



May 30, 2014

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Re: Proposed reforms relating to consumer credit collection cases

Dear Mr. McConnell:

The American Financial Services Association (“AFSA”)¹ appreciates the opportunity to comment on the reforms in consumer credit collection cases proposed by the New York State Unified Court System (“UCS”) to prevent unwarranted default judgments and ensure a fair legal process for debtors (“proposed court rules”). In this regard, the UCS press release announcing the proposed court rules notes that “most of [these cases] are brought by third parties who routinely purchase large portfolios of delinquent credit card debt, often for pennies on the dollar, commencing lawsuits based on little more than boilerplate language and a few fields of data from a spreadsheet.” AFSA understands the concerns of the UCS with respect to collection lawsuits commenced by persons engaged in the business of purchasing portfolios of delinquent consumer credit debt (“debt buyers”).

AFSA is concerned, however, that the proposed court rules will have unintended and inappropriate consequences for assignees of credit agreements who are not debt buyers. Cases in point include sales finance companies that purchase motor vehicle retail installment sale contracts (“RISCs”) from auto dealerships either contemporaneously with, or within days of, their origination, and financial institutions that securitize consumer credit contracts by assigning them to special-purpose entities (“securitization trusts”). As explained below, neither scenario gives rise to the consumer protection concerns associated with collection actions commenced by debt buyers.

AFSA is also concerned that the proposed court rules do not accommodate the various methods by which consumer credit agreements are created and updated, do not take into account original creditors’ use of subsidiary service agents and affiliates, and do not correctly reflect New York law.

If adopted in unmodified form, the proposed court rules would present many significant logistical and compliance difficulties for original creditors,² financing agencies³ and financial institutions without conferring any benefit on consumers.

¹ The American Financial Services Association is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA member companies offer vehicle financing, payment cards, personal installment loans and mortgage loans. The Association encourages and maintains ethical business practices and supports financial education for consumers of all ages.

² The term “original creditor” as used in this letter means the person to whom a consumer credit obligation is initially payable under the agreement evidencing the obligation.

Clarifying the Applicability of the Requirements for Debt Buyer Actions

A principal concern is that the proposed court rules require prescribed affidavit forms for collection actions commenced by an “original creditor” and those commenced by a “debt buyer,” but they do not define either key term. As a result, one is left to attempt to infer scope limitations from the affidavit templates. For example, the proposed court rules require the use of a debt buyer affidavit “where the Plaintiff has purchased the debt.”⁴ The language of the proposed court rules thus suggests that any purchaser of a consumer credit contract would be a debt buyer.

Moreover, the template for the Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff does not suggest a scope limitation with respect to debt buyers. Instead, it merely contains the following averment:

On or about _____ [date], Debt Buyer purchased or was assigned the account from _____ [original creditor or seller] (the “Purchase”).

(Aff. ¶ 2.) The only suggestion of a scope limitation on a “debt buyer” is the following sentence in the Affidavit of Facts and Sale of Account by Original Creditor:

Debtor defaulted and a demand for payment was made by Original Creditor.

(Aff. ¶ 2.) While this averment suggests that the UCS believes a “debt buyer” to be a purchaser of a credit obligation principally engaged in the business of purchasing bad debt for collection purposes, AFSA respectfully submits that the absence of key definitional provisions creates needless uncertainty for plaintiffs and their counsel.

The lack of a “debt buyer” definition creates an ambiguity with respect to the provisions regarding debt buyer actions that could result in the proposed court rules being construed to apply to plaintiffs who are not debt buyers, as that term is commonly understood. One of the problems this presents is that the affidavit templates for Debt Buyer Actions are not appropriate for use by assignees not principally engaged in the business of purchasing bad debt for collection. They are, for example, premised on the erroneous factual assumption that assignees only purchase credit agreements after the debtor has defaulted and a demand for payment has been made by the original creditor. Additionally, the proposed court rules require chain of title affidavits for Debt Buyer Actions. While these chain of title affidavits may be appropriate as applied to purchasers of portfolios of bad debt, AFSA respectfully submits that they are unnecessary, unduly burdensome, and impracticable as applied to assignees such as sales finance companies and securitization trusts, which acquire credit agreements shortly after origination. Indeed, the assignment by the original creditor often is apparent on the face of a motor vehicle retail instalment sale contract purchased by a sales finance company.

³ The New York Motor Vehicle Retail Instalment Sales Act defines a “financing agency” as follows: “Financing agency” means a person engaged, in whole or in part, in the business of purchasing retail instalment contracts from one or more retail sellers. The term includes but is not limited to a bank, trust company, savings bank, savings and loan association, private banker or investment company, if so engaged. The term also includes a retail seller engaged, in whole or in part, in the business of holding retail instalment contracts acquired from retail buyers. *See* N.Y. Pers. Prop. Law § 301(9).

⁴ Proposed 22 N.Y.C.R.R. § 208.14-a(c).

AFSA therefore believes that this ambiguity should be addressed by including a “debt buyer” definition that is limited to a person whose principal purpose is the business of purchasing delinquent or charged-off accounts from unaffiliated third parties for collection purposes. A definition of this nature would be consistent with the Affidavits of Facts and Sale of Account by Original Creditor averment that “Debtor defaulted and a demand for payment was made by Original Creditor.” (Aff. ¶ 2.) As noted previously, this averment suggests that the intent of the proposed court rules is to treat as “debt buyers” only persons engaged in the business of acquiring delinquent or charged-off indebtedness under consumer credit contracts. Expressly doing so would be consistent with the stated goal, announced by the Chief Judge, of addressing the problems posed by consumer credit collection actions “brought by third parties who routinely purchase large portfolios of delinquent credit card debt, often for pennies on the dollar, commencing lawsuits based on little more than boilerplate language and a few fields of data from a spreadsheet.”⁵

This approach also would be consistent with the views expressed by the New York State Department of Financial Services (“DFS”) in connection with its proposed debt collection regulations. Specifically, the DFS noted that “[t]he problem is particularly acute in the cases brought by debt buyers. Debt buyers purchase portfolios of debt for pennies on the dollar and only obtain spreadsheets with skeletal information; they do not have access to contracts, account statements, or other account level documents.”⁶

Debt buyers are commonly understood to be persons principally engaged in the business of purchasing delinquent or charged-off consumer credit debt for collection purposes. AFSA notes by way of analogy that the “debt collection agency” definition adopted by the New York City Department of Consumer Affairs includes:

a buyer of *delinquent* debt who seeks to collect such debt either directly or through the services of another by, including but not limited to, initiating or using legal processes or other means to collect or attempt to collect such debt.(emphasis added)⁷

Similarly, the debt collection rule proposed by the DFS defines the term “debt collector” to include “without limitation a buyer of *delinquent* debt who seeks to collect such debt either directly or indirectly.”⁸

AFSA respectfully submits that these concerns are not implicated by collection actions brought by assignees who are not debt buyers. The concerns noted by the Court are, as the Chief Judge and the DFS have indicated, a problem associated with purchase of portfolios of delinquent or charged-off debt. Proposed definitions of an “original creditor” and a “debt buyer” are included in the proposed rule revisions attached hereto as Exhibit “A.” As discussed below in greater

⁵ Press Release, Chief Judge Announces Comprehensive Reforms to Promote Equal Justice for New York Consumers in Debt Cases, available at http://www.courts.state.ny.us/PRESS/PDFs/PR14_03.pdf (April 30, 2014).

⁶ Federal Trade Commission, The Structure and Practices of the Debt Buying Industry, available at <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf> (January 2013).

⁷ N.Y.A.D.C.Law § 20-489(a).

⁸ See Proposed 23 N.Y.C.R.R. § 1(e), available at <http://www.dfs.ny.gov/legal/regulations/proposed/debt-collection.pdf> (August 2013).

detail, the proposed “debt buyer” definition would ensure, for example, that sales finance companies and securitization trusts are not inadvertently and inappropriately treated as “debt buyers” under the proposed court rules.

Application of Proposed Court Rules to Actions by Assignees Other than Debt Buyers

Retail Installment Sale Contract Concerns

None of the proposed template affidavit forms contemplate collection actions by assignees who are not debt buyers. One commonplace example of such an assignee is a sales finance company. Sales finance companies, including banks, engage in the business of purchasing a RISC not in default from retail sellers. A sample copy of a RISC is attached hereto as Exhibit “B.”

The sales finance line of business is regulated under New York consumer protection and banking laws. The New York Motor Vehicle Retail Instalment Sales Act (“MVRISA”)⁹ and the New York Retail Instalment Sales Act (“RISA”)¹⁰ regulate, respectively, motor vehicle retail instalment sales and retail instalment sales of goods other than motor vehicles. These consumer financial protection laws, which are codified in Articles 9 and 10 of the Personal Property Law, regulate RISCs pursuant to which a retail buyer purchases tangible personal property (*e.g.*, a car) and/or services from a retail seller (*e.g.*, an auto dealership) on an installment sale basis. *See* N.Y. Pers. Prop. Law §§ 301(5), 401(6) (defining the term “retail instalment contract”). These laws, as well as Article 11-B of the Banking Law entitled “Sales Finance Companies,” contemplate that the retail seller may assign its RISC to a sales finance company. *See, e.g.*, N.Y. Banking Law § 491(7) (defining a “sales finance company”); N.Y. Pers. Prop. Law §§ 301(9), 401(18) (defining a “financing agency”), 302(10) (effect of other laws on contract’s purchase and written assignment), 411 (terms of purchase by financing agency).

A typical example would be a motor vehicle RISC that a consumer enters into with an auto dealership and assigns to a sales finance company such as Ford Motor Credit Company or Chase Auto Finance. Because motor vehicle RISCs typically are assigned contemporaneously with, or within days of origination, they are never in default when assigned.

None of the template affidavits contemplate collection actions involving debt attributable to RISCs that are entered into with retail sellers and assigned to a bank or sales finance company. As is evident from the statement that “Plaintiff and Debtor entered into a credit agreement,” the Affidavit of Facts by Original Creditor for Original Creditor Actions is appropriately intended to be used only by a person who entered into a credit agreement with the debtor. (*See* Aff. ¶ 2.) Additionally, the Affidavit of Facts and Sale of Account by Original Creditor for use in Debt Buyer Actions recites that the “[d]ebtor defaulted and a demand for payment was made by Original Creditor.” This suggests that the “debt buyers” contemplated by the proposed court rules are persons whose principal purpose is the business of purchasing delinquent or charged-off debt for collection purposes.

Accordingly, AFSA respectfully requests that the proposed court rules be revised to accommodate a third category of consumer credit collection actions – “Assignee Actions” – and

⁹ N.Y. Pers. Prop. Law § 301 *et seq.*

¹⁰ N.Y. Pers. Prop. Law § 401 *et seq.*

to provide for associated affidavit template(s) for use by assignees other than debt buyers. Additionally, AFSA recommends that the proposed court rules define the term “assignee” in order to clarify when the related affidavit template should be used. A proposed definition of an “assignee” is included in the proposed court rule revisions attached hereto as Exhibit “A.” AFSA would appreciate the opportunity to assist the UCS in drafting an Affidavit of Facts by Assignee template suitable for use in connection with Assignee Actions.

Securitization Concerns

ASFA is concerned that the “debt buyer” provisions of the proposed court rules might be deemed applicable to assignees receivables sold for any purpose. This result would be overly broad given that some financial institutions securitize consumer credit obligations. A securitization involves a financial institution assigning contracts not in default to an affiliated special-purpose entity (a “securitization trust”), as collateral security for financing, while the assigning institution continues to service and administer the contract. As a result, the financial institution, as servicer of the account, remains the person with whom the debtor deals. An account may be transferred to different securitization trusts throughout the life of the contract with no impact on the debtor’s account or change in the identity of the servicer.

Securitization trusts have no employees and do not service consumer credit contracts or collect on them if they go into default. The entity that assigned the contract to the securitization trust continues to service the contract. The securitization trust that holds the credit contracts should not be considered a “debt buyer” for purposes of the proposed court rules because the contracts were not in default when assigned, it does not maintain and administer the account records, and it does not perform any type of collection activity.

Accordingly, AFSA respectfully submits that the transfer of a current receivable to a securitization trust for the purpose of facilitating an asset-backed securitization transaction should be excluded from any of the proposed court rules requiring assignment or chain of title information. Assignments to securitization trusts should be irrelevant for collection suit purposes because the trusts have no contact with the debtor, do not maintain the account records, and present none of the problems the proposed court rules are designed to prevent. The transferor/servicer is the entity that would maintain and administer the account, address any delinquencies and provide all of the account information necessary under the proposed court rules. This entity would be the person with all of the information and decision making authority on the account.

Affidavit of Facts by Original Creditor

Exclusive Use of Loan Terminology

This affidavit template assumes that the consumer credit transaction will be a loan of money insofar as paragraph 4 requires the use of loan terminology (“principal” and “interest”). However, there are two distinct types of consumer credit transactions – consumer loans and consumer credit sales. (Closed end consumer credit sales are referred to, in the New York MVRISA and the New York RISA, as “retail instalment sales.”) The terms “principal” and “interest” are not used in connection with retail installment sales because interest is a charge for

the loan or forbearance of money. This is in contrast to a retail installment sale in which a retail seller sells goods or services to a retail buyer on a deferred payment basis.

In order to accommodate the fact that the terms “amount financed” and “credit service charge” or “finance charge” are used in connection with retail installment sales, this affidavit should be revised to permit the use of the words “amount financed” and “finance charge” instead of “principal” and “interest.”

Personal Knowledge Requirement

The first sentence of paragraph one of the proposed affidavit templates includes the statement that the affiant has “*personal knowledge* and access to plaintiff’s books and records, including electronic records, relating to the account” of the debtor. It is unclear what the words “personal knowledge” used in this sentence are intended to refer to given that the affiant is separately asserting that he or she: (1) has “access to [the] books and records; and (2) has “personal knowledge of the facts set forth in” the affidavit “[b]ased on [his or her] review of [the] books and records.” AFSA thus is concerned that the words “personal knowledge” appearing in the first sentence of the first paragraph may be construed to mean that the affiant has personal knowledge of the making of the books and records, the specific underlying act, transaction, occurrence or event or some other fact in addition to the foundational averments required for the admission of a business record.

The foundational averments required for the admission of a business record are specified in CPLR Rule 4518(a), which provides as follows:

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was *made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.* An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

(emphasis added); *See also Unifund CCR Partners v. Youngman*, 89 App. Div. 3d 1377, 1378 (4th Dep’t 2011) (*citing West Val. Fire Dist. No. 1 v. Village of Springville*, 294 App. Div. 2d, 949, 950 (4th Dep’t 2002)) (“A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker’s business practices and procedures.”).

AFSA respectfully submits that these foundational averments, and the requisite review of the books and records, are satisfied by the following statements in the proposed affidavit templates:

In my position, I also have personal knowledge of Debt Buyer's procedures for creating and maintaining its books and records. Debt Buyer's records were made in the regular course of business and it was the regular course of business such business to make the records. The records were made at or near the time of the events recorded. Based on my review of Debt Buyer's books and records, I have personal knowledge of the facts set forth in this affidavit.

(Aff. ¶ 1) All circumstances not otherwise addressed in CPLR 4518(a) regarding "the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility."¹¹ N.Y. C.P.L.R. Rule 4518(a).

Additionally, the required signature of an *employee, officer or member of Plaintiff that has personal knowledge* in the proposed Affidavit of Facts by Original Creditor concerns AFSA because it does not take into account some creditors' use of subsidiary service agents to manage their credit operations. Most major credit issuers, for example, utilize subsidiary service agents to manage their entire credit operation, from the opening of the account, issuing the credit, posting payments, mailing statements, maintaining the balance, and retaining attorneys to represent them in the event of a default by the consumer. As a result, the individuals who have the requisite personal knowledge are not employees of the Plaintiff, but rather are employees of the servicing agent. The Affidavit does not provide for this scenario. Consequently, the proposed reforms as written create a bar to the New York courts for many original creditors that enter into revolving credit transactions in the state.

At a minimum, the court should address this concern and remedy this problem by expanding the reference in paragraph one from "Plaintiff," to "Plaintiff or its Servicing Agent or Affiliate." Accordingly, AFSA respectfully requests that, at a minimum, the first sentence of the first paragraph of the template factual affidavits be revised to read as follows:

¹¹ See also *Chase Manhattan Bank (Nat'l Asso.), Bank Americard Div. v Hobbs*, 94 Misc. 2d 780 (N.Y.C. Civ. Ct. 1978). Under the statutory provision authorizing the admission of a business record into evidence if the judge finds that it was made in the regular course of business and that it was the regular course of such business to make it at the time of the transaction or event or within a reasonable time thereafter (CPLR 4518(a)), all other circumstances of the making of the record, *including lack of personal knowledge by the maker, may be proved to affect its weight, but not its admissibility*. *Id.* at 786 (emphasis added); *Plymouth Rock Fuel Corp. v Leucadia, Inc.*, 117 App. Div. 2d 727 (2d Dep't 1986) Delivery tickets and invoices prepared from information contained in tickets as to amount, location and date of fuel delivered or other services rendered are admissible under business records exception based upon testimony of president of delivery firm who, *while lacking personal knowledge of deliveries themselves, is able through testimony to establish that information provided in tickets is fully incorporated into records made in regular course of business through billing process*. *Id.* at 728 (emphasis added); *William Conover, Inc. v Waldorf*, 251 App. Div. 2d 727 (3d Dep't 1998) In action for breach of contract to pay plaintiff company to complete installation of heating system for defendants' residence, billing statements prepared by plaintiff's president on basis of job books maintain by plaintiff's employees were admissible as business records where each employee had his or her own job book, in which he or she would record number of hours worked on particular project each day, and *president's lack of personal knowledge of accuracy of job books went to weight, not admissibility, of billing statements*. *Id.* at 728 (emphasis added).

I am a/an _____ [title: employee/officer/member] of Plaintiff or its Servicing Agent or Affiliate, herein and I have access to Plaintiff's books and records relating to the account ("Account") of _____ [name of debtor] ("Debtor").

That said, the required affidavit still does not permit each individual Plaintiff to explain its relationship with the servicing agent or affiliate, which is necessary to set forth the proper relationship of the affiant and the affiant's employer to the plaintiff so that the court can determine that the affiant is in fact the proper person to execute the affidavit. AFSA believes this situation can best be addressed by permitting original creditors to utilize an affidavit that best describes their business practices. As such, we respectfully request that the proposed court rules allow for these variations and alternatives by relaxing the requirements that the proposed affidavit be used verbatim. As an alternative to requiring a specific affidavit, the UCS may want to consider a requirement that sets forth the minimum facts that must be included in the plaintiff's affidavit submitted in support of its application for a default judgment.

True and Correct Copies of All Written Assignments of the Account

The Proposed Court Rules require that True and Correct copies of All Written Assignments of the Account be attached to the Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff. It is unclear whether this means that all written assignments must be attached to the affidavit or an assignment may be proven only by attaching a written assignment. Under the Uniform Electronic Transaction Act ("UETA"), it is not necessary for an assignment to be in written form and, as a result, a written assignment may not always exist when the contract assigned is an electronic contract. Rather, a debt buyer or an original creditor may swear in an affidavit that the assignment occurred. AFSA respectfully requests that the court modify the written assignment requirement in a manner that takes electronic contracting into account.

A True and Correct Copy of the Agreement

The Summary of Proposed Affidavits states that the original creditor must submit, in connection with an Original Creditor Action, "a true and correct copy of the original agreement governing the account upon which the action is based, and any amendments thereto." Credit card issuers send an account agreement to the consumer when the account is opened – an event that may have occurred years or even decades prior to the account delinquency and the commencement of a collection action. The original credit card agreement subsequently may be updated, often on multiple occasions, to change its terms and may even be superseded entirely by a completely new agreement. Once some of its terms have been changed, or once it has been superseded and replaced by an entirely new agreement, the terms of the original agreement no longer govern the account. Moreover, the original agreement is not maintained indefinitely, nor is it required to be by any applicable banking regulation.

AFSA respectfully submits that the apparent goal of this proposed court rule, providing documentary evidence of the agreement between the cardholder and the card issuer, can be more properly and accurately achieved by requiring the production of the most recent account agreement for the account that is the subject of the suit. This agreement would be the one that was in effect when the account was closed and reflects all revisions or updates as of the account closing date.

Further, if an original agreement is defined to mean the agreement in effect when the account was opened, thereby requiring its submission in connection with the application for a default judgment, it would result in a departure from a procedural rule which New York may apply to a federally-chartered depository institution into a banking/lending regulation that would be subject to federal preemption. Any such requirement would effectively render uncollectible any New York account for which the original, obsolete account agreement has not been retained.

In summary, the court should require submission of the current agreement governing the account, which includes any amendments made to the agreement through the change of terms process set forth in Regulation Z, rather than the original agreement. *See* 12 C.F.R. § 1026.9 (Regulation Z change in terms provision).

Affidavit of Non-Expiration of Statute of Limitations

The proposed court rules require the submission of a separate Affidavit of Non-Expiration of Statute of Limitations (the “Affidavit of Non-Expiration”) to be executed by the Plaintiff or its counsel, stating as follows:

Based upon reasonable inquiry, I have reason to believe that the applicable statute(s) of limitations for the cause(s) of action asserted herein has/have not expired.

(Aff. ¶ 2.) AFSA respectfully submits that the Affidavit of Non-Expiration effectively and inappropriately requires the Plaintiff to plead the absence of an affirmative defense.

The statute of limitations is one of the affirmative defenses listed in CPLR Section 3018(b), which apparently is statutory in nature and, hence, presumably subject to modification only by the New York State legislature. Pursuant to CPLR Rule 3211, the statute of limitations “is waived unless raised either by . . . motion [to dismiss] or in the responsive pleading.” N.Y. C.P.L.R. Rule 3211(a)(5), (e).

Numerous reported decisions confirm that the statute of limitations is an affirmative defense that is waived if not raised in the prescribed manner. *See, e.g., Joseph T. Ryerson & Son, Inc. v Piffath*, 132 App. Div. 2d 527 (2d Dep’t 1987) (Plaintiff not obligated to assert timeliness of his second action following dismissal of first action for failure to serve timely complaint, *since statute of limitations is not element of plaintiff’s claim, but rather affirmative defense to be pleaded and proved, or waived, by defendant.*); *Doroski v. Mintler*, 49 App. Div. 2d 990, 374 N.Y.S.2d 721 (3d Dep’t 1975); *In re Lipsit’s Will*, 39 Misc. 2d 27 (Surrogate Ct. Westchester County 1963), *modified on other grounds*, 21 App. Div. 2d 509 (2d Dep’t 1964), *aff’d*, 15 N.Y.2d (1964) holding that the statute of limitations is a statute of repose, *and it is optional with a debtor as to whether or not he should raise it; for the claim exists, but is not collectible because of the bar of the statute*); *Toper v Rotach*, 62 Misc. 2d 290 (Sup. Ct. Special Term Oneida County 1970) (holding the period of limitations is a matter to be pleaded as an affirmative defense).

Finally, AFSA notes that the Affidavit of Non-Expiration fails to recognize that, in addition to New York law or the law of the jurisdiction where cause of action accrued, the statute of limitations may be governed by the choice-of-law clause contained in the parties’ contract.

Conclusion

For the reasons expressed previously, AFSA has significant concerns with the proposed court rules. In view of those concerns, AFSA respectfully requests, on behalf of its members, that the court revise the proposed court rules in accordance with its comments. As noted previously, AFSA would appreciate the opportunity to assist the UCS in drafting an “Affidavit of Facts by Assignee” template suitable for use in connection with “Assignee Actions.”

If you have any questions or would like to discuss our comments in further detail, please do not hesitate to contact me by phone at 952-922-6500 or email at dfagre@afsamail.org.

Sincerely,



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Exhibit A

Proposed Court Rules

§ 208.14-a. Proof of Default Judgment in Consumer Credit Matters (Uniform Civil Rules for the New York City Civil Court)

§ 210.14-a Proof of Default Judgment in Consumer Credit Matters (Uniform Civil Rules for the City Courts Outside the City of New York)

§ 212.14-a Proof of Default Judgment in Consumer Credit Matters (Uniform Civil Rules for the District Courts)

(a) Applicability. In any action arising from a consumer credit transaction, a default judgment shall not be entered against the defendant unless the plaintiff has complied with the requirements of CPLR 3215 and submitted the affidavits required under this section.

(b) Where the plaintiff is the original creditor, the plaintiff must submit the AFFIDAVIT OF FACTS BY ORIGINAL CREDITOR ~~and the AFFIDAVIT OF NON-EXPIRATION OF STATUTE OF LIMITATIONS.~~

(c) Where the plaintiff is an assignee, the plaintiff must submit the AFFIDAVIT OF FACTS BY ASSIGNEE.

(ed) Where the plaintiff is a debt buyer who has purchased the debt, the plaintiff must submit the AFFIDAVIT OF FACTS AND SALE OF ACCOUNT BY ORIGINAL CREDITOR, the AFFIDAVIT OF PURCHASE AND SALE OF ACCOUNT BY DEBT SELLER for each debt buyer who owned the debt prior to the plaintiff, and the AFFIDAVIT OF FACTS AND PURCHASE OF ACCOUNT BY DEBT BUYER PLAINTIFF ~~and the AFFIDAVIT OF NON-EXPIRATION OF STATUTE OF LIMITATIONS.~~

(e) Definitions. The following terms shall have the following meanings for purposes of this section:

(i) “Original creditor” means the person to whom a consumer credit obligation is initially payable under the agreement evidencing the obligation.

(ii) “Debt buyer” means a person whose principal purpose is the business of purchasing delinquent or charged-off consumer debt from unaffiliated third parties for collection.

(iii) “Assignee” means a person other than a debt buyer to whom a consumer credit contract or the indebtedness thereunder has been assigned.

Exhibit B

**RETAIL INSTALMENT CONTRACT
SIMPLE FINANCE CHARGE**

Dealer Number _____ Contract Number _____

Buyer Name and Address (Including County and Zip Code)	Co-Buyer Name and Address (Including County and Zip Code)	Seller-Creditor (Name and Address)
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You, the Buyer (and Co-Buyer, if any), may buy the vehicle below for cash or on credit. By signing this contract, you choose to buy the vehicle on credit under the agreements on the front and back of this contract. You agree to pay the Seller - Creditor (sometimes "we" or "us" in this contract) the Amount Financed and Finance Charge according to the payment schedule below. We will figure your finance charge on a daily basis. The Truth-In-Lending Disclosures below are part of this contract.

New/Used/Demo	Year	Make and Model	Vehicle Identification Number	Primary Use For Which Purchased
				Personal, family, or household unless otherwise indicated below <input type="checkbox"/> business <input type="checkbox"/> agricultural <input type="checkbox"/> _____

FEDERAL TRUTH-IN-LENDING DISCLOSURES				
ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf.	Total of Payments The amount you will have paid after you have made all payments as scheduled.	Total Sale Price The total cost of your purchase on credit, including your down payment of
_____ %	\$ _____	\$ _____	\$ _____	\$ _____ is

Your Payment Schedule Will Be: _____ (e) means an estimate

Number of Payments	Amount of Payments	When Payments Are Due
		Monthly beginning

Or As Follows:

Late Charge. If payment is not received in full within 10 days after it is due, you will pay a late charge of \$ 1.00 or 5 % of the part of the payment that is late, whichever is greater.

Prepayment. If you pay off all your debt early, you will not have to pay a penalty.

Security Interest. You are giving a security interest in the vehicle being purchased.

Additional Information: See this contract for more information including information about nonpayment, default, any required repayment in full before the scheduled date and security interest.

ITEMIZATION OF AMOUNT FINANCED	
1 Cash Price (including \$ _____ sales tax)	\$ _____ (1)
2 Total Downpayment =	
Your trade-in is a _____	
Year	Make
Model	Vehicle Identification No.
Gross Trade-In Allowance	\$ _____
Less Prior Credit or Lease Balance (e)	\$ _____
Equals Net Trade In	\$ _____
+ Cash	\$ _____
+ Other _____	\$ _____
(If total downpayment is negative, enter "0" and see 4I below)	\$ _____ (2)
3 Unpaid Balance of Cash Price (1 minus 2)	\$ _____ (3)
4 Other Charges Including Amounts Paid to Others on Your Behalf	
(Seller may keep part of these amounts):	
A Cost of Optional Credit Insurance	
Paid to Insurance Company or Companies	
Life	\$ _____
Disability	\$ _____
B Vendor's Single Interest Insurance	
Paid to Insurance Company	
	\$ _____
C Other Optional Insurance Paid to Insurance Company or Companies	
	\$ _____
D Fees Paid to Government Agencies	
to _____ for _____	\$ _____
to _____ for _____	\$ _____
to _____ for _____	\$ _____
E Government Taxes Not Included in Cash Price	
	\$ _____
F Government License and/or Registration Fees	
	\$ _____
G Government Certificate of Title Fees	
	\$ _____
H Government Waste Tire Management Fee	
	\$ _____
I Other Charges (Seller must identify who is paid and describe purpose)	

Insurance. You may buy the physical damage insurance this contract requires (see back) from anyone you choose who is acceptable to us. You are not required to buy any other insurance to obtain credit unless the box indicating Vendor's Single Interest Insurance is required is checked below.

If any insurance is checked below, policies or certificates from the named insurance companies will describe the terms and conditions.

**Check the Insurance you want and sign below:
Optional Credit Insurance**

Credit Life: Buyer Co-Buyer Both
 Credit Disability: Buyer Co-Buyer Both

Premium:
 Credit Life \$ _____
 Credit Disability \$ _____

Insurance Company Name _____
 Home Office Address _____

Credit life insurance and credit disability insurance are not required to obtain credit. Your decision to buy or not buy credit life insurance and credit disability insurance will not be a factor in the credit approval process. They will not be provided unless you sign and agree to pay the extra cost. If you choose this insurance, the cost is shown in Item 4A of the Itemization of Amount Financed. Credit life insurance is based on your original payment schedule. This insurance may not pay all you owe on this contract if you make late payments. Credit disability insurance does not cover any increase in your payment or in the number of payments. Coverage for credit life insurance and credit disability insurance ends on the original due date for the last payment unless a different term for the insurance is shown below.

Other Optional Insurance

_____ Type of Insurance _____ Term _____

Premium \$ _____
 Insurance Company Name _____

Home Office Address _____

_____ Type of Insurance _____ Term _____

Premium \$ _____
 Insurance Company Name _____

Home Office Address _____

Other optional insurance is not required to obtain credit. Your decision to buy or not buy other optional insurance will not be a factor in the credit approval process. It will not be provided unless you sign and agree to pay the extra cost. I want the insurance checked above.

X _____
 Buyer Signature _____ Date _____

X _____
 Co-Buyer Signature _____ Date _____

Paid to Insurance Company	\$ _____
C Other Optional Insurance Paid to Insurance Company or Companies	\$ _____
D Fees Paid to Government Agencies	
to _____ for _____	\$ _____
to _____ for _____	\$ _____
to _____ for _____	\$ _____
E Government Taxes Not Included in Cash Price	\$ _____
F Government License and/or Registration Fees	\$ _____
G Government Certificate of Title Fees	\$ _____
H Government Waste Tire Management Fee	\$ _____
I Other Charges (Seller must identify who is paid and describe purpose)	
to _____ for Prior Credit or Lease Balance (e)	\$ _____
to _____ for _____	\$ _____
to _____ for _____	\$ _____
to _____ for _____	\$ _____
to _____ for _____	\$ _____
to _____ for _____	\$ _____
to _____ for _____	\$ _____
to _____ for _____	\$ _____
to _____ for _____	\$ _____
to _____ for _____	\$ _____
to _____ for _____	\$ _____
Total Other Charges and Amounts Paid to Others on Your Behalf	\$ _____ (4)
5 Amount Financed (3 + 4)	\$ _____ (5)

Insurance Company name _____

Home Office Address _____

Other optional insurance is not required to obtain credit. Your decision to buy or not buy other optional insurance will not be a factor in the credit approval process. It will not be provided unless you sign and agree to pay the extra cost. I want the insurance checked above.

X Buyer Signature _____ Date _____

X Co-Buyer Signature _____ Date _____

THIS INSURANCE DOES NOT INCLUDE INSURANCE ON YOUR LIABILITY FOR BODILY INJURY OR PROPERTY DAMAGE.

VENDOR'S SINGLE INTEREST INSURANCE (VSI insurance). If the preceding box is checked, the Creditor requires VSI insurance for the initial term of the contract to protect the Creditor for loss or damage to the vehicle (collision, fire, theft). VSI insurance is for the Creditor's sole protection. This insurance does not protect your interest in the vehicle. You may choose the insurance company through which the VSI insurance is obtained. If you elect to purchase VSI insurance through the Creditor, the cost of this insurance is \$ _____ and is also shown in item 4B of the Itemization of Amount Financed. The coverage is for the initial term of the contract.

Returned Check Charge: You agree to pay a charge of \$ 20 if any check you give us is dishonored.

GAP Waiver Notice
 If this box is checked, and if the vehicle is a total loss because it is confiscated, damaged, or stolen, you will not be liable for the gap amount. The gap amount is the excess, if any, of (1) the amount you would owe under this contract as of the date of loss if the vehicle were not a total loss and you were to prepay the contract in full (less any refunds we get for cancelling optional insurance, maintenance, service or other contracts), over (2) the sum of (a) any past due payments and other amounts due because you broke promises in this contract and (b) the actual cash value of the vehicle immediately before the loss.

Trade-In Payoff Agreement: Seller relied on information from you and/or the lienholder or lessor of your trade-in vehicle to arrive at the payoff amount shown in item 2 of the Itemization of Amount Financed as the "Prior Credit or Lease Balance." You understand that the amount quoted is an estimate. If the actual payoff amount is more than the amount shown in 2 you must pay the Seller the excess on demand. If the actual payoff amount is less than the amount shown in 2 Seller will refund to you any overage Seller receives from your prior lienholder or lessor.

Buyer Signature **X** _____ Co-Buyer Signature **X** _____

OPTION: You pay no finance charge if the Amount Financed, item 5, is paid in full on or before _____, Year _____. SELLER'S INITIALS _____

WARRANTIES
 The following paragraph does not affect any warranties covering the vehicle that the manufacturer may provide or limit any rights you may have under the Lemon Laws or, for used vehicles, under the certificate of serviceability that was included in your purchase contract. The following paragraph also does not apply if the vehicle is a used vehicle you bought in New York City. Unless the Seller makes a written warranty or enters into a service contract within 90 days of the date of this contract, the Seller makes no warranties on the vehicle. Making no warranties means that you get no express warranties, and no implied warranties of merchantability or fitness for a particular purpose.

The following notice only applies to used vehicles bought in New York City:
IMPORTANT NOTICE TO BUYER
 A) STATE LAW REQUIRES THAT SELLERS OF SECOND-HAND CARS CERTIFY IN WRITING TO THE BUYER THAT EACH CAR IS IN SAFE CONDITION AT THE TIME OF SALE.
 B) THIS CERTIFICATION IS A GUARANTEE THAT THE CAR IS IN SAFE CONDITION AT THE TIME OF SALE.
 C) YOU HAVE A RIGHT TO REQUEST THE DEALER TO REPAIR OR TO PAY IN FULL FOR REPAIRS OF ANY UNSAFE CONDITION IN THE CAR WHICH DOES NOT COMPLY WITH THIS CERTIFICATION.
 D) THIS BUSINESS IS LICENSED BY THE DEPARTMENT OF CONSUMER AFFAIRS, 80 LAFAYETTE STREET, NEW YORK, NEW YORK 10013. COMPLAINT PHONE: (212) 964-7777.

NO COOLING OFF PERIOD
 State law does not provide for a "cooling off" or cancellation period for this sale. After you sign this contract, you may only cancel it if the seller agrees or for legal cause. You cannot cancel this contract simply because you change your mind. This notice does not apply to home solicitation sales.

The Annual Percentage Rate may be negotiable with the Seller. The Seller may assign this contract and retain its right to receive a part of the Finance Charge.

HOW THIS CONTRACT CAN BE CHANGED. This contract contains the entire agreement between you and us relating to this contract. Any change to this contract must be in writing and we must sign it. No oral changes are binding. Buyer Signs **X** _____ Co-Buyer Signs **X** _____
 If any part of this contract is not valid, all other parts stay valid. We may delay or refrain from enforcing any of our rights under this contract without losing them. For example, we may extend the time for making some payments without extending the time for making others.
 See back for other important agreements.

NOTICE TO BUYER: 1. Do not sign this agreement before you read it or if it contains any blank space. 2. You are entitled to a completely filled in copy of the agreement. 3. Under the law, you have a right to pay off in advance the full amount due. If you do so, you may, depending on the nature of the credit service charge, either (a) prepay without penalty, or (b) under certain circumstances obtain a rebate of the credit service charge. 4. According to law, you have the privilege of purchasing the insurance on the motor vehicle provided for in this contract from an agent or broker of your own selection.

You agree to the terms of this contract. You confirm that before you signed this contract, we gave it to you, and you were free to take it and review it. You confirm that you received a completely filled-in copy when you signed it.

RETAIL INSTALMENT CONTRACT
 Buyer Signs **X** _____ Date _____ Co-Buyer Signs **X** _____ Date _____
 Co-Buyers and Other Owners — A co-buyer is a person who is responsible for paying the entire debt. An other owner is a person whose name is on the title to the vehicle but does not have to pay the debt. The other owner agrees to the security interest in the vehicle given to us in this contract.

Other owner signs here **X** _____ Address _____
 Seller Signs _____ Date _____ By **X** _____ Title _____

Seller assigns its interest in this contract to _____ (Assignee) under the terms of Seller's agreement(s) with Assignee.
 Assigned with recourse Assigned without recourse Assigned with limited recourse

Seller _____ By _____ Title _____

OTHER IMPORTANT AGREEMENTS

1. FINANCE CHARGE AND PAYMENTS

- a. **How we will figure Finance Charge.** We will figure the Finance Charge on a daily basis at the Annual Percentage Rate on the unpaid part of the Amount Financed.
- b. **How we will apply payments.** We may apply each payment to the earned and unpaid part of the Finance Charge, to the unpaid part of the Amount Financed and to other amounts you owe under this contract in any order we choose.
- c. **How late payments or early payments change what you must pay.** We based the Finance Charge, Total of Payments, and Total Sale Price shown on the front on the assumption that you will make every payment on the day it is due. Your Finance Charge, Total of Payments, and Total Sale Price will be more if you pay late and less if you pay early. Changes may take the form of a larger or smaller final payment or, at our option, more or fewer payments of the same amount as your scheduled payment with a smaller final payment. We will send you a notice telling you about these changes before the final scheduled payment is due.
- d. **You may prepay.** You may prepay all or part of the unpaid part of the Amount Financed at any time. If you do so, you must pay the earned and unpaid part of the Finance Charge and all other amounts due up to the date of your payment.

2. YOUR OTHER PROMISES TO US

- a. **If the vehicle is damaged, destroyed, or missing.** The following paragraph does not apply if the box in the GAP Waiver Notice on the front of this contract is checked.
You agree to pay us all you owe under this contract even if the vehicle is damaged, destroyed, or missing. The terms and conditions of your liability if the vehicle is damaged, destroyed, or missing are described in a separate document you sign. The document is a part of this contract.
- b. **Using the vehicle.** You agree not to remove the vehicle from the U.S. or Canada, or to sell, rent, lease, or transfer any interest in the vehicle or this contract without our written permission. You agree not to expose the vehicle to misuse, seizure, confiscation, or involuntary transfer. If we pay any repair bills, storage bills, taxes, fines, or charges on the vehicle, you agree to repay the amount when we ask for it.
- c. **Security Interest.**
You give us a security interest in:
 - The vehicle and all parts or goods installed in it;
 - All money or goods received (proceeds) for the vehicle;
 - All insurance, maintenance, service, or other contracts we finance for you; and
 - All proceeds from insurance, maintenance, service, or other contracts we finance for you. This includes any refunds of premiums or charges from the contracts.

This secures payment of all you owe on this contract. It also secures your other agreements in this contract. You will make sure the title shows our security interest (lien) in the vehicle. You will not allow any other security interest to be placed on the title without our written permission.

- d. **Insurance you must have on the vehicle.**
You agree to have physical damage insurance covering loss of or damage to the vehicle for the term of this contract. The insurance must cover our interest in the vehicle. If you do not have this insurance, we may, if we choose, buy physical damage insurance. If we decide to buy physical damage insurance, we may either buy insurance that covers your interest and our interest in the vehicle, or buy insurance that covers only our interest. If we buy either type of insurance, we will tell you which type and the charge you must pay. The charge will be the cost of the insurance

If you pay late, we may also take the steps described below.

- b. **You may have to pay all you owe at once.** If you break your promises (default), we may demand that you pay all you owe on this contract at once subject to any right you have to reinstate the contract for less (see below). Default means:
 - You do not pay any payment on time;
 - You start a proceeding in bankruptcy or one is started against you or your property; or
 - You break any agreements in this contract.The amount you will owe will be the unpaid part of the Amount Financed plus the earned and unpaid part of the Prepaid Finance Charge and the Finance Charge, any late charges, and any amounts due because you defaulted.
 - c. **You may have to pay collection costs.** If we hire an attorney who is not our salaried employee to collect what you owe, you will pay the attorney's fee and court costs as permitted by law. The maximum attorney's fee you will pay will be 15% of the amount you owe.
 - d. **We may take the vehicle from you.** If you default, we may take (repossess) the vehicle from you if we do so peacefully and the law allows it. If your vehicle has an electronic tracking device, you agree that we may use the device to find the vehicle. If we take the vehicle, any accessories, equipment, and replacement parts will stay with the vehicle. If any personal items are in the vehicle, we may store them for you at your expense. If you do not ask for these items back, we may dispose of them as the law allows.
 - e. **How you can get the vehicle back if we take it.** If we repossess the vehicle, you may pay to get it back. If two things are true, you have the right to get the vehicle back by paying all past due payments, any late charges, and any expenses we incurred related to retaking the vehicle, holding it, and preparing it for sale (reinstate). First, you must have bought the vehicle primarily for personal, family, or household use. Second, your only default is a failure to pay an instalment payment on time. Otherwise, we will tell you how much to pay to get the vehicle back. Your right to get the vehicle back ends when we sell it.
 - f. **We will sell the vehicle if you do not get it back.** If you do not redeem, we will sell the vehicle. We will send you a written notice of sale before selling the vehicle. We will apply the money from the sale, less allowed expenses, to the amount you owe. Allowed expenses are expenses we pay as a direct result of taking the vehicle, holding it, preparing it for sale, and selling it. Attorney fees and court costs the law permits are also allowed expenses. If any money is left (surplus), we will pay it to you unless the law requires us to pay it to someone else. If money from the sale is not enough to pay the amount you owe, you must pay the rest to us. If you do not pay this amount when we ask, we may charge you interest at a rate not exceeding the highest lawful rate until you pay.
 - g. **What we may do about optional insurance, maintenance, service, or other contracts.** This contract may contain charges for optional insurance, maintenance, service, or other contracts. If we repossess the vehicle, we may claim benefits under these contracts and cancel them to obtain refunds of unearned charges to reduce what you owe or repair the vehicle. If the vehicle is a total loss because it is confiscated, damaged, or stolen, we may claim benefits under these contracts and cancel them to obtain refunds of unearned charges to reduce what you owe.
-
4. **Used Car Buyers Guide.** The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale.
Spanish Translation: Guía para compradores de vehículos usados. La información que ve en el formulario de la ventanilla para este vehículo forma parte del presente contrato. La información del formulario de la ventanilla deja sin efecto toda disposición en contrario contenida en el contrato de

(lien) in the vehicle. You will not allow any other security interest to be placed on the title without our written permission.

d. Insurance you must have on the vehicle.

You agree to have physical damage insurance covering loss of or damage to the vehicle for the term of this contract. The insurance must cover our interest in the vehicle. If you do not have this insurance, we may, if we choose, buy physical damage insurance. If we decide to buy physical damage insurance, we may either buy insurance that covers your interest and our interest in the vehicle, or buy insurance that covers only our interest. If we buy either type of insurance, we will tell you which type and the charge you must pay. The charge will be the cost of the insurance and a finance charge computed at the Annual Percentage Rate shown on the front of this contract.

If the vehicle is lost or damaged, you agree that we may use any insurance settlement to reduce what you owe or repair the vehicle.

e. What happens to returned insurance, maintenance, service, or other contract charges. If we get a refund of insurance, maintenance, service, or other contract charges, we may subtract the refund from what you owe.

3. IF YOU PAY LATE OR BREAK YOUR OTHER PROMISES

a. You may owe late charges. You will pay a late charge on each late payment as shown on the front. Acceptance of a late payment or late charge does not excuse your late payment or mean that you may keep making late payments.

because it is confiscated, damaged, or stolen, we may claim benefits under these contracts and cancel them to obtain refunds of unearned charges to reduce what you owe.

4. Used Car Buyers Guide. The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale.

Spanish Translation: Guía para compradores de vehículos usados. La información que ve en el formulario de la ventanilla para este vehículo forma parte del presente contrato. La información del formulario de la ventanilla deja sin efecto toda disposición en contrario contenida en el contrato de venta.

5. Servicing and Collection Contacts.

You agree that we may try to contact you in writing, by e-mail, or using prerecorded/artificial voice messages, text messages, and automatic telephone dialing systems, as the law allows. You also agree that we may try to contact you in these and other ways at any address or telephone number you provide us, even if the telephone number is a cell phone number or the contact results in a charge to you.

6. Applicable Law

Federal law and the law of the state of our address shown on the front of this contract apply to this contract.

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

The preceding NOTICE applies only to goods or services obtained primarily for personal, family, or household use. In all other cases, Buyer will not assert against any subsequent holder or assignee of this contract any claims or defenses the Buyer (debtor) may have against the Seller, or against the manufacturer of the vehicle or equipment obtained under this contract.