen and she was unable to withdraw money out of an ATM. The affidavit of service

filed in the action stated that she was served personally and described her as an heavy-set African American woman. MFY advised her to file an order to show cause to have the judgment vacated based on the obvious failure to serve her with the summons and complaint.

Dorothy Y., 70, of Manhattan lives in senior housing and her only source of income comes from her Social Security benefits. She first learned of a lawsuit against her on an old Chase card when she received a letter from her bank, informing her that her account had been frozen. Because she had no access to her funds, she was unable to pay bills or her rent on time. The action had been filed in Queens County Civil Court, and the affidavit of service stated that she had been served at an address in Queens from which she had moved seven months earlier. The affidavit of service did not specify which apartment had been served, but described a person of suitable age and discretion whom Ms. Y. did not know or recognize. The case was put on for a traverse hearing three times, but inexplicably adjourned, requiring Ms. Y to keep coming back from Manhattan to appear in Queens. MFY finally represented her at the third scheduled traverse hearing, and the action was dismissed after the hearing.

Chen Z., 35, of Manhattan, discovered that he had been sued by Capital One in 1994 only when he returned from a short trip to China in 2007 and discovered that his bank account was frozen and a City Marshal had remitted the funds to the attorney for Capital One. The affidavit of service stated that he had been served in 1994 at an address where his sister had once lived, but where he had never resided. The summons and complaint had allegedly been taped to the door, and the address had supposedly been confirmed by a "Ms. Lee" whom he did not recognize and whom his sister did not know. Because it was such an old case, he had to wait months to get his bank account released while he waited for the file to be requisitioned from the Civil Court. In the meantime, he depended on his friends and family to support him while he had no access to his bank accounts.

Tracy C., 40, of Manhattan is a single mother working two jobs to support her son. She first learned of a lawsuit against her by Capital One when she was at the checkout counter at Pathmark, buying groceries, and tried to use her debt card. The affidavit of service in the case stated that she had been served at her apartment by affixing the summons and complaint to her door. It further stated that the address was confirmed by an unnamed neighbor with no description, and that the process server confirmed Ms. C.'s apartment by seeing her name on the door. Ms. C. does not have her name on her door for privacy reasons, and does not know her neighbors. Ms. C. filed an order to show cause, but in the meantime, while the motion was pending, she had no access to her funds and could not pay her bills, rent or her son's expenses.

Christina K., 37, of Chicago, Illinois, first learned of a lawsuit filed against her in 2007 in New York County Civil Court when she tried to use an ATM in Chicago and found that her account had been frozen. The affidavit of service filed in the case stated that a person of suitable age and discretion had been served at an address in New York that she had not lived at in over ten years. Because she was in Chicago, she had a difficult time finding legal assistance in New York, and her bank account remained frozen for weeks. MFY agreed to assist her in sending proof of her address at the time of service to the Plaintiff's lawyers, and eventually they agreed to dismiss the case against her.

George M., 57, of Manhattan, became disabled and unable to work approximately four years ago; he is now homebound because he is unable to walk without great difficulty. He discovered that a judgment had been entered against him by a debt buyer when his bank account was frozen. The affidavit of service states that the process server served Mr. M. via substitute service by delivering the summons and complaint to a woman in his home. However, Mr. M. does not know of anyone with the woman's name, or who fits the physical characteristics described in the affidavit. Because he is homebound and rarely leaves his apartment, Mr. M. is fairly certain he was home on the day he was allegedly served. As a result

of this improper service and subsequent freezing of his bank account, Mr. M. had to borrow money from his son to pay his rent and bills. MFY represented Mr. M. and scheduled a traverse hearing to contest service, however, the morning of the hearing, the plaintiff agreed to dismiss the case.

Violet S., 49, of Atlanta, Georgia discovered when her joint bank account was restrained in March of 2008 that a judgment had been entered against her in civil court in Manhattan in a case filed against her in 2007. The affidavit of service indicates that the process server served her by affixing a copy of the summons and complaint on the door of her actual place of residence in New York, New York, and later mailed her copy to that same address. Mrs. S. has lived in Georgia for the past 20 years. As a result of the default judgment that had been improvidently entered against her, Mrs. S. had to seek legal assistance in both Georgia and New York. When MFY appeared in the case on her behalf, the plaintiff agreed to vacate the judgment and to dismiss the case with prejudice.

Linda L., 29, of the Bronx, found out a judgment had been entered against her when she attempted to withdraw money from an ATM in January of 2008 and discovered that her bank account was restrained. The affidavit of service states that the process server served her by delivering the summons and complaint to a person of suitable age and discretion at an address Ms. L. had not lived at since 2000. As a result of losing access to her income, Ms. L. struggled to support her five children, and had to rely on family members to get her through the ordeal. MFY represented Ms. L, and rather than schedule a traverse hearing, the plaintiff agreed to dismiss the case.

Ira K., 61, of Manhattan, was denied public housing in 2007 because a judgment had been entered against him in a case filed in 2005, which affected his credit rating. He never knew he had been sued until long after the default judgment was entered. The affidavit of service indicates that the process server served Mr. K. by delivering a copy of the summons and complaint to a person of suitable age and discretion at his dwelling place and by mailing him a copy. Mr. K. lives alone, is friendly with all of his neighbors, and does not know the woman who allegedly accepted service for him. When MFY intervened, the case was dismissed because the plaintiff abandoned its claim. However, Mr. K. lost his eligibility for public subsidized housing because the process of vacating the judgment and dismissing the case took longer than the time frame allowed by the housing agency to correct his credit report.

Terry E., 51, of the Bronx, discovered that he had been sued on an old credit card debt for which the statute of limitations had run out, when his bank account was frozen. Supposedly Mr. E. had been notified of the lawsuit when a process server served a summons and complaint on a person of suitable age and discretion who allegedly lived with Mr. E. Mr. E. is a working single father who lives with his two young children and does not recognize the description of the woman to whom service had supposedly been made. While his bank account was frozen as a result of the default judgment obtained through improper service, Mr. E. was unable to pay his bills, including children's tuition, for several weeks. With MFY's assistance, Mr. E. asserted the defense of improper service, and the plaintiff agreed to dismiss the case.

4. Recommendations

Although MFY Legal Services' investigation is preliminary and further research is needed, the data collected to date raises serious questions about the reliability of process serving practices. The New York City Department of Consumer Affairs is responsible for licensing and monitoring process servers. We believe, therefore, that DCA should take the lead in addressing this problem. We therefore recommend that DCA:

1. Conduct comprehensive audits of process server companies and licensed individuals prior to renewal of their license every two years. The problem of improper service is so severe that the DCA should conduct individualized audits of companies and individuals at the time of their biennial registration. The audit should be under oath and should review the process server's compliance with record keeping and evidence of their actual conduct in serving process.

2. Require process servers to designate DCA as agent for service pursuant to CPLR 318. Many process serving companies and individuals reside outside New York City. To serve legal papers, such as subpoenas, residents of New York City must investigate where the company or individual is to be found and then hire a different process serve to serve the papers. If the DCA were designated as agent for service, residents would be able to deliver legal papers to the Agency, ensuring that the licensed process servers and individuals still have records when service is reviewed by the court.

3. Require record keeping for seven years rather than two years. Based on MFY's experience, many defendants may not learn about a judgment entered against them by default until more than two years after the summons and complaint allegedly was served. Law firms and attorneys are required to keep records for seven years. Since service of process is an important component of the legal procedure, records relating to the service of process should also be retained for seven years.

4. Require process servers to record in their record book how they determined the residence served is the actual residence of a defendant. Based on MFY's review of 91 cases in Queens and Kings Counties, and the experience of our own clients, service of process is always allegedly made by leaving papers with a person of suitable age and discretion or by "nail and mail" at the defendants "actual" residence. In many cases, the residence is not the actual residence, because the process server relied on old or incorrect information. The DCA should issue a new rule describing acceptable methods for verifying a defendant's residence and require the contemporaneous recording of relevant information in the process server's log book.

5. Immediately establish a joint task force with representatives of the Civil Court, DCA, consumers, advocates, debt collectors and the process servicing industry to investigate the scope of the problem identified in this Report and to recommend additional solutions. All of the parties listed have relevant information about how process is served in New York City and they should share an interest in resolving the problems describe in this Report.

6. Examine the results of the recent amendment to the Uniform Rules for the New York City Civil Court requiring additional notice to defendants in consumer credit transaction cases, and compare those results to affidavits of service filed in those cases.

5. Comments and Methodology

In response to the New York City Department of Consumer Affairs' Notice of Public Hearing dated May 19, 2008, to "assess the nature and extent of abuses in the process server industry," MFY Legal Services is providing a preliminary analysis of civil court data. The data is derived from publicly available information on the New York State Unified Court System E-Courts website; information provided to MFY by the Clerk's Office of the Civil Court of the City of New York; information provided by the New York City Department of Consumer Affairs; and information collected by MFY by reviewing court files in the Civil Court Clerk's Offices in Queens and Brooklyn that were randomly selected by MFY.

MFY reviewed more than 180,000 electronic files that are accessible on the E-Courts website (www.nycourts.gov/index.htm). This data is retrievable in limited ways. MFY conducted searches by year and county with the data sorted by E-Courts to show in chronological order those cases where the defendant made an appearance. Because the E-Courts system currently provides information from only four of the five counties of the City of New York (New York County is not publicly available), MFY was unable to determine the total number of cases filed by law firms or creditors. However it is reasonable to assume that with the inclusion of New York County in the count of cases, the numbers reported would be substantially higher. Moreover, the sample studied in this preliminary report represents roughly one-third of the total number of cases filed in 2007 in the entire five counties, so it fairly represents the circumstances citywide.

A total of 91 case files from the Queens and Brooklyn Civil Court Clerk's Offices were reviewed by MFY as well. The 91 files were compiled from three groups of between 30-40 cases picked by their consecutive index numbers. Consecutive numbers were used in order to track a single process serving company or process server, because these numbers are usually purchased consecutively in large blocks.

MFY also reviewed its own case data pertaining to individuals seeking our services. In the past 12 months, MFY has provided advice and representation to over 350 clients who were being sued in debt collection cases. In nearly every case where the client was sued in a lawsuit filed in the Civil Court before coming to MFY, our clients first learned of the case against them when their bank account was restrained as a result of a default judgment entered against them. For these clients, the consequences often are dire since the money frozen in their bank accounts is needed for food, rent, medication or other necessities.

In addition, MFY requested information from the New York City Department of Consumer Affairs to determine whether the number of individuals licensed to serve process in the City of New York has kept pace with the three-fold increase in the number of lawsuits filed in the Civil Court. The Department was unable to provide this data in time for this Report.

An in depth explanation of the impact of debt collection lawsuits filed in the Civil Court of the City of New York is found in "DEBT WEIGHT: The Consumer Credit Crisis in New York City and Its Impact on the Working Poor," The Urban Justice Center (October 2007). In this report, 600 court files were randomly examined. With regard to the rate in which defendants appeared in court, the findings in this preliminary analysis of over 180,000 records is consistent with the rates found in the UJC report.

For further information, please contact:

Consumer Rights Project – MFY Legal Services, Inc.

299 Broadway, New York, NY 10007 212-417-3700

Carolyn Coffey (ccoffey@mfy.org) and Anamaria Segura (asegura@mfy.org), Staff Attorneys

At a Special Term of the Supreme Court, held in and for the County of Erie at the Erie County Courthouse, in the City of Buffalo, New York, on the 21 day of July 2009.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE
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In the Matter of the petition of HONORABLE ANN PFAU, Chief Administrative Judge of the New York State Unified Court System,

Petitioner,

Index No. I2009-8236

-against-

FORSTER & GARBUS; SHARINN & LIPSHIE, P.C.; KIRSCHENBAUN & PHILLIPS, P.C.; SOLOMON AND SOLOMON, P.C.; GOLDMAN & WARSHAW, P.C.; ELTMAN ELTMAN & COOPER; ERIC M. BERMAN, P.C.; STEPHEN EINSTEIN & ASSOCIATES, P.C.; FABIANO & ASSOCIATES, P.C.; JONES, JONES, LARKIN & O'CONNELL, LLP; PANTERIS & PANTERIS, LLP; ZWICKER & ASSOCIATES P.C.; RELIN, GOLDSTEIN & CRANE LLP; WOODS OVIATT GILMAN LLP; LESCHACK & GRODENSKY, P.C.; HAYT, HAYT & LANDAU LLP; PRESSLER and PRESSLER, LLP; JAFFE & ASHER LLP; MULLEN & IANNARONE, P.C.; ARNOLD A. ARPINO & ASSOCIATES PC; HOUSLANGER & ASSOCIATES, PLLC; MANN BRACKEN, LLP; SMITH, CARROAD, LEVY & FINKEL; MCNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.; THOMAS LAW OFFICES, PLLC; FLECK, FLECK & FLECK; WOLPOFF & ABRAMSON, LLP; ERIC W. OSTRAGER; COHEN & SLAMOWITZ, LLP ; CULLEN and DYKMAN LLP; WINSTON and WINSTON, P.C.; COOPER ERVING & SAVAGE LLP; ROBERT P. ROTHMAN, PC; GERALD D. DE SANTIS; GREATER NIAGARA HOLDINGS, LLC; RODNEY A. GIOVE; ADVANCED LITIGATION SERVICES, LLC; and JASON J. CAFARELLA;

ORDER TO SHOW CAUSE

Respondents.
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Upon reading and filing the annexed verified petition of the Honorable Ann Pfau, Chief Administrative Judge of the New York State Unified Court System, verified on July 9, 2009, and the affirmation of James M. Morrissey, Assistant Attorney General of the New York State Attorney General ("OAG"), affirmed to on July 17, 2009; the affidavits of Aric Andrejko,

JMM
216-NF-OH

Associate Internal Auditor for the Internal Audit Unit of the New York State Unified Court System ("UCS"), sworn to on July 6, 2009; Bradely J. Bartram, Intelligence Analyst with the Investigations Division of the OAG, sworn to on June 30, 2009; George Danyluk, Audit Manager for the Internal Audit Unit of the UCS, sworn to on July 15, 2009; Brian Jasinski, Internal Auditor for the Internal Audit Unit of the UCS, sworn to on July 6 , 2009; Sylvia Mahoney, Senior Court Office Assistant with the Buffalo City Court, sworn to on June 30, 2009; Sandra J. Migja, Investigator with the OAG, sworn to on June 29, 2009; OAG Investigator Kathleen Coppersmith, sworn to on June 24, 2009; OAG Investigator Ralph Dorismond, sworn to on June 24, 2009; OAG Senior Investigator Brian Ford, sworn to on June 24, 2009; OAG Investigator Jeffrey D. Haber, sworn to on June 24, 2009; OAG Investigator Andrea Hughes, sworn to on June 24, 2009; OAG Investigator Cynthia Kane, sworn to on June 23, 2009; OAG Investigator Joseph T. Kelly, sworn to on June 24, 2009; OAG Senior Investigator Judith L. Koerber, sworn to on June 25, 2009; OAG Investigator William L. Lightbody, sworn to on June 24 and July 8, 2009; OAG Investigator Douglas Lindamen, sworn to on June 24, 2009; OAG Investigator Frank Lingeza, sworn to on June 24, 2009; OAG Investigator Gerald J. Matheson, sworn to on June 24, 2009; OAG Investigator Paul Matthews, sworn to on June 26, 2009; Investigator John G. Phillips, sworn to on June 24, 2009; OAG Senior Investigator Peter Schwindeller, sworn to on June 24, 2009; OAG Investigator Chad A. Shelmidine, sworn to on June 25, 2009; OAG Senior Investigator Salvatore J. Ventola, sworn to on June 30, 2009; OAG Investigator Jon K. Wescott, sworn to on June 25, 2009, and the exhibits thereto, and upon the motion of ANDREW M. CUOMO, Attorney General of the State of New York, attorney for the petitioner, it is

ORDERED that the respondents in the above-entitled action show cause before Part 8 of this Court, at a Special Term thereof, to be held at the Erie County Courthouse, 25 Delaware Avenue, Buffalo, New York on the 25 day of August/September, 2009, at ~~9:30~~ 2:00 pm

o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, why an order should not be made pursuant to CPLR § 5015(c) and (d):

1. Ordering respondents to identify those actions and proceedings commenced in the judicial districts of New York State (i) in which they appeared, as a party and/or counsel, and (ii) for which American Legal Process, served the summons and complaint, or the notice of petition or order to show cause and petition, and (iii) for which a default judgment was taken, or for which an application for a default judgment is pending (referred to herein as "identified actions and proceedings");

2. Ordering respondents to notify the parties to the identified actions and proceedings ("interested parties") by first class mail to the last known residence, or actual place of business, using the notice form annexed as Exhibit N to the motion papers, of the pendency of this special proceeding, and of their right to be heard;

3. Requiring that respondents file with the Court a schedule of interested parties to which they sent the notice, including (i) the date each notice was sent, (ii) the name and address to which the notice was sent, (iii) the amount of the default judgment, (iv) the amount paid by the judgment-debtor after the default judgment was entered, if any;

4. Providing interested parties with an opportunity to be heard herein;

5. Vacating and setting aside default judgments taken in the identified actions and proceedings upon such terms as may be just, or denying a pending motion for a default judgment, unless the party seeking to obtain or enforce a default judgment establishes at the hearing, without reference to an American Legal Process affidavit of service, that service was effected properly pursuant to CPLR Article 3;

6. With respect to those default judgments that are vacated and set aside, directing restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal;

7. Enjoining the respondents from seeking to obtain a default judgment against any individual defendant as to whom the respondent used American Legal Process to serve the summons and complaint, or the notice of petition or order to show cause and petition, until such time as the respondents can show evidence of service other than an affidavit of service provided by American Legal Process; and

8. For such other and further relief as the court deems just and proper; and it is further

ORDERED that the petitioner shall file with the Erie County Clerk and the Court an electronic copy of the exhibits, and a paper copy of Exhibits C-P, and shall serve upon the respondents herein an electronic copy of the exhibits; and it is further

ORDERED that the Erie County Clerk shall seal Exhibits A and B, electronic databases containing personally identifiable information of New York State residents, and may not show Exhibits A and B to anyone other than a party, or by Order of the Court, but that such exhibits shall be provided to the respondents; and it is further

ORDERED that Pursuant to C.P.L.R. § 403(b), answering papers, if any, are required to be served at least two days before the return date of this special proceeding. If, however, this order to show cause is served at least twelve days before the return date, answering papers, if any, are required to be served at least seven days before the return date.

SUFFICIENT CAUSE to me appearing therefore,

LET service of one copy of this order and supporting papers on respondents by delivery of the same to their actual places of business by July 31, 2009 be deemed due and sufficient service hereof.

GRANTED

JUL 21 2009

BY Carol M. Williams
CAROL M. WILLIAMS
COURT CLERK

HON. TIMOTHY J. DRURY, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE
----------X

In the Matter of the petition of HONORABLE ANN PFAU, Chief Administrative Judge of the New York State Unified Court System,

Petitioner,

Index No.

-against-

FORSTER & GARBUS; SHARINN & LIPSHIE, P.C.; KIRSCHENBAUN & PHILLIPS, P.C.; SOLOMON AND SOLOMON, P.C.; GOLDMAN & WARSHAW, P.C.; ELTMAN ELTMAN & COOPER; ERIC M. BERMAN, P.C.; STEPHEN EINSTEIN & ASSOCIATES, P.C.; FABIANO & ASSOCIATES, P.C.; JONES, JONES, LARKIN & O'CONNELL, LLP; PANTERIS & PANTERIS, LLP; ZWICKER & ASSOCIATES P.C.; RELIN, GOLDSTEIN & CRANE LLP; WOODS OVIATT GILMAN LLP; LESCHACK & GRODENSKY, P.C.; HAYT, HAYT & LANDAU LLP; PRESSLER and PRESSLER, LLP; JAFFE & ASHER LLP; MULLEN & IANNARONE, P.C.; ARNOLD A. ARPINO & ASSOCIATES PC; HOUSLANGER & ASSOCIATES, PLLC; MANN BRACKEN, LLP; SMITH, CARROAD, LEVY & FINKEL; MCNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.; THOMAS LAW OFFICE, PLLC; FLECK, FLECK & FLECK; WOLPOFF & ABRAMSON, LLP; ERIC W. OSTRAGER; COHEN & SLAMOWITZ, LLP ; CULLEN and DYKMAN LLP; WINSTON and WINSTON, P.C.; COOPER ERVING & SAVAGE LLP; ROBERT P. ROTHMAN, PC; GERALD D. DE SANTIS; GREATER NIAGARA HOLDINGS, LLC; RODNEY A. GIOVE; ADVANCED LITIGATION SERVICES, LLC; and JASON J. CAFARELLA;

VERIFIED PETITION

Respondents.
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Petitioner, the Honorable Ann Pfau, alleges upon information and belief:

JURISDICTION AND PARTIES

1. This is a special proceeding to vacate default judgments in all of the judicial districts of New York State, upon such terms as may be just, and for restitution where the underlying summons and complaint, or notice of petition or order to show cause and petition, were served by ZMOD Process Corp. DBA as American Legal Process ("American

Legal Process"). For purposes of this action, serving a summons and complaint, or a notice of petition or an order to show cause and a petition, is referred to as serving process.

2. Petitioner brings this special proceeding pursuant to N.Y. Civil Practice Law and Rules (CPLR) § 5015(c) and (d).

3. CPLR § 5015(c) provides:

> An administrative judge, upon a showing that default judgments were obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities or where such default judgments were obtained in cases in which those defendants would be uniformly entitled to interpose a defense predicated upon but not limited to the foregoing defenses, and where such default judgments have been obtained in a number deemed sufficient by him to justify such action as set forth herein, and upon appropriate notice to counsel for the respective parties, or to the parties themselves, may bring a proceeding to relieve a party or parties from them upon such terms as may be just. The disposition of any proceeding so instituted shall be determined by a judge other than the administrative judge.

4. CPLR § 5015(d) provides: "Where a judgment or order is set aside or vacated, the court may direct and enforce restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal."

5. Petitioner is the Chief Administrative Judge for the New York State Unified Court System, appointed by the Chief Judge of the Court of Appeals pursuant to Article 6, § 28(a) of the New York State Constitution and Judiciary Law § 210(3) to supervise on behalf of the Chief Judge the administration and operation of the Unified Court System. Article 6, § 28(b) and Judiciary Law § 210(3). Chief Administrative Judge Pfau possesses the authority to do all things necessary and convenient to carry out her functions, powers and duties, and both designates the administrative judges for any and all of the courts of the Unified Court System, and delegates to those administrative judges administrative functions, powers and duties possessed by her which she, in her sole discretion, deems appropriate.

6. Respondents, except as noted below, are law firms and lawyers who

used American Legal Process to serve process, and who obtained default judgments in New York State with respect to actions and proceedings for which American Legal Process served process.

7. Respondent Mann Bracken L.L.C. is the successor by merger to Wolpoff & Abramson L.L.P., and Eskanos & Adler P.C., and is named in its own capacity and as the successor by merger to Wolpoff & Abramson L.L.P., and Eskanos & Adler P.C.

8. Respondent Greater Niagara Holdings, LLC is engaged in the business of debt collection and used American Legal Process to serve process on its behalf, and obtained default judgments in New York State with respect to actions and proceedings for which American Legal Process served process.

9. Respondent Rodney A. Giove represents plaintiffs in debt collection actions and proceedings, including Greater Niagara Holdings, LLC, and used American Legal Process to serve process, and obtained default judgments in New York State with respect to actions and proceedings for which American Legal Process served process.

10. Respondent Advanced Litigation Services, LLC is engaged in the business of debt collection and used American Legal Process to serve process on its behalf, and obtained default judgments in New York State with respect to actions and proceedings for which American Legal Process served process.

11. Respondent Jason J. Cafarella serves or served as corporate counsel to Advanced Litigation Services, LLC and used American Legal Process to serve process, and obtained default judgments in New York State with respect to actions and proceedings for which American Legal Process served process.

12. From 2004 to date, respondents each have used American Legal Process to serve process on at least 100 occasions.

13. Petitioner seeks an order and judgment, *inter alia*, ordering respondents

to identify those actions and proceedings for which they obtained default judgments on behalf of their clients where American Legal Process served process, and vacating those default judgments upon such terms as may be just unless respondents establish at the hearing, without reference to an American Legal Process affidavit of service, that service was effected properly pursuant to CPLR Article 3.

STATUTORY BACKGROUND

14. In New York State, an action is commenced by the filing of a summons and complaint with the court or county clerk. A proceeding is commenced by the filing of a notice of petition or order to show cause and petition. As used herein, the term summons and complaint includes notices of petitions and orders to show cause and petitions. The term action includes proceedings as well.

15. The plaintiff must serve the summons and complaint upon the defendant in the manner prescribed by the New York Civil Practice Law and Rules ("CPLR") Article 3.

16. The plaintiff may serve a natural person by delivery of the summons and complaint within the state to the defendant. CPLR § 308(1). This method is referred to herein as "actual service."

17. The plaintiff may also serve a natural person other than the defendant "by delivery of the summons [and complaint] within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served" and mailing the summons and complaint by first class mail to the person's last known residence or actual place of abode. CPLR § 308(2). This method of service is referred to herein as "substitute service."

18. Where the service cannot be made with due diligence by actual service, or substitute service, the plaintiff may affix the summons and complaint "to the door of either the actual place of business, dwelling place or usual place of abode within the state of the

person to be served" and mail the summons and complaint by first class mail to the person's last known residence or actual place of abode. CPLR § 308(4). This method of service is referred to herein as "nail-and-mail service."

19. While CPLR § 308(4) does not define the term "due diligence," typically courts have required three prior attempts at service made on separate days, at various times during the day, before a plaintiff may resort to nail-and-mail service.

FACTS

20. Since 2004, respondents used American Legal Process to serve process upon New York residents statewide on well over 150,000 occasions. For example, from January 1, 2007 through October 8, 2008 alone, American Legal Process served process on 102,126 occasions of which more than 101,000 were served at the request of respondents.

21. The venues for these actions and proceedings, which almost always involved suits against consumers for an alleged debt, were located in every county and all of the judicial districts located in New York State.

22. Respondents' process server, American Legal Process, prepared affidavits of service in which it, or its servers, detailed how they claimed to effect service of process, and provided the affidavits of service to the appropriate county clerk or court clerk, or to respondents, for filing.

23. In the great majority of actions for which American Legal Process served process, the defendant did not answer, and the respondents sought and obtained a default judgment pursuant to CPLR § 3215 on behalf of their clients.

24. To obtain such default judgments, the respondents filed, or had filed, American Legal Process affidavits of service that the defendant was properly served with process.

25. American Legal Process, or its individual servers, however, repeatedly

and persistently falsified its affidavits of service, and/or improperly and illegally notarized the affidavits of service.

26. Respondents' process server, American Legal Process, and its individual servers, repeatedly and persistently lied on affidavits of service that they had attempted, without success, to serve the defendant in the action on three occasions before resorting to nail-and-mail service.

27. Respondents' process server, American Legal Process, and its individual servers, repeatedly and persistently lied on affidavits of service that they had confirmed that the address to which they affixed the summons and complaint was the actual address of the defendant in the action.

28. Respondents' process server, American Legal Process, and its individual servers, repeatedly and persistently lied on affidavits of service that they had confirmed that the defendant in the action was not in active military service.

29. Respondents' process server, American Legal Process, and its individual servers, repeatedly and persistently lied on affidavits of service that the servers had mailed a copy of the summons and complaint to the defendant in the underlying action within twenty days after they served the summons and complaint by substitute or nail-and-mail service.

30. Respondents' process server, American Legal Process, and its individual servers, when using nail-and-mail service, repeatedly and persistently affixed the summons and complaint to an address that was not the address of the defendant in the action.

31. William Singler, the owner of American Legal Process, on a repeated and persistent basis, notarized the signatures of process servers who were not present at the time that he notarized the signature.

32. Respondents' or respondents' process server, American Legal Process, acting on their behalf, provided the falsified and/or illegally executed affidavits to county clerk or

court clerks.

33. Relying on these falsified and/or illegally executed affidavits of service which claimed that defendants had been properly served, courts in the all of the judicial districts granted thousands of default judgments which otherwise would not have been granted.

HARM CAUSED BY USING FALSIFIED AFFIDAVITS OF SERVICE

34. The harm to civil defendants subjected to default judgments where they have not been properly served , and to the courts that processed the defaults, is near incalculable.

35. Affidavits of service swear to the truthfulness of the information contained therein. Persons who are sued and the courts rely on the presumption that the affidavits are truthful. They all must be able to rely on the truthfulness of the affidavits for the courts to render decisions in those disputes, leaving no question as to the validity and fairness of those decisions. The integrity of the court system depends upon the confidence of the litigants and public that courts provide justice, and there can be no such confidence when there is doubt whether parties received proper notice to appear in court to be heard in the underlying case.

36. When false affidavits of service are relied upon to form the basis of a default judgment, a defendant is deprived of his or her opportunity to appear to answer the summons and complaint, and to prevent a wrongful default judgment. The harm to such defendants is substantial, becoming subject to judgments to which they had no opportunity to be heard and to present any cognizable defense, and suffering the significant collateral consequences of having judgments entered against them. And the courts will be burdened by service litigation as the parties dispute the validity of the service in contesting the legality of default judgment.

CAUSE OF ACTION

37. By reason of the foregoing, respondents have obtained thousands of

default judgments from courts in the judicial districts of New York State on behalf of their clients by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law or other illegalities or where such default judgments were obtained in cases in which those defendants or respondents would be uniformly entitled to interpose a defense predicated upon but not limited to the foregoing defenses.

RELIEF REQUESTED

WHEREFORE, petitioner demands an order and judgment against respondents as follows:

A. Ordering respondents to identify those actions and proceedings commenced in the judicial districts of New York State (i) in which they appeared, as a party and/or counsel, and (ii) for which American Legal Process served the summons and complaint, or the notice of petition or order to show cause and petition, and (iii) for which a default judgment was taken, or for which an application for a default judgment is pending (referred to herein as "identified actions and proceedings");

B. Ordering respondents to notify the parties to the identified actions and proceedings ("interested parties") by first class mail to the last known residence, or actual place of business, using the notice form annexed as Exhibit N to petitioner's motion papers, of the pendency of this special proceeding, and of their right to be heard;

C. Requiring that respondents file with the Court a schedule of interested parties to which they sent the notice, including (i) the date each notice was sent, (ii) the name and address to which the notice was sent, (iii) the amount of the default judgment, (iv) the amount paid by the judgment-debtor after the default judgment was entered, if any;

D. Providing interested parties with an opportunity to be heard herein;

E. Vacating and setting aside default judgments taken in the identified actions and proceedings upon such terms as may be just, or denying a pending motion for a

default judgment, unless the party seeking to obtain or enforce a default judgment establishes at the hearing, without reference to an American Legal Process affidavit of service, that service was effected properly pursuant to CPLR Article 3;

F. With respect to those default judgments that are vacated and set aside, directing restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal;

G. Enjoining the respondents from seeking to obtain a default judgment against any individual defendant as to whom the respondent used American Legal Process to serve the summons and complaint, or the notice of petition or order to show cause and petition, until such time as the respondents can show evidence of service other than an affidavit of service provided by American Legal Process; and

H. For such other and further relief as the court deems just and proper; and it is further

Dated: New York, New York
July 9, 2009

ANN PFAU
CHIEF ADMINISTRATIVE JUDGE
NEW YORK STATE UNIFIED COURT SYSTEM

VERIFICATION

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

ANN PFAU, being duly sworn, deposes and says: She is the Chief Administrative Judge of the New York State Unified Court System. She has read the foregoing petition and knows the contents thereof, and the same is true to her own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters she believes them to be true.

ANN PFAU

Sworn to before me this
9th day of July, 2009.

Notary Public

HAYDEE MARRERO
NOTARY PUBLIC, State of New York
No. 01MA5067882
Qualified in Bronx County
Commission Expires 4-1-2010

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

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In the Matter of the petition of HONORABLE ANN PFAU, Chief Administrative Judge of the New York State Unified Court System,

Petitioner,

-against-

FORSTER & GARBUS, ET AL.,

Respondents.

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Index No. 2009-8236

ATTORNEY AFFIRMATION

JAMES M. MORRISSEY, an attorney admitted to practice law before the courts of New York State, hereby affirms under penalties of perjury that:

1. I am an Assistant Attorney General in the office of Andrew M. Cuomo, Attorney General of the State of New York "(OAG"). I am responsible for the prosecution of this case and am fully familiar with the facts and circumstances thereof. I submit this affirmation in support of petitioners' order to show cause and verified petition. In the course of my duties I have conducted an investigation of the above-captioned matter. Unless otherwise indicated, I make this affirmation upon information and belief, based upon my investigation, a review of documents and other evidence on file with the Department of Law.

2. Petitioner brings this action to vacate default judgments taken statewide – usually against consumers alleged to owe a debt – that were obtained by fraud, misrepresentation, illegality and lack of proper service. The number of default judgments respondent seeks to vacate is likely in excess of 100,000.

3. ZMOD Process Corp., which was incorporated in June 2004, is a domestic corporation with its principal place of business located at 381 Sunrise Highway R5, Lynbrook, New York 11563. ZMOD Process Corp. does business as "American Legal Process" (referred to herein as "American Legal Process"). Respondents herein used American Legal

Process to serve process statewide.

4. On April 15, 2009, the OAG brought a special proceeding against American Legal Process in Erie County Supreme Court as a result of its deceptive, fraudulent and illegal business practices. The special proceeding is pending. William Singler, the owner of American Legal Process, was arrested by the OAG on a felony complaint on that same day effectively closing down American Legal Process.

5. American Legal Process maintained an electronic database using ProcessCase.com on which it kept track of the services it provided. The raw database is annexed hereto on a DVD as Exhibit A.

6. The Internal Audit Unit of the Unified Court System ("Internal Audit Unit) eliminated repetitive records and analyzed the data base with respect to the service of process in cases involving New York State courts from January 1, 2007 through October 8, 2008, about a 17-month period of the 57 months that American Legal Process was actively serving process. Thus, the numbers and statistics presented herein, while very dramatic, represent an analysis of less than one-third of the life of the company. The database analyzed by the Internal Audit Unit is referred to herein as the ProcessCase database, and is annexed hereto on a DVD as Exhibit B.

7. Annexed hereto as Exhibit C are copies of sample records of payments made by American Legal Process to servers. Exhibit C was obtained from American Legal Process.

8. Annexed hereto as Exhibit E are copies of sample worksheets prepared by American Legal Process servers from which American Legal Process prepared affidavits of service. Exhibit E was obtained from American Legal Process.

9. Annexed hereto as Exhibit J are copies of sample affidavits of service

prepared by American Legal Process. Exhibit D was obtained from American Legal Process.

10. Annexed hereto as Exhibit M are copies of selected corporate records with respect to American Legal Process.

11. Annexed hereto as Exhibit O are copies of sworn hand written statements of American Legal Process employees and/or servers Emily Katt, dated April 3, 2009, Mary Hughes, dated April 2, 2009, Megan Montreuil, dated April 2, 2009 and Linda Hand, dated April 2, 2009. The statements were taken by the OAG and are transcribed for the convenience of the Court.

12. Annexed hereto as Exhibit P are selected email messages to or from American Legal Process. Exhibit P was obtained from Google.

13. Respondents are attorneys and law firms, and two debt collectors who used American Legal Process to serve process.

14. American Legal Process served summonses and complaints, or a notice of petition or order to show cause and a petition ("summons and complaint") as follows: (a) a respondent provided American Legal Process with the summons and complaint to be served; (b) American Legal Process mailed the summons and complaint, with a copy of each, to the appropriate county clerk or court clerk with a check for the purchase of the index number; and (c) the clerk assigned and affixed the index number to the original summons and complaint and the copy, filed the original summons and complaint, and returned the copy to respondent. Affidavit of Sylvia Mahoney, Senior Court Office Assistant with the Buffalo City Court, sworn to on June 30, 2009 ("Mahoney Aff."), ¶¶ 2-3. On occasion, American Legal Process may have mailed the summons and complaint, with a copy of each, directly to the process server, with the check, and the process server delivered the pleadings to the clerk and purchased the index number.

15. American Legal Process then sent the summons and complaint out to one of its servers for service. American Legal Process used process servers across New York State, each responsible for certain territories. See Exhibit L-3 for a list of the top twenty servers and the judicial districts in which they operated. These top twenty served 84.83% of the 102,126 documents served by American Legal Process from January 1, 2007 through October 8, 2008. American Legal Process usually paid its servers only $4.00 to $8.00 on a per service basis. See Exhibit C for sample payment records.

16. After serving the summons and complaint, the server provided American Legal Process with a worksheet on which the server detailed how he or she claimed to have effected service. The worksheet requested no information with respect to mailing the summons and complaint where nail-and-mail or substitute service was used. Sample worksheets annexed hereto as Exhibit E.

17. American Legal Process prepared the actual affidavits of service from the worksheets provided to it by the servers. Among other things, the affidavits of service set forth the manner of service, and, where nail-and-mail service was used, (i) the attempted service dates, and (ii) details of a conversation with the defendant's neighbor confirming the defendant's address, and the fact that the defendant was not active in the military service. Even though there was no information on the worksheet with respect to mailing the summons and complaint, the affidavit set forth the date that the process server purportedly mailed the summons and complaint to the defendant. See Exhibit J for sample affidavits of service.

18. American Legal Process provided the affidavits of service to the appropriate county clerk or court clerk. Mahoney Aff., ¶ 4. In some cases, the server filed them directly with the clerks.

19. Where American Legal Process served a summons and complaint by so-

called "nail and mail" service, defendants defaulted 75.8% of the time. The OAG reviewed 235 cases in which respondents used American Legal Process to serve process and obtained default judgments. Affidavit of George Danyluk, Internal Audit Manager of the Unified Court System Internal Audit Unit, sworn to on July 15, 2009 ("Danyluk Aff.") ¶ 6. Almost all of the actions and proceedings were against consumers who were alleged to owe a debt, and the average default judgment was for $5,475.

AMERICAN LEGAL PROCESS FALSIFIED AFFIDAVITS OF SERVICE

American Legal Process' Policy to Attempt Service Only Once

20. American Legal Process' policy and practice, communicated to its servers, was to attempt service once, affix the summons and complaint to the door if no one answered the door, and fabricate two earlier attempts. This policy and practice is shown by the sworn handwritten statements from American Legal Process employees and/or servers annexed hereto as Exhibit O, and the Unified Court System Internal Audit Unit analysis of the ProcessCase database. This policy may have changed after Annette Forte, an American Legal Process server, was arrested in April 2008 for filing false documents.

American Legal Process Servers at Two Places at the Same Time

21. The ProcessCase database shows that, on 3,512 occasions, American Legal Process servers served, or attempted to serve, documents on (i) different defendants (ii) at two different locations (iii) on the same date and (iv) at the same time. Danyluk Aff. ¶ 6. This, of course, is physically impossible. For ease of reference, petitioners refer to the service of process and the attempted service of process as "service attempts" or "attempted service". A table of the top twenty servers, who served 85% of the documents, appears below. The table is derived from the Danyluk Aff. ¶ 7(a)-(t).

Name	Instances at 2 locations or more at same time	Instances at 3 or more locations (included in the previous total)
Raymond Bennett	407	39 times at 3 locations at same time, 3 times at 4 locations at the same time, and once at 5 locations at same time
Dunham Toby Tyler	839	39 times at 3 locations at same time, and once at 4 locations at same time
Gene Gagliardi	450	18 times at 3 locations at same time, and twice at 4 locations at same time
Drefel Grimmett	388	9 times at 3 locations at same time
Bill Matzel	199	15 times at 3 locations at same time
John Hughes	184	4 times at 3 locations at same time
Andrea D'Ambra	168	6 times at 3 locations at same time
Greg Tereshko	165	3 times at 3 locations at same time
Diana Lentz	134	2 times at 3 locations at same time
Herb Katz	125	9 times at 3 locations at same time
Bernard Holder	81	1 time at 3 locations at same time
Adnan Omar	69	1 time at 3 locations at same time
Annette Forte	68	2 times at 3 locations at same time
Issam Omar	51	1 time at 3 locations at same time
Dan Beck	49	
Beth Eubank	42	1 time at 3 locations at same time
Michelle Miller	42	4 times at 3 locations at same time
Harry Marinelli	33	1 time at 3 locations at same time
Michael Pszczola	10	
Courtney Goldstein	8	

American Legal Process Servers at Two Places When Physically Impossible

22. The ProcessCase database shows that American Legal Process servers,

repeatedly and persistently, claimed to be at different locations at different times when it was physically impossible to do so, given the time difference and the physical distance between the locations. Danyluk Aff., ¶ 9.

23. Examples from eleven American Legal Process servers, derived from the Danyluk Aff., ¶¶ 9-29, are given below. These servers served more than 49,300 documents from January 1, 2007 through October 8, 2008. Danyluk Aff., ¶ 30. For purposes of the table the terms "serves" includes attempts at service.

Name	**Service Attempts**	**Times Serving Process**	**Miles Required for Attempts/ Time Required**	**Examples**
Isaam Omar	77 on 6/16/08	6:09 am - 10:19 pm	8,194 6 days, 4 hrs, 34 minutes	Eleven round trips b/t Kings & Cattaraugus Counties (400 miles apart); serves in Olean at 10:17 a.m. and 2 minutes later in Brooklyn
Isaam Omar	69 6/17/08 (the next day)	6:05 am - 8:28 pm	10,771 7 days, 19 hrs, 58 minutes	Thirteen round trips b/t Kings & Chautauqua Counties (400 miles apart); serves in Brooklyn at 8:19 a.m. and 1 minute later in Jamestown
Drefel Grimmett	85 on 9/1/07	6:00 am - 9:29 pm	3,373 3 days, 2 hrs, 14 minutes	Serves in Cohoes at 8:02 p.m. and Wappinger Falls 7 minutes later (94 miles away)
Drefel Grimmett	81 on 9/3/07	6:07 am - 9:39 pm	3,199 3 days, 22 minutes	Serves in Albany at 7:07 a.m. and Ellenville 4 minutes later (84 miles away)
Annette Forte	73 on 11/13/07	6:06 am - 9:33 pm	3,859 3 days, 13 hrs, 8 minutes	Four round trips b/t Wayne & Chautauqua Country (150 miles apart); serves in Newark at 6:56 am and Bemus Point 6 minutes later (171 miles apart)
Annette Forte	94 on 2/12/08	6:01 am - 10:01 pm	2,036 2 days, 1 hr, 3 minutes	Serves in Lindley at 9:05 a.m. and Tonawanda 6 minutes later (146 miles apart)

Name	Service Attempts	Times Serving Process	Miles Required for Attempts/ Time Required	Examples
Gene Gagliardi	88 on 8/15/07	6:02 am - 9:51 pm	3,079 2 days, 21 hrs, 41 minutes	Serves in Richmond County at 4:02 p.m. and Putnam County 4 minutes later (82 miles apart)
Gene Gagliardi	91 on 8/16/07	6:02 am - 9:46 pm	2,640 2 days, 12 hours, 38 minutes	Serves in Orange County at 7:58 am and Richmond County one minute later (84 miles away)
Dan Beck	92 on 3/7/08	6:06 am- 9:24 pm	2,068 2 days, 8 hrs	Serves in Canajoharie at 3:37 pm and Saratoga Springs 2 minutes later (87 miles apart)
Dunham Toby Tyler	86 on 9/24/07	6:28 am - 7:27 pm	1,662 1 day, 18 hrs, 15 minutes	Serves in Baldwinsville at 3:01 pm and Dexter 6 minutes later (77 miles apart)
Raymond Bennett	74 on 4/19/08	6:04 am - 9:10 pm	1,313 1 day, 9 hours, 13 minutes	Serves in Cahoes at 6:14 am and Cairo 3 minutes later (55 miles apart)
Raymond Bennett	69 4/21/08	6:04 am - 9:20 pm	1,368 1 day, 11 hours, 18 minutes	Serves in Averill Park at 8:42 pm and Cairo 1 minute later (54 miles apart)
Bill Matzel	72 9/24/07	8:03 am - 8:56 pm	1,184 1 day, 9 hours, 35 minutes	Serves in Blossvale at 8:38 am and Little Falls 1 minute later (62 miles apart)
Bill Matzel	67 2/21/08	8:01 am - 10:26 pm	1,419 1 day, 15 hours, 47 minutes	Serves in West Winfield at 6:39 pm and Camden 4 minutes later (57 miles apart)
Harry Marinelli	50 9/1/07	6:13 am - 4:41 pm	1,662 1 day, 16 hours, 58 minutes	Serves in Saranac Lake at 7:16 am and Massena 2 minutes later (80 miles apart)
Harry Marinelli	43 4/10/08	6:12 am - 8:51 pm	1,194 1 day, 4 hours, 33 minutes	Serves in Parishville at 7:44 am and Cadyville 4 minutes later (89 miles apart)

Name	Service Attempts	Times Serving Process	Miles Required for Attempts/ Time Required	Examples
Michele Miller	49 5/9/08	7:25 am - 9:10 pm	1,697 1 day, 17 hours, 37 minutes	Serves in Watertown at 8:22 pm and Brusher Falls one minute later (83 miles apart)
Michele Miller	50 5/13/08	7:38 am - 9:00 pm	1,187 1 day, 7 hours, 33 minutes	Serves in Adams at 12:05 pm and Waddington 7 minutes later (94 miles apart)
Diana Lentz	100 9/17/07	6:33 am - 8:15 pm	1,172 1 day, 2 hours, 13 minutes	Serves in Depew at 7:26 am and Rochester 4 minutes later (69 milies apart)
Diana Lentz	100 10/30/07	6:09 am - 10:12 pm	1,848 1 day, 18 hours, 44 minutes	Serves in Rochester at 6:46 am and Niagara Falls 3 minutes later (95 miles apart)

American Legal Process Servers Attempt Service Before Documents Received

24. The ProcessCase database shows that on 13,040 occasions, fifty-five of American Legal Process servers (including all of the top twenty) attempted to serve a document on a defendant before the document was transmitted from respondents to American Legal Process. This, of course, is physically impossible. Danyluk Aff., ¶ 31.

25. This is also shown by the email messages annexed hereto as Exhibit P, and the American Legal Process reports annexed hereto as Exhibit F.

American Legal Process Servers Attempt Service Before Index Number Purchased

26. The American Legal Process ProcessCase database shows that on 516 occasions, twenty-two of its servers attempted to serve a summons and complaint on a defendant before the plaintiff had purchased an index number and filed the summons and complaint with the appropriate clerk. Danyluk Aff., ¶ 32. It is physically impossible to serve a

summons and complaint, with an index number affixed to it, before the index number is purchased from the clerk.

27. This is also shown by the American Legal Process report and memos annexed hereto as Exhibit F.

William Singler Falsely Claimed to Have Notarized Signatures

28. The American Legal Process ProcessCase database shows that, from January 1, 2007 to October 8, 2008, William Singler, the owner of American Legal Process, claims to have notarized the signatures of process servers from across New York State on 73,395 occasions for an average of over 3,300 affidavits per month. Danyluk Aff., ¶ 39.

29. The analysis of the UCS Internal Audit Unit shows that Singler notarized the signatures of servers on dates when, according to American Legal Process ProcessCase database, it was physically impossible for him to do, or the claim is so highly improbable that it should not be credited.

30. The Internal Audit Unit looked at November 26-28, 2007, and examined 4 process servers for whom ProcessCase shows served process and had their signatures notarized by Singler. A summary of the results where both are claimed, created from the Danyluk Aff., ¶¶ 40-51, appears below.

Name	**Activities Shown in Processcase database**
Annette Forte	The ProcessCase database shows that Annette Forte served process for more than 15 hours on November 26, 2007 and made a 14 hour round trip to Lynbrook to have her signature notarized. She served for more than 14 hours on November 27 and made the same round trip. Forte served for just under 16 hours on November 28 and made a third consecutive trip to Lynbrook. It was not physically possible for Forte to do both on any of these three days.

Name	Activities Shown in Processcase database
Beth Eubank	While it was physically possible for Beth Eubank to serve process for 10.5 hours on November 27, 2007, and make the 14.5 hour round trip to Lynbrook to have her signature notarized by Singler, she would have had to work for 25 ½ hours continuously to do so (from 8:00 p.m. on 11/26 until 9:35 on 11/27).
Raymond Bennett	While it was physically possible for Raymond Bennett to serve process and drive to Lynbrook on November 26, 27 and 28, 2007to have his signature notarized, he would have had to work an 18-hour, 19-hour and 15-hour workday respectively to do so.
Bethel Debman	While it was physically possible for Bethel Debman to serve process and drive to Lynbrook on November 27 and 28, 2007to have his signature notarized, he would have had to work and 17-hour and 18-hour workday respectively to do so.

31. The UCS Internal Audit Unit also looked at ProcessCase for days that servers were especially active in serving process, and had their signatures notarized on the same day. A summary of the results, created from the Danyluk Aff., ¶¶ 52-66, appears below.

Name	Date	Activities Shown in ProcessCase Database
Diana Lentz	10/29/07	It was not possible for Lentz to serve process for more than 13 hours, and drive to Lynbrook to have her signature notarized.
Diana Lentz	1/30/07	It was not possible for Lentz to serve process for more than 16 hours, and drive to Lynbrook to have her signature notarized.
Annette Forte	2/11/08	It was not possible for Forte to serve process for just under 16 hours, and drive to Lynbrook to have her signature notarized.
Annette Forte	2/12/08	It was not possible for Forte to serve process for 16 hours, and drive to Lynbrook to have her signature notarized.
Dan Beck	1/3/08	To both serve for just over 15 hours and have his signature notarized 25 times would have required a 21.5-hour work day.

Name	Date	Activities Shown in ProcessCase Database
Dan Beck	1/4/08	To both serve for just over 13 hours and have his signature notarized 24 times would have required a second consecutive 21.5-hour work day.
Bill Matzel	9/24/07	To both serve for just under 13 hours and have his signature notarized 26 times would have required a 23-hour work day.
Bill Matzel	9/25/07	To both serve for just under 13 hours and have his signature notarized would have required a second consecutive 23-hour work day.
Issam Omar	6/23/08	To both serve for just over 15 hours and have his signature notarized 60 times would have required a 19-hour work day.
Issam Omar	6/24/08	To both serve for just over 11 hours and have his signature notarized 36 times would have required a 15.5-hour work day, after his previous 19-hour work day.
Raymond Bennett	2/26/08	To both serve for just over 15 hours and have his signature notarized would have required a 21-hour work day.
Raymond Bennett	2/27/08	To both serve for just over 15 hours and have his signature notarized would have required a second consecutive 21-hour work day.
Raymond Bennett	2/28/08	To both serve for 15 hours and have his signature notarized 76 times would have required a third consecutive 21-hour work day.

32. The evidence that Singler falsely claimed to have notarized his server's signatures also includes the handwritten sworn statements of American Legal Process employees and/or servers Emily Katt, Mary Hughes, Megan Montreuil and Linda Hand, annexed hereto as Exhibit O and an email annexed hereto as Exhibit P, page 2.

American Legal Process Servers Lied about Confirming Addresses and Military Status

33. American Legal Process, or its servers, prepared affidavits of service representing that, when the servers used nail-and-mail service, the server confirmed with a

neighbor of the address to which the process was affixed that: (i) the address was in fact the address of the named defendant, and (ii) the named defendant was not in military service (referred to herein as "confirming conversation"). The affidavits of service set forth the neighbor's address and the date of the confirming conversation. See Exhibit J for sample affidavits of service.

34. The evidence shows that, on a repeated and persistent basis, American Legal Process servers lied about having the confirming conversation, since the address of the neighbor set forth in the affidavit simply does not exist. The evidence includes an analysis of the addresses of neighbors with whom American Legal Process servers claimed to have the confirming conversation, Danyluk Aff., ¶¶ 34-36, an email annexed hereto as Exhibit P, page 1 and Exhibit K.

American Legal Process Servers Affix Summons and Complaint to the Wrong Address

35. The evidence shows that American Legal Process servers, on a repeated and persistent basis, affixed the summons and complaint to an address that was not the address of the defendant named in the underlying action when they used nail-and-mail service. The evidence includes the analysis of the OAG and the UCS, Danyluk Aff., ¶¶ 37-38, email annexed hereto as Exhibit P, pages 6, 8, 10, 11, and Exhibit D.

American Legal Process Affidavits of Service Falsely State That the Server Mailed the Summons and Complaint after Claiming to Effect Service by Nail-and-Mail or Substitute Service

36. American Legal Process affidavits of service falsely state that the individual server mailed the summons and complaint after claiming to effect service by nail-and-mail or substitute service.

37. This is shown by the handwritten sworn statements of American Legal Process servers and/or employees Emily Katt and Mary Hughes annexed hereto as Exhibit M, pages 1, 3, 5 and 7.

CONCLUSION

38. The Court should grant the petition in all respects.

Dated: Buffalo, New York
July 17, 2009

JAMES M. MORRISSEY
Assistant Attorney General

At Special Term of the Buffalo City Court,
held at the Courthouse located at
50 Delaware Avenue, Buffalo, New York
the ___day of _____, 2013

Present: HON. _____
Judge of the City Court

_____

Plaintiff

v.

Defendant(s)

_____

ORDER TO SHOW CAUSE
TO VACATE DEFAULT JUDGMENT

Index No.

Upon reading and filing the affidavit of [ ], sworn to on the [ ] day of [ ], 2013, and upon all prior papers and proceedings:

Let the Plaintiff or their attorney show cause at Special Term Part of this Court, to be held at the Courthouse at 50 Delaware Avenue, Buffalo, New York, on the [ ] day of [ ], 2013, at 9:30 AM or as soon as the parties may be heard why an order should not be entered under CPLR 5015(a)(4) vacating judgment granted in favor of the Plaintiff and, under CPLR 3211(a)(8), dismissing the complaint [; or, in the alternative, under CPLR 5015(a)(1), CPLR 317, and/or in the interest of justice, vacating judgment granted in favor of the Plaintiff and permitting the Defendant to interpose an Answer;] [ONLY INCLUDE IF SHERIFF BEING SERVED directing that the Plaintiff pay any poundage owed to the Erie County Sheriff;] [ONLY INCLUDE IF MONEY ALREADY TAKEN directing the Plaintiff to make restitution to the Defendant of funds collected through enforcement proceedings heretofore, pursuant to CPLR 5015(d)] and why the Defendant should not have such other and further relief as may be just and proper.

Sufficient reason being presented for the relief requested, it is

ORDERED, that pending the hearing of this motion, [the Marshals/Sheriff and] the Plaintiff and all their agents are stayed from conducting any proceedings to enforce the judgment, and further it is

ORDERED, that the Defendant serve a copy of this order on the Plaintiff 's attorney, pursuant to CPLR 2214, via certified mail, return receipt requested, [and on the Marshals of the Buffalo City Court, located at 50 Delaware Avenue, Buffalo, New York, 14202, by hand delivery] [and on the Erie County Sheriff, Civil Process Division, 134 West Eagle Street, Fourth Floor, Buffalo, New York 14202,] mailing and delivery to be accomplished by the Defendant on or before the _____ day of _____, 2013.

_____

Hon.

Judge of Buffalo City Court

City Court of the City of Buffalo
County of Erie

Plaintiff

v.

AFFIDAVIT IN SUPPORT
of Order to Show Cause to
Vacate a Default Judgment

Index No.

Defendant(s)

State of New York, County of Erie ss.:

I, [ ], being duly sworn, depose and say:

1. I am the Defendant in this action.
2. I reside at:
3. The plaintiff in this action purports to sue me for:
4. On the [ ] day of [ ], [ ], this Court entered a default judgment against me in the amount of $[ ].
5. I first learned of the existence of this judgment [ ] when I received [ ]. I then obtained a copy of the court file from the Buffalo City Court Clerk's Office, and at that time I first saw the summons and complaint in this action. I also reviewed a copy of the affidavit of service submitted by the Plaintiff.
6. I submit this affidavit in support of my motion to vacate that default judgment under CPLR 5015(a)(4) for lack of jurisdiction, and to dismiss the complaint under CPLR 3211(a)(8) for lack of personal jurisdiction. [In the alternative, I move to vacate the default judgment under CPLR 5015(a)(1) because I have a reasonable excuse for defaulting; under CPLR 317 because I was not served personally and have a

meritorious defense to raise; or in the interest of justice because _____.]

7. This motion is brought by order to show cause because CPLR 5015(a) provides that the Court will direct the form of notice of this motion that shall be provided to the Plaintiff. Thus the rule does not permit the motion to be brought by notice of motion.

CPLR 5015(a)(4):

8. The judgment must be vacated under CPLR 5015(a)(4) because Plaintiff never properly served process on me. Because process was never properly served in accord with the CPLR, the Court has not been vested with jurisdiction over me.
9. It has long been well established that "[a]bsent proper service to achieve jurisdiction, [a] default judgment is a nullity and must be vacated." *2837 Bailey Corp.* v. *Gould*, 143 A.D.2d 523, 523-24, 533 N.Y.S.2d 34, 35 (4th Dep't 1988).
10. Indeed, where service has not been properly made, CPLR 5015(a)(4) requires that the judgment be unconditionally vacated with no further showing required from the Defendant. The Court has no discretion in the matter. *Hitchcock* v. *Pyramid Centers of Empire State Co.*, 151 A.D.2d 837, 839, 542 N.Y.S.2d 813, 815 (3d Dep't 1989); *Citibank, N.A.* v. *Keller*, 133 A.D.2d 63, 64-65, 518 N.Y.S.2d 409, 410-11 (2d Dep't 1987); *Shaw* v. *Shaw*, 97 A.D.2d 403, 404, 467 N.Y.S.2d 231, 233 (2d Dep't 1983).
11. In particular, the Defendant need not establish a reasonable excuse or a meritorious defense (other than the lack of service) to be entitled to vacatur under CPLR 5015(a)(4). Indeed, it would be error for the Court to consider either of those two issues without having first determined that it has obtained jurisdiction over the Defendant through a valid service of process. *Ariowitsch* v. *Johnson*, 114 A.D.2d 184, 185-86, 498 N.Y.S.2d 891, 893 (3d Dep't 1986).
12. Moreover, there is no time limit on a motion under CPLR 5015(a)(4). *Ross* v. *Eveready Ins. Co.*, 156 A.D.2d 657, 657, 549 N.Y.S.2d 151, 152 (2d Dep't 1989)

(judgment entered without acquiring personal jurisdiction is a nullity and may be schallenged by defendant at any time).

13. Furthermore, it is well settled that whether the Defendant received actual notice of the lawsuit is absolutely irrelevant to the question of jurisdiction, which requires not notice but procedurally proper service. As the Fourth Department has lucidly explained: "In a challenge to service of process, the fact that a defendant has received prompt notice of the action is of no moment . . . . Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court." *Hartloff* v. *Hartloff*, 296 A.D.2d 849, 850, 745 N.Y.S.2d 363, 364 (4th Dep't 2002); *see also Parker* v. *Mack*, 61 N.Y.2d 114, 118-19, 472 N.Y.S.2d 882, 884, 460 N.E.2d 1316, 1318 (1984).
14. Here, according to its affidavit of service, Plaintiff purports to have served me under CPLR 308([ ]) by [ ].
15. This was not proper service because [ ].
16. [308(2) OR (4) AT IMPROPER LOCATION] To be proper under CPLR 308(2) or 308(4), service must be made at the "actual dwelling place or usual place of abode" of the Defendant. It is not sufficient to serve the Defendant at a "last known address" where the Defendant no longer has a permanent and stable presence. *Feinstein* v. *Bergner*, 48 N.Y.2d 234, 239 n.3, 422 N.Y.S.2d 356, 358 n.3, 397 N.E.2d 1161, 1163 n.3 (1979) (where defendant had moved from parent's house to own residence more than a year before service was putatively made at his parents' house, jurisdiction was lacking and judgment must be vacated).
17. At the time of the putative service here, I resided at [ ]. I had not resided at [ ] since [ ], when I moved from there to [ ]. I attach to this affidavit [ ], which evidences that I was residing at [ ] during the months [ ]. [I also submit the affidavit of [ ], who was my [roommate, landlord, etc.] at [ ], and who attests that I moved [ ] on or around [ ].]

18. [308(2) WITH NO PERSON OF SUITABLE AGE AND DISCRETION] To be proper service, in addition to being made at a proper location, substitute service under CPLR 308(2) must be made on a person of "suitable age and discretion." Plaintiff's purported service here fails this requirement because it [was made on a nonexistent, fictional person] [was made on [ ], who is not of "suitable age and discretion" because [ ].]
19. To be of "suitable discretion," the person served as a substitute must have enough of a relationship of trust with the Defendant that the Defendant would rely on them to transmit important legal documents to him or her. *50 Court St. Assocs.* v. *Mendelson & Mendelson*, 151 Misc. 2d 87, 90, 572 N.Y.S.2d 997, 998-99 (N.Y.C. Civ. Ct. 1991) (collecting authorities) ("Suitable discretion" requires that "the nature of [the substitute's] relatisonship with the person to be served makes it more likely than not that they will deliver process to the named party. In applying this principle, the courts search for indications that the person served can be counted on to inform the named party of the proceeding."); *see also*, *e.g.*, *Pickman Brokerage* v. *Bevona*, 184 A.D.2d 226, 226, 584 N.Y.S.2d 807, 807 (1st Dep't 1992) (building porter not of "suitable age and discretion" under C.P.L.R. 308(2)).
20. Here, the person allegedly served as a substitute was not a proper substitute because [ ].
21. [FOR 308(4) SERVICE CHALLENGED FOR LACK OF DUE DILIGENCE] To be proper service under CPLR 308(4), affixing may be performed only after personal or substitute service under CPLR 308(1) and (2) has been attempted with due diligence to no avail. New York courts rigidly enforce the requirement of "due diligence." *See*, *e.g.*, *Scott* v. *Knoblock*, 204 A.D.2d 299, 300, 611 N.Y.S.2d 265 (2d Dep't 1994); *Fulton Sav. Bank* v. *Rebeor*, 175 A.D.2d 580, 580, 572 N.Y.S.2d 245, 245 (4th Dep't 1991). Where the affidavit of service does not make out adequate "due diligence,"

the judgment should be vacated on the papers alone, and it would be error even to order a traverse hearing. *Schwarz* v. *Margie*, 62 A.D.3d 780, 781, 878 N.Y.S.2d 459, 460 (2d Dep't 2009); *Leviton* v. *Unger*, 56 A.D.3d 731, 732, 868 N.Y.S.2d 126, 127 (2d Cir. 2008).

22. To satisfy the requirement of "due diligence," the process server must attempt personal or substitute service on a variety of days and at variety of times, so as to render successful service likely regardless of the defendant's habits or schedule. *See*, *e.g.*, *Austin* v. *Tri-County Mem. Hosp.*, 39 A.D.3d 1223, 1224, 834 N.Y.S.2d 419, 420 (4th Dep't 2007) ("due diligence" not shown; attempts were on three successive weekdays); *Leviton*, 56 A.D.3d at 732, 868 N.Y.S.2d at 127 ("due diligence" lacking where all three attempts at service were during working hours on various weekdays).
23. Here, the process server [ ]. This was patently insufficient to constitute the required "due diligence." For that reason, the judgment must be vacated on the papers alone.
24. [WHERE AFF OF SERVICE HAS WRONG DESCRIPTION OF PLAINTIFF OR REFUTED BY WITNESSES ATTESTING E.G. THE PERSON SERVED DOESN'T EXIST, WASN'T THERE, THE SERVER WASN'T THERE, ETC.] Moreover, the affidavit of service is false. I [ ]. Furthermore, I submit with these motion papers the affidavit of [ ], who is my [ ]. [ ] attests that [ ].
25. Because I [and my witness] have specifically refuted the information in the affidavit of service, it would be error to deny this motion without at the least holding a traverse hearing at which Plaintiff would be required to prove that service was actually made in accord with the CPLR. *See Bart-Rich Enters., Inc.* v. *Boyce-Canandaigua, Inc.*, 8 A.D.3d 1119, 1120, 776 N.Y.S.2d 818, 819 (4th Dep't 2004).
26. Assuming the Court vacates the judgment against me for lack of jurisdiction, the summons and complaint cannot be re-served but, rather, must be dismissed,

because it has been more than 120 days since their filing. C.P.L.R. 306-b. Thus, this action should be dismissed for lack of jurisdiction over the defendant under C.P.L.R. 3211(a)(8).

Dismissal under CPLR 3211:

27. Assuming the Court vacates the judgment against me for lack of jurisdiction, the summons and complaint cannot be re-served but, rather, must be dismissed, because it has been more than 120 days since their filing. C.P.L.R. 306-b. Thus, this action should be dismissed for lack of jurisdiction over the person of defendant under C.P.L.R. 3211(a)(8).
28. Where the Court has not been vested with jurisdiction over the Defendant through a valid service of process, the action is subject to dismissal under the plain language of C.P.L.R. 3211(a)(8). *See David* v. *Total Identity Corp.,* 50 A.D.3d 1484, 1485, 857 N.Y.S.2d 380, 382 (4th Dep't 2008) (reversing denial of motion to dismiss for lack of jurisdiction where corporate defendant not served with process, despite defendant's having received notice of the action); *Austin* v. *Tri-County Memorial Hosp.,* 39 A.D.3d 1223, 1223-24, 834 N.Y.S.2d 419, 420 (4th Dep't 2007) (reversing denial of motion to dismiss where service under C.P.L.R. 308(4) was not proper because there were not due diligence efforts at prior personal or substitute service).
29. Thus, courts routinely grant motions to dismiss under C.P.L.R. 3211(a)(8) in conjunction with vacating a default judgment for lack of jurisdiction under C.P.L.R. 5015(a)(4). *See Commissioners of State Ins. Fund* v. *Khondoker,* 55 A.D.3d 525, 526, 865 N.Y.S.2d 287, 288 (2d Dep't 2008) (reversing denial of *pro se* defendant's motion to vacate and dismiss where location of service under C.P.L.R. 308(4) was improper); *In Ja Kim* v. *Dong Hee Han,* 37 A.D.3d 662, 662, 830 N.Y.S.2d 345, 346 (2d Dep't 2007) (reversing denial of motion to vacate and dismiss where putative service under C.P.L.R. 308(4) done somewhere where defendant had never lived).

CPLR 5015(a)(1) and 317 and Interest of Justice:

30. CPLR 5015(a)(1) authorizes the Court to relieve a party from any order "upon such terms as may be just" on the ground of excusable default. I understand that to obtain this relief I have to establish that I am prepared to plead a meritorious defense to the underlying action. A motion under CPLR 5015(a)(1) must be brought "within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party."
31. Under CPLR 317 the Court may vacate a default judgment if the Defendant did not receive personal notice of the action and has a meritorious defense. This motion must be made within five years after entry of judgment and within one year after the Defendant learns of the judgment.
32. As the Court of Appeals has explained, in addition to the grounds expressly enumerated in C.P.L.R. 5015(a)(1)-(4), a motion to vacate under C.P.L.R. 5015(a) may also be granted "for sufficient reason, and in the interest of substantial justice." *Woodson* v. *Mendon Leasing Corp.*, 100 N.Y.2d 62, 68, 760 N.Y.S.2d 727, 731, 790 N.E.2d 1156, 1160 (2003).
33. New York courts liberally grant motions to vacate under CPLR 5015(a)(1) and CPLR 317 and in the interest of justice "because of the strong public policy favoring dispositions on the merits . . . ." *Home Ins. Co.* v. *Meyers Parking Sys., Inc.*, 186 A.D.2d 497, 498, 589 N.Y.S.2d 322, 323 (1st Dep't 1992).
34. This motion is timely under CPLR 5015(a)(1) because [it has been less than one year since judgment was entered] [notice of entry was served no earlier than ___] [I have never received a copy of the judgment with notice of entry from the Plaintiff. Because Plaintiff has never served notice of entry, the time to make a motion under CPLR 5015(a)(1) has not begun to elapse]. I may also move under CPLR 317 because Plaintiff purports to have served me by [], which is not personal service, and because I first learned of the existence of the judgment when [], less than a year ago.

35. The reason I did not appear timely in this action is []. These circumstances constitute a reasonable excuse for my failure to appear.
36. The meritorious defense[s] I am prepared to raise in this lawsuit [is] [are]: [].
37. [I submit herewith a proposed answer pleading these defenses.]
38. Because I have a reasonable excuse, [was not personally served,] and am prepared to raise meritorious defenses, this motion to vacate should be granted and I should be permitted to appear and answer.
39. In determining whether to vacate the judgment in the interest of justice the Court may consider the fact that the default judgment was procedurally improper to begin with. *PRS Assets* v. *Rodriguez*, 2006 N.Y. Slip Op. 51148U, 2006 N.Y. Misc. LEXIS 1517 (Dist. Ct. June 21, 2006) (vacating judgment in interest of justice despite absence of reasonable excuse for default where complaint not properly verified, no affidavit by someone with personal knowledge was submitted in support of default judgment, and defendant had colorable defenses).
40. Here, the default judgment was not procedurally proper because the Plaintiff failed to comply with the "proof" requirement of CPLR 3215(f). CPLR 3215(f) requires that, before the Court order even a defaulting defendant to pay damages, someone from the Plaintiff, with personal knowledge, swear in an affidavit to facts sufficient to establish the claimed liability and damages.
41. [DEFECTIVE OUT OF STATE AFFIDAVIT] [Here, the only "proof" that Plaintiff provided of the claim in seeking its default judgment was an affidavit of facts notarized in the State of [] but not accompanied by a certificate of conformity. An affidavit signed and notarized outside the State of New York is not of evidentiary value to constitute "proof" of anything unless it is accompanied by a certificate of conformity. CPLR 2309(c); *Citibank (South Dakota), N.A.* v. *Martin*, 11 Misc. 3d 219, 224, 807 N.Y.S.2d 284, 289 (N.Y.C. Ct. 2005).]

42. [AFFIDAVIT WITHOUT PERSONAL KNOWLEDGE] [It is insufficient under CPLR 3215(f) to submit an affidavit of a person without personal knowledge of the essential facts, because such an affidavit does not constitute “proof” of anything. *See Citibank (South Dakota), N.A.* v. *Martin*, 11 Misc. 3d 219, 223, 807 N.Y.S.2d 284, 289 (N.Y.C. Civ. Ct. 2005) (“The affidavit must demonstrate personal knowledge of essential facts or the judgment will be assailable, even if the defendant defaults.” (internal citations to various authorities omitted)).

43. Here, the Plaintiff is not an original creditor but is, rather, a debt buyer. The putative original creditor is []. Plaintiff’s application for a default judgment here was supported only by the affidavit of [], who asserted that he had personal knowledge of the books and records of the Plaintiff but made no assertion with respect to []'s books and records. [] does not purport to be an employee or officer of [] or otherwise to have knowledge of its records. All relevant evidence in this case would have been among the books and records of []. []'s affidavit is therefore not based on personal knowledge, and so is insufficient to constitute “proof” of anything under C.P.L.R. 3215(f).

44. Under analogous circumstances, courts have held an attorney’s verification to be insufficient to support a default judgment under C.P.L.R. 3215(f), because such a verification is not based on personal knowledge and so is insufficient to constitute “proof” of the essential facts of liability and damages. *Mullins* v. *DiLorenzo*, 199 A.D.2d 218, 219, 606 N.Y.S.2d 161, 162 (1st Dep’t 1993).

45. Moreover, it is now well settled in this Department that an affidavit of a debt buyer's employee is not admissible as proof of the underlying claim that accrued in favor of the original creditor, knowledge of which could only be held by the original creditor's employees. *See Unifund CCR Partners* v. *Youngman*, 89 A.D.3d 1377, 1377, 932 N.Y.S.2d 609, 609 (4th Dep’t 2011), *lv. denied*, 2012 N.Y. Slip Op. 72420 (debt

buyer's affiant failed to show how she could have personal knowledge of a different company's business records).]

46. [In addition, the affidavit failed to make out any cause of action against the Defendant in any event, because [].]

47. Where, like here, the Plaintiff has improperly obtained an unsupported default judgment, and has not submitted any evidence supporting its cause of action, and the defendant is prepared to assert meritorious defenses, and in light of New York's strong public policy favoring merits dispositions, the interest of justice support vacatur. In addition, [LIST ANY OTHER REASONS THE INTERESTS OF JUSTICE SUPPORT VACATUR, I.E. THIS WAS IDENTITY THEFT, DOMESTIC VIOLENCE, USURY, A BIG SCAM, WHATEVER], further supporting vacatur in the interest of justice.

Poundage:

48. CPLR 8012(b)(4) provides that where an income execution or property execution is vacated after levy, the Sheriff is entitled to "poundage upon the value of the property levied upon" and the Court may order the "party liable therefor" to pay this to the Sheriff. Under CPLR 8012(b)(1) the poundage rate is 5% of the first $250,000 collected.

49. The Sheriff's Office presumably withholds its 5% poundage as it collects income under an income execution, and so should not be entitled to any further poundage following the vacatur of the judgment in this matter, as it will collect no further income. *See* Op. N.Y. State Comptroller 88-16 (Sheriff is entitled to 5% of moneys actually collected as principal and interest under income execution, and should withhold this poundage from each installment collected).

50. Assuming that the Sheriff's Office is, for some reason, entitled to additional poundage, the "party liable therefor" must be the Plaintiff, because the Court lacks

jurisdiction over the Defendant and so does not have the power to impose this cost on the Defendant. *See Estate of Randolfi* v. *Ultissima Beauty Institute, Ltd.*, 182 A.D.2d 799, 800, 586 N.Y.S.2d 492, 493 (2d Dep't 1992) (poundage correctly imposed on Plaintiff where default judgment vacated for lack of jurisdiction); *West Side Nat'l Bank of Chicago* v. *Warsaw Discount Bank*, 204 A.D. 4, 4, 197 N.Y.S. 144, 145 (1st Dep't 1922) (where judgment vacated for lack of jurisdiction, it was error to condition vacatur on defendant's payment of Sheriff's poundage: "No obligation rested upon the defendant to pay the sheriff's fees, because the moneys were unlawfully taken by the sheriff upon a void attachment. The order should have required the return of all the moneys attached, and should at the same time have required the plaintiff in that action to pay the sheriff's fees which had accumulated.").

Restitution:

51. Under C.P.L.R. 5015(d), where a judgment or order is vacated, the Court may order the plaintiff to make restitution of amounts obtained through enforcement of the vacated judgment.
52. In light of the fact that the judgment here was entered without jurisdiction and was therefore a nullity from the beginning, an order of restitution is appropriate and necessary to prevent the Plaintiff from being unjustly enriched.
53. To date the Plaintiff has collected $_____ through enforcement of the judgment. I attach _____ as documentation of the collection.
54. The Court should therefore order Plaintiff to disgorge to me the entire $_____ that Plaintiff obtained through its _____.
55. No Previous application has been made for the relief sought herein.

WHEREFORE, I respectfully request an order vacating the judgment and dismissing the complaint in this action, and such further relief as the Court may find to be just and proper.

_____
[Name]
Pro Se

Sworn to before me this _____ day of _____, 2013

_____
Notary Public

At Special Term of the Buffalo City Court,
Held at the Courthouse located at
50 Delaware Avenue, Buffalo, New York
the _____ day of _____, 2013

Present: HON._____
Judge of the City Court

Plaintiff,

v.

Defendant.

ORDER

Index No. _____

This matter was brought before the Court by Order to Show Cause by the Defendant, [], seeking vacatur of the default judgment issued by this Court on [], under CPLR 5015(a)(4) [or, in the alternative, CPLR 5015(a)(1), CPLR 317, and/or in the interest of justice].

This matter came to be heard on [], and the Court, having heard the arguments of the Defendant, having read the affidavit of the Defendant, sworn to on [], and upon all supporting documents annexed thereto, [and on the Plaintiff's failure to appear] herby orders the following:

IT IS HEREBY ORDERED:

The motion to vacate is granted. Judgment rendered in favor of the Plaintiff and against the Defendant on [], for $[], is vacated in its entirety and [the action is dismissed] [the action is restored to the calendar and the proposed Answer attached to the order to show cause is deemed to have been filed and served as of the date of this order]. [Any poundage to which the Erie County Sheriff is entitled shall be paid by the Plaintiff.] [Plaintiff is to make restitution to the Defendant, within 30 days from service of notice of

entry of this order, of moneys in the amount of $_____ collected through enforcement of the judgment.]

Hon. _____, J.C.C.

CITY COURT OF THE CITY OF BUFFALO
COUNTY OF ERIE

[],

Plaintiff,

v.

[],

Defendant.

AFFIDAVIT OF SERVICE BY MAIL

Index No:

State of New York, County of Erie ss.:

[], being duly sworn says, I am over 18 years of age and served the motion papers on opposing party under CPLR 2214 in the following fashion:

On _____, I mailed by certified mail, return receipt requested, a true copy of the Order to Show Cause to Vacate Default Judgment and supporting papers enclosed and properly sealed in a postpaid envelope, which I deposited in an official depository under the exclusive care and custody of the United State Postal Services within the State of New York addressed to:

Buffalo City Court Marshals
50 Delaware Ave.
Buffalo, NY 14202

[LAW FIRM ADDRESS]

_____

[Name]

Sworn to before me this ___ day of _____ 2013

_____
Notary Public

MFY LEGAL SERVICES, INC.

EVALUATING DEFENSES AND PREPARING ANSWERS

Appendix 2

Evan Denerstein
Staff Attorney
MFY Legal Services, Inc.

CONSUMER CREDIT TRANSACTION
IMPORTANT! YOU ARE BEING SUED!!
THIS IS A COURT PAPER - *A SUMMONS*

DON'T THROW IT AWAY!! TALK TO A LAWYER RIGHT AWAY! PART OF YOUR PAY CAN BE TAKEN FROM YOU [GARNISHEED]. IF YOU DO NOT BRING THIS TO COURT, OR SEE A LAWYER, YOUR PROPERTY CAN BE TAKEN AND YOUR CREDIT RATING CAN BE HURT!! YOU MAY HAVE TO PAY OTHER COSTS TOO!! IF YOU CAN'T PAY FOR YOUR OWN LAWYER, BRING THESE PAPERS TO THIS COURT RIGHT AWAY. THE CLERK [PERSONAL APPEARANCE] WILL HELP YOU!

Court identification

Civil Court of the City Of New York

County of BRONX ← County

Summons And Formal Complaint

Index no. → 012345

R

APR 06 2011

CITIBANK (SOUTH DAKOTA), N.A.

Plaintiff

Index No.

Plaintiff's Address: 701 E 60 ST N
SIOUX FALLS SD 57117

FILE NO. 000000000000000000

Plaintiff

against

Ida Incognito

Defendant (you)

Defendant(s)

The basis of venue designated is:
Defendant resides in BRONX

Transaction to place in BRONX

amount sued for

To the above named Defendant(s)
YOU ARE HEREBY SUMMONED to appear in The Civil Court of the City of New York, County of BRONX *at the office of the Court Clerk at* 851 GRAND CONCOURSE, BX *in the County of* BRONX *City and State of New York, within the time provided by the law as noted below and to file your answer to the annexed complaint with the Clerk: upon your failure to answer, judgement will be taken against you for the sum of $* 1,757.18 *together with the costs of this action.*

Date: 3/31/11

FORSTER & GARBUS LLP ATTY FOR PLTF
60 Motor Parkway Commack NY 11725
TEL: (631-393-9400)

Plaintiff's firm

Def.: 123 Fake St. BRONX NY 10456

Note: The law provides that:(a) if this summons is served by its delivery to you personally within the City Of New York, you must appear and answer within 20 days after such service; or (b) If this summons is served by delivery to any person other than you personally, or is served outside the City of New York, or by publication, or by any means other than personal delivery to you within the City of New York, you are allowed 30 days after proof of service thereof is filed with the Clerk of this Court within which to appear and answer.

FORMAL COMPLAINT

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

Caption

CITIBANK (SOUTH DAKOTA), N.A.

against *Plaintiff*

Ida Incognito

Defendant(s)

Plaintiff, by its attorney(s) complaining of the Defendant(s), upon information and belief, alleges:
1. That Defendant(s) resides in the county in which this action is brought; or that Defendant(s) transacted business within the county in which this action is brought in person or through his agent and that the instant cause of action arose out of said transaction.
2. PLAINTIFF IS A NATIONAL BANKING ASSOCIATION.

type of debt

3. ON INFORMATION AND BELIEF DEFENDANT IN PERSON OR BY AGENT MADE CREDIT CARD PURCHASES AND/OR TOOK MONEY ADVANCES UNDER A CREDIT AGREEMENT AT DEFENDANTS' REQUEST; A COPY OF WHICH AGREEMENT WAS FURNISHED TO DEFENDANT AT THE TIME THE ACCOUNT WAS OPENED.
4. THERE REMAINS AN AGREED BALANCE ON SAID ACCOUNT OF $ 1,757.18

5. DEFENDANT(S) IS IN DEFAULT AND DEMAND FOR PAYMENT HAS BEEN MADE.

6. PLAINTIFF IS THE ORIGINAL CREDITOR AND IS NOT REQUIRED TO BE LICENSED BY THE NYC DEPARTMENT OF CONSUMER AFFAIRS.

2ND CAUSE/ACTION:PLAINTIFF STATED AN ACCOUNT TO DEFENDANT WITHOUT OBJECTION

Identification of Plaintiff as creditor

amount sued for

There is due Plaintiff from Defendant(s) the amount in the complaint, no part of which has been paid, although duly demanded

WHEREFORE Plaintiff demands judgement against Defendant(s) for the sum of $ 1,757.18 together with the costs and disbursements of this action.

WE ARE DEBT COLLECTORS; ANY INFORMATION OBTAINED WILL BE USED IN ATTEMPTING TO COLLECT THIS DEBT.

FORSTER & GARBUS LLP
TEL # 1-631-393-9400
ATTORNEY(S) FOR PLAINTIFF
60 MOTOR PARKWAY
COMMACK, NY 11725
NYC DCA LIC # 1259596

Plaintiff's law firm

PURSUANT TO PART 130-1.1-a OF THE RULES OF THE CHIEF ADMINISTRATOR THIS SIGNATURE APPLIES TO THE ATTACHED SUMMONS AND COMPLAINT

DATED: THE 31 DAY OF MARCH ,2011
FILE NO.

GLENN S. GARBUS JOEL D. LEIDERMAN

COPY

File # G136326

CONSUMER CREDIT TRANSACTION

IMPORTANT!! YOU ARE BEING SUED!!

THIS IS A COURT PAPER - A SUMMONS. DON'T THROW IT AWAY!! TALK TO A LAWYER RIGHT AWAY!! PART OF YOUR PAY CAN BE TAKEN FROM YOU (GARNISHEED) IF YOU DO NOT BRING THIS TO COURT, OR SEE A LAWYER, YOUR PROPERTY CAN BE TAKEN AND YOUR CREDIT RATING CAN BE HURT!! YOU MAY HAVE TO PAY OTHER COSTS TOO!! IF YOU CAN'T PAY FOR YOUR OWN LAWYER, BRING THESE PAPERS TO THIS COURT RIGHT AWAY. THE CLERK (PERSONAL APPEARANCE) WILL HELP YOU!!

CIVIL COURT OF THE CITY OF NEW YORK - COUNTY OF NEW YORK

MIDLAND FUNDING LLC DBA IN NEW YORK AS MIDLAND FUNDING OF DELAWARE LLC

Plaintiff,

-against-

[redacted] 2009

Index No.

SUMMONS

[redacted]

Plaintiff's Residence Address
8875 AERO DRIVE SUITE 200
SAN DIEGO CA 92123
The Basis of this venue designated is:
Defendant's residence

Defendant(s)

Defendant's Residence Address:

[redacted]

To the above named defendant(s):

YOU ARE HEREBY SUMMONED to appear in the Civil Court of the City of New York , COUNTY OF NEW YORK , at the office of the clerk of the said Court at 111 CENTRE STREET in the COUNTY OF NEW YORK , City and State of New York within the time provided by law as noted below and to file your answer to the annexed complaint with the clerk; upon your failure to answer, judgment will be taken against you for the sum of $1,687.77 with interest on the sum of $1,687.77 from 07/05/09 together with the costs of this action.

Dated: 07/08/09

PRESSLER and PRESSLER, LLP
Attorneys for Plaintiff

By: _____
Lori R. Cetani , Esq.
305 Broadway 9th Floor
New York, NY 10007
(516)222-7929

FILED
JUL 15 2009
NEW YORK COUNTY
CIVIL COURT

Note the law provides that:
a) If this summons is served by its delivery to you personally with the City of New York, you must appear and answer within TWENTY DAYS after such service; or
b) If this summons is served by its delivery to any person other than you personally, or is served outside the City of New York, or by publication, or by any means other than personal delivery to you within the City of New York, you are allowed THIRTY DAYS after the proof of service thereof is filed with the Clerk of this Court within which to appear and answer.

File # G136326

CIVIL COURT OF THE CITY OF NEW YORK - COUNTY OF NEW YORK

MIDLAND FUNDING LLC DBA IN NEW YORK AS MIDLAND FUNDING OF DELAWARE LLC

Plaintiff(s) Index No.

-against- COMPLAINT

[redacted]

Defendant(s)

Plaintiff by its attorney, Pressler and Pressler, LLP complaining of the defendant(s) respectfully alleges upon information and belief as follows:

Debt Buyer

FIRST CAUSE OF ACTION

1. Plaintiff, MIDLAND FUNDING LLC DBA IN NEW YORK AS MIDLAND FUNDING OF DELAWARE LLC, is a limited liability company formed under the laws of the state of DE and having taken assignment of is owner of NORDSTROM FSB account number [redacted]192 and is a debt collection agency licensed by the New York City Department of Consumer Affairs license No. 1312658 and is authorized to do business in the State of New York .

Assignment clause

NYC DCA Lic. #

2. Defendant(s) resides within the jurisdictional limits of this court.

Original creditor

3. The defendant(s) entered into a credit card agreement account number [redacted]192 with NORDSTROM FSB wherein defendant(s) agreed to pay NORDSTROM FSB all amounts charged to said account by the authorized use thereof.
4. The agreement containing the terms and conditions governing the use of the charge account, including terms of payment was issued to defendant(s).
5. Thereafter defendant(s) incurred charges by use of the said account in the sum of $1,670.47 .
6. There is now due and owing the plaintiff , as the assignee of the account from the defendant(s) the agreed sum of $1,670.47 .

SECOND CAUSE OF ACTION

7. Plaintiff repeats, realleges and reiterates each and every allegation contained in paragraphs 1-6 as if set forth at length.
8. Plaintiff's predecessor in interest mailed monthly statements required by the agreement to the defendant(s) thereby rendering a full just and true account of all unpaid amounts charged by the defendant(s) which are due and owing, and defendant(s) received, accepted and retained same without objection.
9. By reason of the aforementioned, an account stated was taken and had between the plaintiff's predecessor in interest and defendant(s) for the agreed total balance of $1,670.47 .

WHEREFORE, plaintiff demands judgment against defendant(s) on the first cause of action for the sum of $1,670.47 together with pre-suit interest from 05/24/09 to 07/05/09 in the amount of $17.30 for a total sum of $1,687.77 together with accruing interest to the date of judgment plus costs and disbursements of this action and for such further and other relief as the Court deems just and proper and on the second cause of action for the sum of $1,670.47 together with pre-suit interest from 05/24/09 to 07/05/09 in the amount of $17.30 for a total sum of $1,687.77 together with accruing interest to the date of judgment plus costs and disbursements of this action and for such further and other relief as the Court deems just and proper.

PRESSLER and PRESSLER, LLP
305 Broadway 9th Floor
New York, NY 10007
(516)222-7929

PRESSLER and PRESSLER, LLP
Attorneys for Plaintiff

By:_____
Lori R. Cetani , Esq.

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

CONSUMER CREDIT TRANSACTION
IMPORTANT! YOU ARE BEING SUED!!
THIS IS A COURT PAPER - *A SUMMONS*

DON'T THROW IT AWAY!! TALK TO A LAWYER RIGHT AWAY! PART OF YOUR PAY CAN BE TAKEN FROM YOU [GARNISHEED]. IF YOU DO NOT BRING THIS TO COURT, OR SEE A LAWYER, YOUR PROPERTY CAN BE TAKEN AND YOUR CREDIT RATING CAN BE HURT!! YOU MAY HAVE TO PAY OTHER COSTS TOO!! IF YOU CAN'T PAY FOR YOUR OWN LAWYER, BRING THESE PAPERS TO THIS COURT RIGHT AWAY. THE CLERK [PERSONAL APPEARANCE] WILL HELP YOU!

FILED
JAN 10 2011
NEW YORK C...
CIVIL COURT

Civil Court of the City Of New York — Summons And Formal Complaint.

County of NEW YORK — 2011

MIDLAND FUNDING, LLC
DBA IN NEW YORK AS MIDLAND
FUNDING OF DELAWARE LLC
A/P/O BANK OF AMERICA

"A/P/O" indicates that plaintiff is a debt buyer

Plaintiff

Defendant(s)

Index No. [redacted]
Plaintiff's Address: 8875 AERO DR STE#200
SAN DIEGO CA 92123

FILE NO. P018534881550

The basis of venue designated is:
Defendant resides in NEW YORK

Transaction to place in NEW YORK

To the above named Defendant(s)
YOU ARE HEREBY SUMMONED to appear in The Civil Court of the City of New York, County of NEW YORK *at the office of the Court Clerk at* 111 CENTRE STREET *in the County of* NEW YORK *City and State of New York, within the time provided by the law as noted below and to file your answer to the annexed complaint with the Clerk: upon your failure to answer, judgement will be taken against you for the sum of $* 7,402.38 *with interest thereon from the* 17 *day of* OCTOBER , 2010 , *together with the costs of this action.*

Date: 12/30/10

FORSTER & GARBUS LLP ATTY FOR PLTF
60 Motor Parkway Commack NY 11725
TEL: (631-393-9400)

Def.: [redacted]

Note: The law provides that:(a) if this summons is served by its delivery to you personally within the City Of New York, you must appear and answer within 20 days after such service; or (b) If this summons is served by delivery to any person other than you personally, or is served outside the City of New York, or by publication, or by any means other than personal delivery to you within the City of New York, you are allowed 30 days after proof of service thereof is filed with the Clerk of this Court within which to appear and answer.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

MIDLAND FUNDING, LLC
DBA IN NEW YORK AS MIDLAND
FUNDING OF DELAWARE LLC.
A/P/O BANK OF AMERICA

against — *Plaintiff*

[redacted] — *Defendant(s)*

Plaintiff, by its attorney(s) complaining of the Defendant(s), upon information and belief, alleges:
1. That Defendant(s) resides in the county in which this action is brought; or that Defendant(s) transacted business within the county in which this action is brought in person or through his agent and that the instant cause of action arose out of said transaction.
2. ON INFORMATION AND BELIEF THE DEFENDANT IN PERSON OR THROUGH AN AGENT MADE CREDIT CARD PURCHASES OR TOOK MONEY ADVANCES UNDER A CREDIT CARD OR LINE OF CREDIT ACCOUNT OR PROMISSORY NOTE/LOAN- WHICH A COPY WAS FURNISHED TO DEFENDANT. PLAINTIFF PURCHASED THIS ACCOUNT FOR VALUE AND THE DEFENDANT WAS NOTIFIED OF SAME.
3. THERE REMAINS AN AGREED BALANCE ON SAID ACCOUNT OF $ 7,402.38 ,DUE AND OWING ON PLAINTIFF'S CAUSE OF ACTION. NO PART [redacted] ALTHOUGH DULY DEMANDED.

This identifies the plaintiff as a debt buyer

4. DEFENDANT(S) IS IN DEFAULT AND DEMAND FOR PAYMENT HAS BEEN MADE.
5. PLAINTIFF, AS OWNER, IS AUTHORIZED TO PROCEED WITH THIS ACTION.
6. PLAINTIFF IS LICENSED BY THE NYC DEPARTMENT OF CONSUMER AFFAIRS LICENSE NUMBER 1312658

Plaintiff's NYC DCA License #

There is due Plaintiff from Defendant(s) the amount in the complaint, no part of which has been paid, although duly demanded

WHEREFORE Plaintiff demands judgement against Defendant(s) for the sum of $ 7,402.38 with interest thereon from the 17 day of OCTOBER , 2010 together with the costs and disbursements of this action.

FORSTER & GARBUS LLP
TEL # 1-631-393-9400
ATTORNEY(S) FOR PLAINTIFF
60 MOTOR PARKWAY
COMMACK, NY 11725
NYC DCA LIC # 1259596

WE ARE DEBT COLLECTORS; ANY INFORMATION OBTAINED WILL BE USED IN ATTEMPTING TO COLLECT THIS DEBT.

Note: this is not the NYC DCA License # for the Plaintiff. It is the license # for the Plaintiff's lawfirm

PURSUANT TO PART 130-1.1-a OF THE RULES OF THE CHIEF ADMINISTRATOR THIS SIGNATURE APPLIES TO THE ATTACHED SUMMONS AND COMPLAINT

DATED: THE 30 DAY OF DECEMBER ,2010
FILE NO: [redacted]

GLENNS.GARBUS JOEL D. LEIDERMAN

COPY

CIVIL COURT OF THE STATE OF NEW YORK
COUNTY OF _____
----------*---

_____,

Index No. _____

Plaintiff(s),

- against -

WRITTEN ANSWER
CONSUMER CREDIT
TRANSACTION

_____,

Defendant(s).
----------*---

ANSWER: (Check all that apply)

1.____ General Denial: I deny the allegations in the Complaint.

SERVICE

2.____ I did not receive a copy of the Summons and Complaint.

3.____ I received the Summons and Complaint, but service was not correct as required by law.

DEFENSES

4.____ It is not my debt. I am a victim of identity theft or mistaken identity.

5.____ I have paid all or part of the alleged debt.

6.____ I dispute the amount of the debt.

7.____ I had no business dealings with Plaintiff (Plaintiff lacks standing) and/or Plaintiff is not the legal owner of my debt.

8.____ The NYC Department of Consumer Affairs shows no record of plaintiff having a license to collect debt (only for cases filed in New York City).

9.___ Plaintiff does not allege a debt collector's license number in the Complaint (only for cases filed in New York City).

10.___ Statute of limitations (the time has passed to sue on this debt).

11.___ This debt has been discharged in bankruptcy.

12.___ The collateral (property) was not sold at a commercially reasonable price.

13.___ Failure to provide proper notice before selling collateral (property).

14.___ Failure to mitigate damages (Plaintiff did not take reasonable steps to limit damages).

15.___ Unjust enrichment (the amount demanded is excessive compared with the original debt).

16.___ Violation of the duty of good faith and fair dealing.

17.___ Unconscionability (the contract is unfair).

18.___ Laches (plaintiff has excessively delayed in bringing this lawsuit to my disadvantage).

19. _____ **OUTSIDE OF NEW YORK CITY ONLY:** Lack of personal jurisdiction under Uniform City Court Act § 213 (applies if you do not work in the city where the case was filed **and** you are not a resident of that city **or** (for all counties except Westchester and Nassau counties) you are not a resident of a town next to that city within the same county).

OTHER

20.___ Other
Reasons_____
_

21.___ Defendant is in the military

22.___ Please take notice that my only source of income is _____, which is exempt from collection.

COUNTERCLAIM(S)

23.___ Counterclaim(s): $_____ Reason:
_____

VERIFICATION

State of New York, County of _____ss:

_____, being duly sworn, deposes and says: I have read the Answer in Writing and know the contents to be true from my own knowledge, except as to those matters stated on information and belief, and as to those matters I believe them to be true.

Sworn to before me this ____ day of _____, 20____.

_____

_____ Signature of Defendant

Notary/Court Employee

_____

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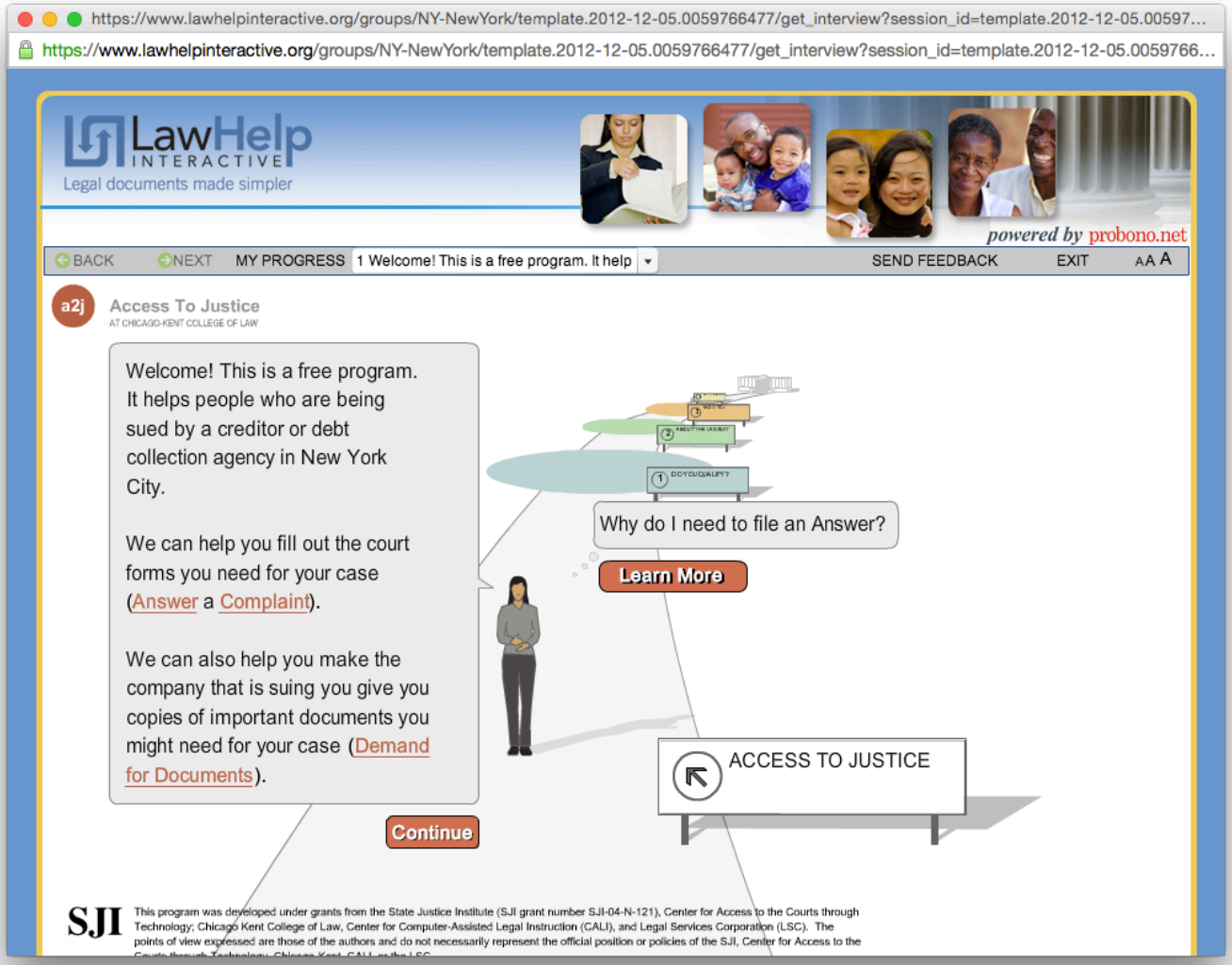
Legal Services Programs for Consumers And Innovative Uses of Technology

Appendix 3

Carolyn E. Coffey, MFY Legal Services, Inc.

Adam Friedl, Pro Bono Net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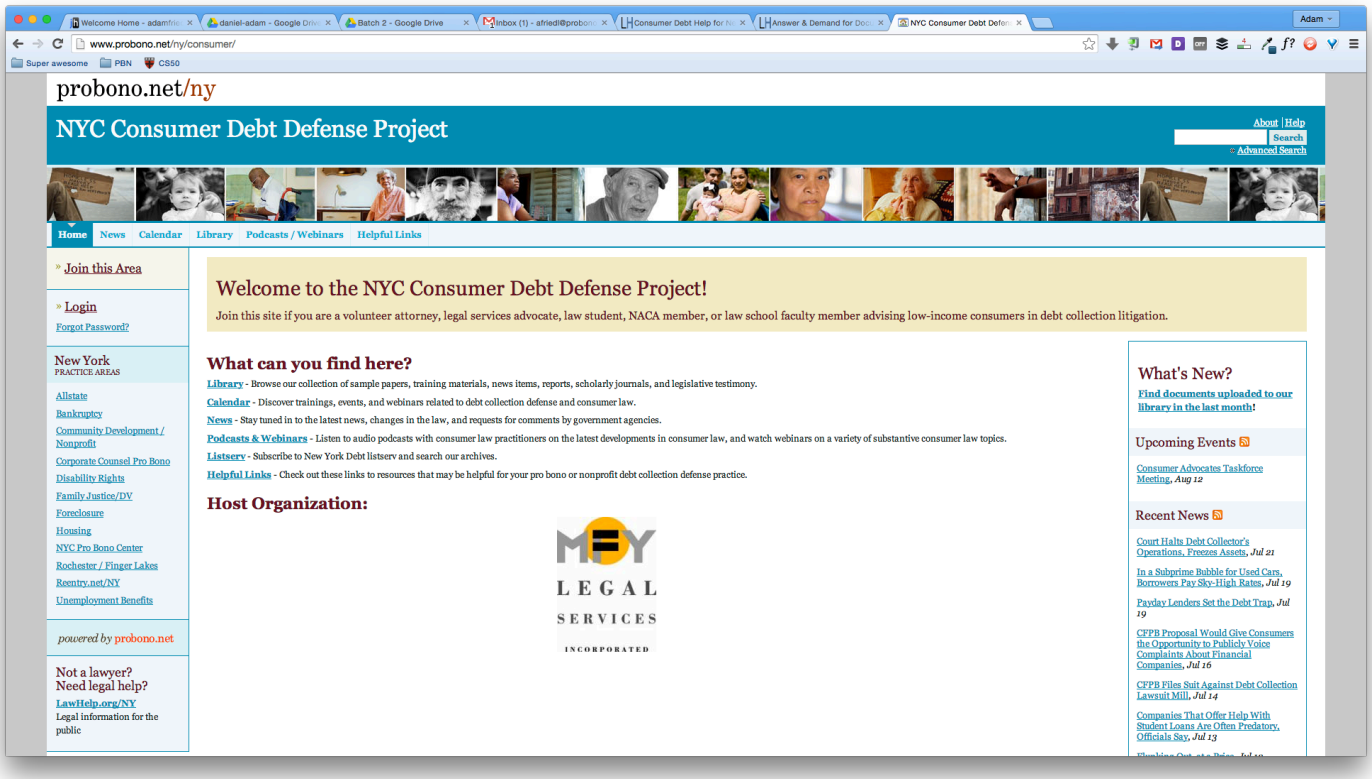
1 Welcome! This is a free program. It help
SEND FEEDBACK
EXIT
AA A
a2j
Access To Justice
AT CHICAGO-KENT COLLEGE OF LAW
Welcome! This is a free program. It helps people who are being sued by a creditor or debt collection agency in New York City.
We can help you fill out the court forms you need for your case (Answer a Complaint).
We can also help you make the company that is suing you give you copies of important documents you might need for your case (Demand for Documents).
Continue
Why do I need to file an Answer?
Learn More
ACCESS TO JUSTICE
SJI
This program was developed under grants from the State Justice Institute (SJI grant number SJI-04-N-121), Center for Access to the Courts through Technology; Chicago Kent College of Law, Center for Computer-Assisted Legal Instruction (CALI), and Legal Services Corporation (LSC). The points of view expressed are those of the authors and do not necessarily represent the official position or policies of the SJI, Center for Access to the


www.probono.net/ny/consumer/
probono.net/ny
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Unemployment Benefits
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Not a lawyer? Need legal help?
LawHelp.org/NY
Legal information for the public
Welcome to the NYC Consumer Debt Defense Project!
Join this site if you are a volunteer attorney, legal services advocate, law student, NACA member, or law school faculty member advising low-income consumers in debt collection litigation.
What can you find here?
Library - Browse our collection of sample papers, training materials, news items, reports, scholarly journals, and legislative testimony.
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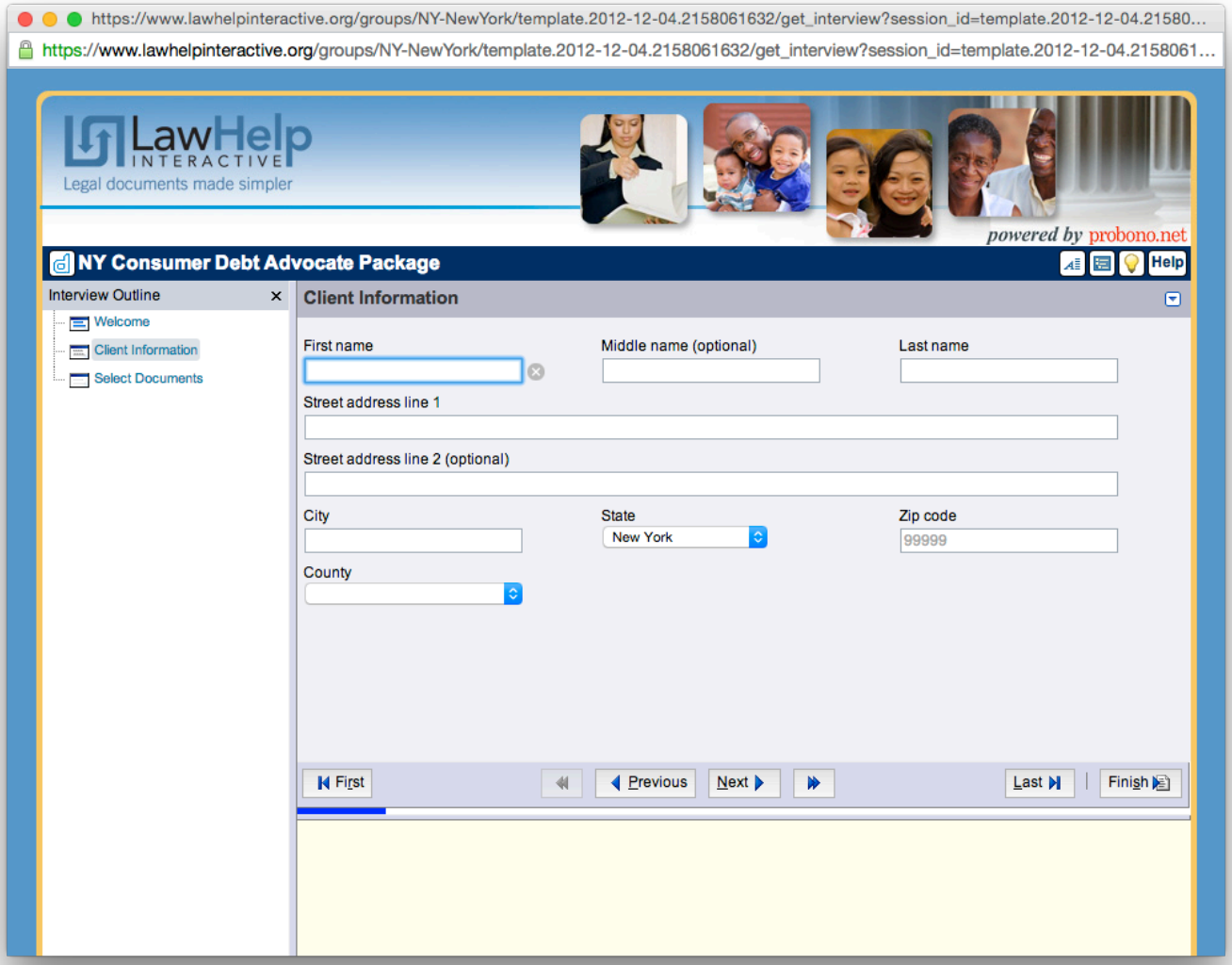
News - Stay tuned in to the latest news, changes in the law, and requests for comments by government agencies.
Podcasts & Webinars - Listen to audio podcasts with consumer law practitioners on the latest developments in consumer law, and watch webinars on a variety of substantive consumer law topics.
Listserv - Subscribe to New York Debt listserv and search our archives.
Helpful Links - Check out these links to resources that may be helpful for your pro bono or nonprofit debt collection defense practice.
Host Organization:
MFY LEGAL SERVICES INCORPORATED
What's New?
Find documents uploaded to our library in the last month!
Upcoming Events
Consumer Advocates Taskforce Meeting, Aug 12
Recent News
Court Halts Debt Collector's Operations, Freezes Assets, Jul 21
In a Subprime Bubble for Used Cars, Borrowers Pay Sky-High Rates, Jul 19
Payday Lenders Set the Debt Trap, Jul 19
CFPB Proposal Would Give Consumers the Opportunity to Publicly Voice Complaints About Financial Companies, Jul 16
CFPB Files Suit Against Debt Collection Lawsuit Mill, Jul 14
Companies That Offer Help With Student Loans Are Often Predatory, Officials Say, Jul 13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LawHelp INTERACTIVE
Legal documents made simpler
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NY Consumer Debt Advocate Package
Help
Interview Outline
Welcome
Client Information
Select Documents
Client Information
First name
Middle name (optional)
Last name
Street address line 1
Street address line 2 (optional)
City
State
New York
Zip code
99999
County
First
Previous
Next
Last
Finish

Biographies

Carolyn E. Coffey is a Supervising Attorney at MFY Legal Services, Inc., which provides free legal assistance to New York City residents in the areas of housing, foreclosure, public benefits, civil and disability rights, employment, consumer and family law, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through law reform, impact litigation, and policy advocacy. Ms. Coffey supervises MFY's Consumer Rights Project, which provides advice, counsel, and representation to low-income New Yorkers on a range of consumer problems and represents consumers in state court lawsuits and appeals and in federal court proceedings in affirmative cases, including class actions. She also supervises MFY's Low-Income Bankruptcy Project, which provides full representation in Chapters 7 and 13 bankruptcy filings to New Yorkers seeking a fresh start who are unable to afford an attorney, and prepares petitions for pro se debtors with the help of pro bono attorneys. She also engages in legislative advocacy, successfully helping to enact pro-consumer laws in New York City and New York State, drafts amicus curiae briefs, has co-authored reports concerning the debt collection industry, and conducts trainings on consumer law. Ms. Coffey is active in the CLARO (Civil Legal Advice and Resource Office) program in the courts, and regularly serves as a consumer law expert. Ms. Coffey is also an adjunct professor at Cardozo Law School, where she teaches a consumer clinic seminar.

Evan Denerstein is a Staff Attorney at MFY Legal Services' Consumer Rights Project. The Consumer Rights Project provides advice, counsel, education and representation to low-income individuals on a range of consumer issues, prioritizing direct services to people living on fixed incomes and people with disabilities. Prior to joining MFY, Mr. Denerstein assisted clients on a variety of consumer issues as a Staff Attorney at The Financial Clinic. Mr. Denerstein received his B.A. from the University of California at Berkeley (2004) and his J.D. from Brooklyn Law School (2010).

Adam Friedl joined Pro Bono Net in September 2012. Previously, Adam was the Coordinating Attorney for New York Appleseed's Volunteer Lawyer for the Day - Consumer Credit Project. He has also worked as a staff attorney at The Family Center and served as Acting Director of the Public Interest Center at St. John's University School of Law. Before law school, Adam was a case manager working with immigrant communities in the South Bronx and his native Oklahoma.

Matthew Parham is an attorney with the Western New York Law Center in Buffalo, handling consumer rights litigation matters and serving as the consumer law expert at CLARO-Buffalo consumer law clinics. After graduating from NYU Law School in 2004, Mr. Parham clerked for the Honorable Rosemary S. Pooler of the United States Court of Appeals for the Second Circuit, and then spent five years at the Manhattan headquarters of the global law firm Sullivan & Cromwell, LLP, at which he represented large financial institutions and other corporations in high-stakes commercial litigation and handled pro bono immigration matters. Between October 2010 and September 2012, Mr. Parham operated a solo law practice in Buffalo practicing consumer and civil rights litigation, including debt collection defense and prosecuting debt collector harassment, wrongful automobile repossession, and other consumer rights matters, and police and correction officer misconduct cases. Mr. Parham has also served as an adjunct clinical professor at the SUNY-Buffalo Law School teaching consumer finance law and litigation.