Consumer Credit Manual

Hon. Noach Dear

With thanks to the Hon. Peter Sweeney and Hon. Jack A. Battaglia for their comments and to my Court Attorney, Joseph Etra, for all his hard work in preparing this manual.

I. General Information

A. What is Consumer Credit

1. CPLR 105(f) [and NYC CCA 2106(g)]: Consumer credit transaction. The term "consumer credit transaction" means a transaction wherein credit is extended to an individual and the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes.

2. GBL 600[1]: "Consumer claim" means any obligation of a natural person for the payment of money or its equivalent which is or is alleged to be in default and which arises out of a transaction wherein credit has been offered or extended to a natural person, and the money, property or service which was the subject of the transaction was primarily for personal, family or household purposes. The term included an obligation of a natural person who is a co-maker, endorser, guarantor or surety as well as the natural person to whom such credit was originally extended.

3. Broader Definition: Any case in which a judgment is sought against an individual for credit extended to him or her including, but limited to, credit cards and loans.

B. Venue

1. CPLR 503(f): "In an action arising out of a consumer credit transaction where a purchaser, borrower or debtor is a defendant, the place of trial shall be the residence of a defendant, if one resides within the state or the county where such transaction took place, if it is within the state, or, in other cases, as set forth in subdivision (a)."

2. Pursuant to CPLR 513, the clerk should reject the consumer credit summons if venue is incorrect under CPLR 503(f).

II. Common Causes of Action/Affirmative Defenses/Counterclaims

A. Claims

1. Breach of Contract

a. Generally

(1) Elements of breach of contract claim are 1) the existence of a contract, 2) one party's performance under the contract, 3) another party's breach of that contract, and 4) resulting damages (*Hampshire Properties v. BTA Bldg. and Developing, Inc.*, 122 A.D.3d 573 [2d Dept 2014]; *New York State Workers' Compensation Bd. v. SGRisk, LLC*, 116 A.D.3d 1148, 1153 [3rd Dept 2014]; *Niagara Foods, Inc. v. Ferguson Elec. Service Co., Inc.*, 111 A.D.3d 1374, 1176 [4th Dept 2013]; *VisionChina Media Inc. v. Shareholder Representative Services*, LLC, 109 A.D.3d 49, 58 [1st Dept 2013])

(2) Existence of Contract

(a) A party alleging a breach of contract must demonstrate the existence of a contract reflecting the terms and conditions of the purported agreement (*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 [2011])

(b) "It is axiomatic that a party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to all essential terms. Courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract" (*Silber v. New York Life Ins. Co.*, 92 A.D.3d 436, 439 [1st Dept 2012][citations omitted])

(c) "Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms" (*Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 [2007])

(d) "Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear (1 Williston, Contracts § 47, at 153–156 [3d ed. 1957])." (Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp., 74 N.Y.2d 475, 483 [1989])

(3) Performance

(a) Plaintiff's lack of performance is an affirmative defense that must be pled by D, or else waived (CPLR 3025[a]["(a) Conditions precedent. The performance or occurrence of a condition precedent in a contract need not be pleaded. A denial of performance or occurrence shall be made specifically and with particularity. In case of such denial, the party relying upon the performance or occurrence shall be required to prove on the trial only such performance or occurrence as shall have been so specified."])

i) If complaint alleges the condition precedent was met, a "general denial" is sufficient to place the performance thereof in issue (*Allis-Chalmers Mfg. Co. v. Malan Const.*

Corp., 30 N.Y.2d 225, 233 [1972]; *Carr v Birnbaum*, 75 A.D.3d 972 [3d Dept 2010]; *1199 Housing Corp. v. International Fidelity Ins. Co.*, 14 A.D.3d 383, 384 [1st Dept 2005])

(4) Breach

(a) In order to state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached (*Sutton v. Hafner Valuation Group, Inc.*, 115 A.D.3d 1039, 1042 [3d Dept 2014]; *New York City Educational Const. Fund v. Verizon New York Inc.*, 114 A.D.3d 529 [1st Dept 2014]; *Barker v. Time Warner Cable, Inc.*, 83 A.D.3d 750, 751 [2d Dept 2011])

(5) Damages

(a) Without a clear demonstration of damages, there can be no claim for breach of contract (*Milan Music, Inc. v. Emmel Communications Booking*, Inc., 37 A.D.3d 206 [1st Dept 2007])

b. Credit Card

(1) **Use of credit card forms a contract with the issuer (even in the absence of a written credit card agreement).**

(a) "In the absence of a binding credit agreement, the issuance of the credit card constitutes an offer of credit, and the use of the credit card constitutes the acceptance of the offer of credit." (*Feder v. Fortunoff, Inc.*, 123 Misc.2d 857 [Sup Ct, Nassau Cty 1984]). (This is the venerable precedent generally cited for proposition that use of credit card is acceptance of contract)

(2) "The plaintiff made a prima facie showing of entitlement to judgment as matter of law on its cause of action to recover damages for breach of contract. The plaintiff tendered sufficient evidence that there was an agreement, which the defendant accepted by her use of the credit card and payments made thereon, and which was breached hy the defendant when she failed to make required payments" (*Citibank (South Dakota), N.A. v. Brown-Serulovic*, 97 A.D.3d 522, 523-524 [2d Dept 2012] [citations omitted]; see, similarly, *Citibank (South Dakota). N.A. v. Keskin*, 121 A.D.3d 635 [2d Dept 2014]; *Citibank v Roberts*, 304 A.D.2d 901 [3rd Dept 2003])

2. Account Stated

a. General Principles:

(1) An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due (see, *Roe v. Roe*, 117 A.D.3d 1217, 1219, 985 N.Y.S.2d 335 [2014]; *Haselton Lumber Co., Inc. v. Bette & Cring, LLC*, 998 N.Y.S.2d 491, 493 [3rd Dep't 2014]). It is an agreement, independent of the underlying agreement, regarding the amount due on past transactions (*G.W. White & Son, Inc. v. Gosier*, 219 A.D.2d 866, 866, 632 N.Y.S.2d 910, 911 [4th Dep't 1995])

(2) "[A]n account stated cannot be made an instrument to create liability when none otherwise exists but assumes the existence of some indebtedness between the parties or an express agreement to treat the statement in question as an account stated' " (*Enviroclean Services, LLC v. Cem, Inc.*, 12 AD3d 1042, 1043, 785 N.Y.S.2d 641 [4th Dept 2004] [citations omitted]). Thus, "allegedly unfulfilled contractual conditions precedent to [a] defendant's payment obligation negate any inference of an implied agreement by [the] defendant that the amounts claimed in plaintiff's invoices were then due," and preclude the existence of an account stated (see *Enviroclean Servs., LLC v. CEM, Inc.*, 12 A.D.3d 1042, 1043, 785 N.Y.S.2d 641 [2004]). Stated differently, in order to prevail on a cause of action for account stated, the plaintiff must establish the "existence of some indebtedness between the parties or an express agreement to treat the statement in question as an account stated" (*Enviroclean Services, LLC v. Cem, Inc.*, 12 A.D.3d 1042, 1043, 785 N.Y.S.2d 641 [4th Dept. 2004] [citations omitted])

(3) An account stated may be express or implied. An account stated will be implied when a party has retained billing statements without rejecting them or objecting to them within a reasonable time under circumstances thus evincing assent to their accuracy (*White Plains Cleaning Services, Inc. v. 901 Properties, LLC*, 94 A.D.3d 1108, 1109, 942 N.Y.S.2d 636, 638 [2nd Dep't 2012]). "[W]here an account is rendered showing a balance, the party receiving it must, within a reasonable time, examine it and object, if he disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be

bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown" (*Peterson v. Schroder Bank & Trust Co.*, 172 A.D.2d 165, 166, 567 N.Y.S.2d 704 [1st Dep't 1991], see also, *Haselton Lumber Co., Inc. v. Bette & Cring, LLC*, 998 N.Y.S.2d 491, 493 [3rd Dep't 2014])

(4) It is not necessary to establish the reasonableness of the amount owed since a defendant's act of holding the account statement without objection will be construed as acquieseence as to its correctness (*Cohen Tauber Spievak & Wagner, LLP v. Almwick*, 33 A.D.3d 562, 563, 825 N.Y.S.2d 439, 439 - 440 [1st Dep't 2006])

(5) There can be no account stated where no account was presented or where any dispute about the account is shown to have existed (*Abbott, Duncan & Wiener v. Ragusa*, 214 A.D.2d 412, 413, 625 N.Y.S.2d 178, 178 [1st Dep't 1995]).

(6) The question of whether there is an account stated is one of law (*Peterson v. IBJ Schroder Bank & Trust Co.*, 172 A.D.2d 165, 167, 567 N.Y.S.2d 704, 705 [1st Dep't 1991])

b. Prima Facie Case:

(1) A plaintiff establishes a prima facie entitlement to judgment as a matter of law on a cause of action to recover on an account stated by tendering sufficient evidence that it generated account statements for the defendant in the regular course of business, that it mailed those statements to the defendant on a monthly basis, and that the defendant accepted and retained these statements for a reasonable period of time without objection (see, *Citibank (South Dakota), N.A. v. Keskin* , 121 A.D.3d 635, 636, 993 N.Y.S.2d 343, 344 [2nd Dep't 2014]). Plaintiff is not required to submit a signed credit card application in order to establish its claim based on an account stated (see, *Citibank (SD) N.A. v. Reine*, 14 Misc.3d 130[A], 2007 N.Y. Slip Op 50013[U])

(2) Mailing:

(a) Typically, a plaintiff establishes that a defendant had received an account statement by submitting proper proof of mailing. "Generally, proof of proper mailing gives rise to a presumption that the item was received by the addressee ... The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are

properly addressed and mailed" (*Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679, 680, 729 N.Y.S.2d 776 [2d Dept. 2001]). Generally, a plaintiff fails to establish, prima facie, a cause of action for an account stated in the absense of sufficient proof of mailing (see, *Morrison Cohen Singer & Weinstein, LLP v. Brophy*,19 A.D.3d 161, 162, 798 N.Y.S.2d 379, 380 - 381 [1st Dep't 2005]; *Discover Bank v. Williamson*, 4 Misc.3d 136(A), 2007 N.Y. Slip Op. 50231(U) [App Term, 9th & 10th Jud. Dists.]; *Citibank (SD) N.A. v. Goldberg*, 24 Misc.3d 143(A), 2009 N.Y. Slip Op. 51735(U) [App Term, 2nd, 11th & 13th Jud. Dists.])

(3) Retention without Objection:

(a) Where plaintiff fails to submit evidentiary proof that the defendant retained the billing statements for an unreasonable period of time without objecting to them, the plaintiff fails to meet its prima facie burden (see, *Citibank (South Dakota), N.A. v. Brown-Serulovic*, 97 A.D.3d 522, 523, 948 N.Y.S.2d 331, 332 [2nd Dep't 2012]; *Raytone Plumbing Specialities, Inc. v. Sano Const. Corp.*, 92 A.D.3d 855, 856, 939 N.Y.S.2d 116, 118 [2nd Dep't 2012]; *American Express Centurion Bank v. Cutler*, 81 A.D.3d 761, 916 N.Y.S.2d 622 [2nd Dep't 2011])

(b) "Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible" (*Leo J. Roth Corp. v. Trademark Development Co., Inc.* 90 A.D.3d 1579, 1581, 935 N.Y.S.2d 780, 782 - 783 [4th Dep't 2011], citing *Legum v. Ruthen*, 211 A.D.2d 701, 703, 621 N.Y.S.2d 649 [2nd Dep't 1995])

3. Unjust Enrichment

a. Elements

(1) To prove a claim of unjust enrichment, "[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good

conscience to permit the other party to retain what is sought to be recovered " (*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 [2011][citations and internal quotation marks omitted]).

b. Unavailable if there is a contract

(1) "[A] party may not recover in ... unjust enrichment where the parties have entered into a contract that governs the subject matter" (*Cox v NAP Constr. Co., Inc.*, 10 N.Y.3d 592, 607 [2008]).

(2) However, where "the existence of the contract is in dispute, the plaintiff may allege causes of action to recover for unjust enrichment and in quantum meruit as alternatives to a cause of action alleging breach of contract" (*Thompson Bros. Pile Corp. v. Rosenblum*, 121 A.D.3d 672 [2d Dept 2014])

B. Affirmative Defenses

1. Personal Jurisdiction

a. CPLR 3211(e) states in relevant part, "an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship."

b. CPLR 308 [Service]

(1) Generally

(a) Process server's sworn affidavit ordinarily creates prima facie evidence of proper service. If there is a detailed, sworn denial that delivery was accomplished, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing. (*Machovec v Svoboda*, 120 A.D.3d 772 [2d Dept 2014]; *Cellino & Barnes, P.C. v Martin, Lister & Alvarez, PLLC*, 117 A.D.3d 1459, 1460 [4th Dept 2014]; *TD Banknorth, N.A. v Olsen*, 112 A.D.3d 1169 [3d Dept 2013])

(b) A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR 308 (2). Where, however, as in this case, there is a sworn denial that delivery to the defendant was accomplished, the affidavit of service is rebutted and the plaintiff must establish

jurisdiction by a preponderance of the evidence at a hearing. Even if a defendant eventually acquires actual notice of the lawsuit, actual notice alone will not sustain the service or subject a person to the court's jurisdiction when there has not been compliance with prescribed conditions of service. ... A defendant can rebut a process server's affidavit by a detailed and specific contradiction of the allegations in the process server's affidavit (*Bankers Trust Co. Of Cal., N.A. v Tsoukas*, 303 AD2d 343, 344 [2d Dept 2003])

(c) "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (*NYCTL 2009-A Trust v Tsafatinos*, 101 A.D.3d 1092 [2d Dept 2012] [citations and internal quotation marks omitted]; see also *Associates First Capital Corp. v Wiggins*, 75 A.D.3d 614 [2d Dept 2010] ["since the defendants' affidavits amounted to no more than bare and conclusory denials of service which were insufficient to rebut the prima facie proof of proper service ... created by the process server's affidavit, no hearing was required"]; *Cellino & Barnes, P.C. v Martin, Lister & Alvarez, PLLC*, 117 A.D.3d 1459, 1460 [4th Dept 2014]).

(2) 308(1)

(a) "Personal service upon a natural person shall be made by any of the following methods: 1. by delivering the summons within the state to the person to be served" (CPLR 308[1])

(b) A sworn denial of receipt alone is insufficient to rebut the process server's affidavit (*Deutsche Bank Nat. Trust Co. v. Quinones*, 114 A.D.3d 719 [2d Dept 2014])

(c) A defendant's affidavit denying that she was ever served pursuant to CPLR 308(1) and setting forth significant discrepancies between the process server's physical description of her and her actual

physical appearance is sufficient to rebut the process server's affidavit and necessitate a traverse hearing. (*Wells Fargo Bank, N.A. v. Final Touch Interiors*, LLC, 112 A.D.3d 813, 815 [2d Dept 2013])

(3) 308 (2)

(a) Generally

i) "Personal service upon a natural person shall be made by any of the following methods: ... 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 either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other" (CPLR 308[2]).

ii) Service pursuant to CPLR 308(2) is not complete until 10 days after filing proof of service (*Id.*)

iii) "CPLR 308(2) requires strict compliance and the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made" (*Samuel v. Brooklyn Hosp. Center*, 88 A.D.3d 979, 980 [2d Dept 2011])

iv) Jurisdiction is not acquired pursuant to CPLR 308(2) unless both the delivery and mailing requirements have been strictly complied with. However, a minor error in the address to which a summons is mailed will not render service of process void where "it is virtually certain that the summons will arrive" at its intended destination

(*Gray-Joseph v Shuhai Liu*, 90 A.D.3d 988 [2d Dept 2011] [internal citations omitted])

v) A general statement by the alleged "person of suitable age and discretion" that she never received the summons and complaint is alone insufficient to warrant a traverse hearing. (*Caba v Rai*, 63 A.D.3d 578, 583 [1st Dept 2009])

(b) Person of Suitable Age and Discretion

i) "The defendant's failure to recall the person of suitable age and discretion who was served, without specific facts of the identity of his employees, employment records, payroll records, or affidavits from others, fails to rebut the process server's affidavit " (*Stephan B. Gleich & Assoc. v Gritsipis*, 87 A.D.3d 216, 221 [2d Dept 2011])

ii) Claim that the there was no one residing at the service address on the date of service meeting the description of the person allegedly served is insufficient to rebut the presumption that service was proper as such a claim does not mean that the person described in the affidavit of service was not present at the place and time specified on the affidavit of service (*Roberts v Anka*, 45 A.D.3d 752, 753 [2d Dept 2007])

(c) Dwelling Place or Usual Place of Abode

i) The usual place of abode is determined based on its permanence and stability. Relevant information includes (but is not limited to) the address provided by Defendant to the Post Office, DMV, bank, employer, etc., the address associated with the phone listed in the person's name, and whether the person established a more recent permanent address. (*Argent Mtge. Co., LLC v Vlahos*, 66 A.D.3d 721 [2d Dept 2009]; *Merchants Ins. Group v Coutrier*, 59 A.D.3d 602, 603 [2d Dept 2009])

ii) The outer bounds of the actual dwelling place must be deemed to extend to the location at which the process server's

progress is arrested (such as by an apartment house doorman) (F. I. duPont, Glore Forgan & Co. v. Chen, 41 N.Y.2d 794, 797 [1977])

(d) Actual Place of Business

i) "CPLR 308(2) permits personal service on a natural person 'by delivering the summons within the state to a person of suitable age and discretion at the actual place of business' of the person to be served and, within 20 days thereafter, mailing a copy of the summons to the actual place of business in a specified manner (CPLR 308[2]). (*Samuel v. Brooklyn Hosp. Center*, 88 A.D.3d 979, 980 [2d Dept 2011])

ii) "A person's 'actual place of business' must be where the person is physically present with regularity, and that person must be shown to regularly transact business at that location" (*Selmani v. City of New York*, 100 A.D.3d 861 [2d Dept 2012])

(e) Doorman

i) Plaintiff satisfied its burden of establishing personal jurisdiction over defendant-appellant (defendant), pursuant to CPLR 308(2). At the traverse hearing, the process server testified that, after attempting to personally serve defendant and her husband at their apartment building, he delivered the pleadings to the building's doorman, a "person of suitable age and discretion" (*2110-2118 ACBP v. Holland-Harden*, 118 A.D.3d 461[1st Dept 2014])

ii) Service upon the doorman of defendants' apartment building was proper under CPLR 308(2), given that the process server was denied access to defendants' apartment (*Bank of America, N.A. v. Grufferman*, 117 A.D.3d 508 [1st Dept 2014])

(f) Timeliness

i) Both the service and the mailing must be made within the 120 day period of CPLR 306-b (*Qing Dong v Chen Mao Kao*, 115

A.D.3d 839, 840 [2d Dept 2014])

(4) 308(4)

(a) "Personal service upon a natural person shall be made by any of the following methods: ... 4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons 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 by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other" (CPLR 308[4])

i) "Service pursuant to CPLR 308(4), commonly known as "nail and mail" service, may be used only where service under CPLR 308(1) or 308(2) cannot be made with "due diligence" (*Estate of Waterman v Jones*, 46 AD3d 63, 65 [2d Dept 2007])

(b) Service pursuant to CPLR 308(4) is not complete until 10 days after filing proof of service (CPLR 308[4])

(c) Need due diligence

i) There is no hard-and-fast rule as to what constitutes due diligence. It is a case specific analysis.

a) "This Court has repeatedly emphasized that 'the due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received'. What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality

(*McSorley v Spear*, 50 AD3d 652, 653 [2d Dept 2008][citations omitted]).

b) "Although "due diligence" is not defined in the statutory framework, the term has been interpreted and applied on a case-by-case basis. [T]he due diligence requirement refers to the quality of the efforts made to effect personal service, and certainly not to their quantity or frequency. ... "due diligence" may be satisfied with a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such location at those times. For the purpose of satisfying the "due diligence" requirement of CPLR 308(4), it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment, given the reduced likelihood that a summons served pursuant to [nail and mail service] will be received. (*Estate of Waterman v Jones*, 46 AD3d 63, 65 [2d Dept 2007][citations and internal quotation marks omitted]).

ii) The process server must make a good faith effort to locate both the dwelling and business address of defendant in order to attempt to effectuate personal or substitute service

a) For the purpose of satisfying the "due diligence" requirement of CPLR 308(4), it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment (*Cadlerock Joint*

Venture, L.P. v Kierstedt, 119 A.D.3d 627 [2d Dept 2014]; *Estate of Waterman v Jones*, 46 AD3d 63, 65 [2d Dept 2007])

iii) Attempts at Dwelling Only Upheld in Some Cases

a) "Contrary to the appellant's contention, the process server's uncontradicted testimony that he made three attempts to effect personal service at the appellant's residence at different times on different days, including a Saturday, were sufficient to satisfy the "due diligence" requirement of CPLR 308(4)" (*Wells Fargo Bank, N.A. v. Cherot*, 102 A.D.3d 768 [2d Dept 2013]; see., similarly, *Deutsche Bank Natl. Trust Co. v White*, 110 A.D.3d 759, 760 [2d Dept 2013]; *JPMorgan Chase Bank, N.A. v. Szajna*, 72 A.D.3d 902 [2d Dept 2010])

b) "Under the circumstances of this case, the affidavit, which stated that the process server attempted to serve Mappa at his dwelling at different times and on different days, was sufficient to meet the "due diligence" requirement of CPLR 308(4). Furthermore, since there was no evidence that Mappa was employed, the plaintiff was not required to attempt to serve Mappa at his place of business" (State v. Mappa, 78 A.D.3d 926 [2d Dept 2010][citations omitted])

c) "Plaintiff's process server's successive attempts to serve defendants personally at various times of the day when it could be reasonably expected that they would be at home satisfied the due diligence requirement of CPLR

308(4) so as to permit nail-and-mail service ... Nor was it necessary that the process server, before resorting to nail-and-mail, attempt to serve defendants at their place of business" (*Farias v Simon*, 73 A.D.3d 569, 570 [1st Dept 2010])

d) "Where four attempts to serve the defendant at his residence included an attempt on a late weekday evening and an attempt on an early Saturday morning, it was not necessary that the plaintiff, County of Nassau, attempt to serve the defendant at his workplace" (*County of Nassau v Gallagher*, 43 AD3d 972, 973-974 [2d Dept 2007]).

e) Weekday attempts at 7:30 AM, 7:15 PM, and 10:10 AM coupled with confirming the home address with a neighbor sufficient (*State of N.Y. Higher Educ. Servs. Corp. v Sparozic*, 35 A.D.3d 1069, 1070 [3d Dept 2006])

f) "Contrary to the defendant's contention, the Supreme Court properly concluded that the three attempts made by the plaintiffs' process server to personally serve him at his residence satisfied the due diligence requirement" (*Lemberger v Khan*, 18 AD3d 447 [2d Dept 2005]).

g) "The three attempts to make service of the summons and complaint upon the defendant at his residence at different times and on different days, including a Saturday, were sufficient to constitute due diligence (see, Matos v. Knibbs, 186 A.D.2d 725, 588 N.Y.S.2d 911). Since there was no indication that he worked on Saturdays, there was no showing of

any other reasonable means whereby the chances of successful personal service could have been significantly increased (see, Matos v. Knibbs, supra)." (Johnson v. Waters, 291 A.D.2d 481 [2d Dept 2002]).

(d) "Actual place of business, dwelling place or usual place of abode" are defined, supra.

i) Although the required subsequent mailing may be sent to the defendant's last known residence, affixing process to the door of the defendant's last known residence will not be sufficient to meet the first element of the statute (*Olscamp v Fasciano*, 118 A.D.3d 1472 [4th Dept 2014]; *Kalamadeen v. Singh*, 63 A.D.3d 1007, 1008 [2d Dept 2009])

ii) Attaching to outer door/fence is allowed under limited circumstance (*F. I. duPont. Glore Forgan & Co. v. Chen*, 41 N.Y.2d 794, 798 [1977]["In our analysis if a process server is not permitted to proceed to the actual apartment ... the outer bounds of the actual dwelling place must be deemed to extend to the location at which the process server's progress is arrested"]; *Albert Wagner & Son, Inc. v. Schreiber*, 210 A.D.2d 143 [1ST Dept 1994] [affixing to inner foyer door of apartment building deemed sufficient when server could get no further]; *Res Land, Inc. v. SIIS Baisley*, LLC, 33 Misc.3d 128[A], 2011 N.Y. Slip Op. 51847[U] [App Term 2nd, 11th and 13th Judicial Districts 2011][upholding service where affixed to fence around property when could not gain entry])

c. Waiver

(1) Through Appearance in the case

(a) "An appearance by a defendant in an action is deemed to be the equivalent of personal service of a summons upon him [or her], and therefore confers personal jurisdiction over him [or her], unless he [or

she] asserts an objection to jurisdiction either by way of motion or in his [or her] answer. By statute, a party may appear in an action by attorney (CPLR 321), and such an appearance constitutes an appearance by the party for purposes of conferring jurisdiction" (*Countrywide Home Loans Servicing, LP v. Albert*, 78 AD3d 983, 984 [2d Dept 2010] [citations and internal quotation marks omitted).

(b) A party appears in an action either formally, by serving and filing notice of appearance or answer or by making motion that serves to extend time to answer, or informally, by participating in the merits of an action without raising any jurisdictional objection *(NYCTL 1998-1 Trust v. Prol Properties Corp*, 18 A.D.3d 525 [2d Dept 2005]; *USF & G. v. Maggiore*, 299 AD3d 341, 343 [2d Dept 2002]).

(2) Failure to Move For Dismissal Within 60 Days of Filing the Answer

(a) CPLR 3211(e) states in relevant part: "an objection that the summons and complaint ...was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship."

i) A showing of "undue hardship" is a higher standard than "good cause" and requires proof that the motion could not have been made within the proscribed time through the exercise of ordinary diligence (*see*, *Abitol v. Schiff*, 180 Misc.2d 949 [Sup Ct, Queens County 1999]; *See also, Aris v. Meghan McGregor*, 2 Misc.3d 1004[A] [Sup Ct, Nassau County 2004]).

(3) Unrelated Counterclaim

(a) Bringing a counterclaim that cannot be potentially be barred under principles of collateral estoppel if unraised in this action, is a waiver of personal jurisdiction defenses as the defendant is taking affirmative advantage of the court's jurisdiction (*Textile Technology Exchange, Inc. v. Davis*, 81

N.Y.2d 56, 58-59 [1993])

(4) Through voluntary payments

(a) "A defect in personal jurisdiction may be waived, where a party submits to the court's jurisdiction by, inter alia, stipulating to settle an action. Here, the defendant's partial satisfaction of the judgment against him in order to obtain a release of the lien on his real property amounted to a partial settlement of the action which impliedly acknowledged the validity of the judgment. Accordingly, the defendant consented to the court's jurisdiction over him and waived any jurisdictional objection " (*Lomando v Duncan*, 257 AD2d 649, 650 [2d Dept 1999][citations omitted])

(5) Through involuntary payments

(a) "appellant has waived any objection to the court's jurisdiction over him by making payments on the deficiency judgment under the wage garnishment order for over a year before bringing this motion to vacate " (*Calderock Joint Ventures, L.P. v Mitiku*, 45 AD3d 452, 453 [1st Dept 2007]) see, also Cadlerock Joint Venture, L.P. v. Kierstedt, 119 A.D.3d 627 [2d Dept 2014]; but see, HSBC Bank USA, N.A. v A&R Trucking Co., Inc., 66 A.D.3d 606 [1st Dept 2009][finding that defendant did not waive jurisdictional defenses in waiting 7-10 months after first bank levy prior to filing OSC])

(6) Through failure to update address

(a) While the respondent's sworn denial of service may have been sufficient to rebut the plaintiff's prima facie showing that the respondent was properly served pursuant to CPLR 308(2), the issue of whether the respondent was estopped from challenging the propriety of service due to his failure to notify the Commissioner of the Department of Motor Vehicles (hereinafter the DMV) of his purported change of address, as required by Vehicle and Traffic Law § 505(5), should have been decided first even if service had been improper (see Kalamadeen v. Singh, 63 A.D.3d 1007, 1008, 882 N.Y.S.2d 437). ... Since the

respondent failed to notify the DMV of his change of residence, as required by Vehicle and Traffic Law § 505(5), he was estopped from raising a claim of defective service. Accordingly, that branch of the respondent's motion which was pursuant to CPLR 5015(a)(4), based on lack of personal jurisdiction, should have been denied. Likewise, the respondent was not entitled to relief pursuant to CPLR 5015(a)(1), based upon excusable default; the respondent's purported change of residence is not a reasonable excuse, because he failed to comply with Vehicle and Traffic Law § 505(5). (*Canelas v. Flores,* 112 A.D.3d 871 [2d Dept 2013][citations omitted])

(b) "Vehicle and Traffic Law § 505 (5) requires that every motor vehicle licensee notify the Commissioner of Motor Vehicles of any change in residence within 10 days of the change. A party who fails to comply with this provision will be estopped from challenging the propriety of service made at the former address .... As the defendant was estopped from raising a claim of defeetive service because he failed to apprise the DMV of his current address, the Supreme Court providently exercised its discretion in denying his motion to vacate." (*Kandov v Gondal*, 11 AD3d 516 [2d Dept 2004][citations omitted])

(c) Vehicle and Traffic Law § 505(5) statute has no extraterritorial effect for non-New York license holders who move into NY (*Meza v. Proud Transit Inc.*, 55 A.D.3d 332, 333 [1st Dept 2008]).

2. Standing

a. Generally

(1) "Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria" (*Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769 [1991])

(2) "The existence of an injury in fact—an actual legal stake in the matter being adjudicated—ensures that the party

seeking review has some concrete interest in prosecuting the action which casts the dispute "in a form traditionally capable of judicial resolution ...To this essential principle of standing, the courts have added rules of self-restraint, or prudential limitations: a general prohibition on one litigant raising the legal rights of another; a ban on adjudication of generalized grievances more appropriately addressed by the representative branches; and the requirement that the interest or injury asserted fall within the zone of interests protected by the statute invoked" (*Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 772-773 [1991]; see also, *Suffolk County Water Authority v. Dow Chemical Co.*, 121 A.D.3d 50, 55 [2d Dept 2014] [internal citations omitted][" Generally, a plaintiff has standing to sue if it has suffered an injury in fact in some way different from that of the public at large and within the zone of interests to be protected by relevant statutory and regulatory provisions"]; *Animal Legal Defense Fund, Inc. v. Aubertine*, 119 A.D.3d 1202 [3d Dept 2014])

b. Assignment of a Claim

(1) "No particular words are necessary to effect an assignment; it is only required that there be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right in the things assigned " (*Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994])

(2) "An assignee stands in the shoes of its assignor, subject to all the equities and burdens attached to the property acquired" (*Condren, Walker & Co., Inc. v. Portnoy*, 48 A.D.3d 331 [1st Dept 2008]) – that is, the assignee has the rights to the assignor's claims, but any defenses or related counterclaims that could have been asserted against the assignor can be asserted against the assignee.

(3) "[A]n assignment of a loan obligation means that the obligation has been transferred, not paid in full and, thus, ... does not render the obligation satisfied and discharged" (*Benson v. Deutsche Bank Nat. Trust, Inc.*, 109 A.D.3d 495, 498 [2d Dept 2013])

c. In a Consumer Credit Context

(1) In essence, Plaintiff must show that it is the owner of the debt sued upon. It is imperative that admissible evidence show that the specific account was owned by the Plaintiff at

the time of suit. (General assignments referring to pools of accounts are insufficient unless the account-in-suit is shown to be included.)

(a) "To establish such standing, plaintiff was required to submit evidence in admissible form establishing that [original creditor] had assigned its interest in defendant's debt to plaintiff " (*Unifund CCR Partners v Youngman*, 89 A.D.3d 1377 [4th Dept 2011]; see, similarly, *Palisades Collection, LLC v Kedik*, 67 A.D.3d 1329 [4th Dept 2009])

(b) "Given that courts are reluctant to credit a naked conclusory affidavit on a matter exclusively within a moving party's knowledge, an assignee must tender proof of assignment of a particular account or, if there were an oral assignment, evidence of consideration paid and delivery of the assignment" (*Citibank (South Dakota), N.A. v. Martin*, 11 Misc.3d 219, 807 N.Y.S.2d 284 [Civ Ct., NY County 2005][citations omitted])

(2) "The securitization of plaintiff credit card issuer's receivables did not divest it of its ownership interest in the account, and therefore did not deprive it of standing to sue to recover defendant's overdue credit card payments" (*American Exp. Bank FSB v. Najieb*,125 A.D.3d 470, 471 [1st Dept 2015])

d. Waiver

(1) A lack of standing does not deprive the Court of subject matter jurisdiction (*HSBC Bank USA, N.A. v. Ashley*, 104 A.D.3d 975 [3d Dept 2013]; *Wells Fargo Bank Minnesota, Nat. Ass'n v. Mastropaolo*, 42 A.D.3d 239, 241 [2d Dept 2007])

(2) It is, thus, waivable: "A party's alleged lack of standing to commence an action is a defense that is waived if not raised in an answer or in a pre-answer motion to dismiss the complaint." (*Wells Fargo Bank Minnesota, Nat'l Assoc. v Mastropaolo*, 42 A.D.3d 239 [2d Dept. 2007])

(a) However, the allegation of lack of standing in an answer need not be pled as an affirmative defense (*Bank of America, N.A. v. Paulsen*, 125 A.D.3d 909, 910 [2d Dept 2015]["Although the appellant's answer did not raise standing as a separate defense,

a fair reading of his answer reveals that it contained language which denied that the plaintiff was the owner and holder of the note and mortgage being foreclosed. Under such circumstances, the appellant was not required to expressly plead lack of standing as a defense "]; *U.S. Bank Nat. Ass'n v. Faruque*, 120 A.D.3d 575 [2d Dept 2014])

(3) Standing defenses are waived by non-appearing defendant (*HSBC Bank USA, N.A. v. Simmons*, 125 A.D.3d 930, 932 [2d Dept 2015]; *U.S. Bank, N.A. v. Bernabel*, 125 A.D.3d 541 [1st Dept 2015])

3. Statute of Limitations

a. The NY statute of limitations for breach of contract, account stated, and unjust enrichment is 6 years (CPLR 213). However, "[a]n action for breach of any contract for sale [of goods] must be commenced within four years after the cause of action has accrued" (UCC 2–725[1]).

(1) In contract cases, the cause of action accrues and the Statute of Limitations begins to run from the time of the breach (*Ely-Cruikshank Co., Inc. v. Bank of Montreal*, 81 N.Y.2d 399, 402 [1993]; *QK Healthcare, Inc. v InSource, Inc.*, 108 A.D.3d 56, 65 [2d Dept 2013]["The general rule applicable to actions to recover damages for breach of contract is that a six-year statute of limitations begins to run when a contract is breached or when one party fails to perform a contractual obligation "]). The statute of limitations is "triggered when the party that was owed money had the right to demand payment, not when it actually made the demand" (*Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co.*, 18 N.Y.3d 765, 771 [2012])

(2) "With respect to a note payable on demand, the cause of action to recover on such a note accrues at the time of its execution. However, with respect to a note payable in installments... there are separate causes of action for each installment accrued, and the statute of limitations begins to run on the date each installment becomes due and is defaulted upon, unless the debt is accelerated" (*See v. Ach*, 56 A.D.3d 457, 458 [2d Dept 2008]).

(3) A cause of action on an account stated accrues at the time of the last transaction on the account (see 75 N.Y. Jur. 2d, Limitations and Laches § 90; *Joseph Gaier, P.C. v. Iveli*,

287 A.D.2d 375, 731 N.Y.S.2d 692 [1st Dept. 2001]; *Elie Intern., Inc. v. Macy's West Inc.* 106 A.D.3d 442, 443, 965 N.Y.S.2d 52, 53 - 54 [1st Dep't 2013]).

b. However, "[w]hen a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. If the claimed injury is an economic one, the cause of action typically accrues where the plaintiff resides and sustains the economic impact of the loss" (*Portfolio Recovery Associates, LLC v. King*, 14 N.Y.3d 410, 416 [2010] [internal quotation marks and citations omitted])

c. A debt buyer is afforded the statute of limitations of the original creditor's claim (*Id.*)

d. Exceptions

(1) Equitable Estoppel: "The extraordinary remedy of equitable estoppel may be invoked to bar the affirmative defense of the statute of limitations only where the defendant's affirmative wrongdoing contributed to the delay between accrual of the cause of action and commencement of the legal proceeding. Further, the plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations, and the plaintiff's due diligence in ascertaining the facts" (*Clark v. Ravikumar*, 90 A.D.3d 971 [2d Dept 2011]; see, similarly, *Kosowsky v. Willard Mountain, Inc.*, 90 A.D.3d 1127, 1130 [3d Dept 2011])

(2) Acknowledgement: "An acknowledgment will toll or restart the running of the applicable statute of limitations if it is in writing, recognizes the existence of the obligation and contains nothing inconsistent with an intent to honor the obligation"(*Sullivan v. Troser Management, Inc.*, 15 A.D.3d 1011 [4th Dept 2005])

(3) Partial Payment: "In order [for] a part payment [to] 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" (*Lew Morris Demolition Co. v. Board of Educ. of City of N.Y.*, 40 N.Y.2d 516, 521, 387 N.Y.S.2d 409, 355 N.E.2d 369)

4. Laches

   a. " Laches is defined as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. The essential element of this equitable defense is delay prejudicial to the opposing party" (*In re Barabash's Estate*, 31 N.Y.2d 76, 81 [1972][internal quotaion marks and citations omitted])

   b. "To establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant" (*Cohen v. Krantz*, 227 A.D.2d 581, 614 [2d Dept 1996]; see also *Jean v. Joseph*, 117 A.D.3d 989, 990 [2d Dept 2014]; *Miner v. Town of Duanesburg Planning Bd.*, 98 A.D.3d 812, 813-814 [3d Dept 2012])

   c. However, this equitable defense is not available in an action at law (*Cadlerock, L.L.C. v. Renner*, 72 A.D.3d 454 [1st Dept 2010]; *Cognetta v. Valencia Developers, Inc.*, 8 A.D.3d 318, 319 [2d Dept 2004]) and, thus, it is inapplicable in most, if not all, consumer credit cases.

5. Waiver of Right to Collect

   a. "waiver requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable" (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 184 [1982])

6. Violation of Duty of Good Faith and Fair Dealing

   a. In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the parties' contractual relationship, they do encompass any promises that a reasonable person in the position of the promisee would understand to be included in the parties' agreement. (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 [2002])

   b. Violation of the duty of good faith and fair dealing cannot be asserted where it is duplicative of a breach of contract claim (*Val Tech Holdings, Inc. v. Wilson Manifolds, Inc.*, 119 A.D.3d 1327,

1331 [4th Dept 2014]; *Board of Managers of Soho North 267 West 124th Street Condominium v. NW 124 LLC*, 116 A.D.3d 506, 507 [1st Dept 2014])

c. When asserted as an affirmative defense, violation of the duty of good faith and fair dealing seemingly is an allegation that Plaintiff failed to properly perform under the contract.

C. Counter-Claims

1. Harassment

a. NY does not recognize a common law cause of action for harassment (*Santoro v Town of Smithtown*, 40 AD3d 736, 738 [2d Dept 2007]).

2. Intentional Infliction of Emotional Distress

a. "In order to establish intentional infliction of emotional distress, the plaintiff must prove four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. The tort of intentional infliction of emotional distress predicates liability on the basis of conduct which is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. [T]he requirements of the rule are rigorous, and difficult to satisfy. Without sufficiently outrageous conduct, no claim for intentional infliction of emotional distress can be established. (*Capellupo v Nassau Health Care Corp.*, 97 AD3d 619, 623 [2d Dept. 2012] [internal citations and quotation marks omitted])

3. NYGBL §349

a. To successfully assert a claim under General Business Law § 349(h), "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" *(North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5[2d Dept. 2012] [citations and internal quotation marks omitted])

b. Consumer-Oriented

(1) On the other hand, conduct has been held to be sufficiently consumer-oriented to satisfy the statute where it involved "an extensive marketing scheme," where it involved the "multi-media dissemination of information to the public,"

and where it constituted a standard or routine practice that was "consumer-oriented in the sense that [it] potentially affect[ed] similarly situated consumers. " Simply put, "[the] defendant's acts or practices must have a broad impact on consumers at large" *(North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5[2d Dept. 2012] [citations and internal quotation marks omitted])

c. Materially Misleading

(1) "A plaintiff seeking to state a cause of action under General Business Law § 349 must plead that the challenged act or practice was misleading in a material way. Whether a representation or an omission, the test is whether the allegedly deceptive practice is likely to mislead a reasonable consumer acting reasonably under the circumstances. Such a test ... may be determined as a matter of law or fact (as individual cases require) (*Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 165 [2d Dept 2010][citations and internal quotation marks omitted])

4. FDCPA/TCPA/FCRA, though occasionally raised, will not be discussed herein.

III. Pre-Trial

A. Default Judgment

1. Generally

a. CPLR 3215 (a): "When 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, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest"

b. Plaintiff must seek default judgment within one year from when the answer is due or else the action will be deemed abandoned (CPLR 3215[c])

(1) The failure to timely seek a default judgment may be excused if sufficient cause is shown why the complaint should not be dismissed – that is both a reasonable excuse for the delay in timely moving for a default judgment and a

demonstration that the cause of action is potentially meritorious (*Pipinias v. J. Sackaris & Sons, Inc.*, 116 A.D.3d 749, 751 [2d Dept 2014])

c. Pursuant to CPLR 3215(f), on any application for judgment by default, the applicant shall file:

(1) proof of service of the summons and the complaint, or a summons and notice;

(2) proof of the facts constituting the claim, the default and the amount due by affidavit made by the party. (Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney.); and

(a) To demonstrate the facts constituting the claim the movant need only submit sufficient proof to enable a court to determine that a viable cause of action exists (*Fried v. Jacob Holding, Inc.*, 110 A.D.3d 56, 60 [2d Dept 2013]; *New Media Holding Co. LLC v. Kagalovsky*, 97 A.D.3d 463, 465 [1st Dept 2012])

(b) In determining whether the plaintiff has a viable cause of action, the court may consider the complaint, affidavits, and affirmations submitted by the plaintiff (*Interboro Ins. Co. v. Johnson*, 123 A.D.3d 667 [2d Dept 2014])

(c) To be accorded weight, a verified complaint must contain evidentiary facts from one with personal knowledge. A pleading verified by an attorney pursuant to CPLR 3020(d)(3) is insufficient to establish its merits (*Triangle Properties 2, LLC v. Narang*, 73 A.D.3d 1030, 1032 [2d Dept 2010])

(3) proof of mailing the notice required by 3215 (g), where applicable

(a) A failure to send a required 3215(g) notice mandates denial of a default judgment against that defendant (*Bono v DuBois*, 121 A.D.3d 932 [2d Dept 2014]; *American Tr. Ins. Co. v Solorzano*, 108 A.D.3d 449 [1st Dept 2013])

d. Non-Military Affidavit

(1) The submission must include proof that the defendant is not in the military services (see 50 App USCA §521 ["In any

action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit... stating whether or not the defendant is in military service and showing necessary facts to support the affidavit"])

(a) "The Federal Soldiers' and Sailors' Civil Relief Act , as applied to New York courts, requires that, upon the Defendant's default in any action or proceeding, Plaintiff must, prior to entering judgment, file an affidavit establishing that (1) defendant is not in the military service of either the United States or an ally; (2) plaintiff's investigation was done after the default occurred; (3) such investigation was performed shortly before the submission of the affidavit of military service" (*Sunset 3 Realty v. Booth*, 12 Misc.3d 1184[A], 2006 N.Y. Slip Op. 51441[U] [Sup Ct, Suffolk County 2006][citations omitted])

e. To defeat a motion for leave to enter a default judgment, the defendant must establish a reasonable excuse for the default and a potentially meritorious defense to the action (*Diederich v. Wetzel*, 112 A.D.3d 883 [2d Dept 2013])

f. Order of Severance

(1) If a judgment is being entered against less than all defendants, an order must be entered severing the action as to them.

2. Consumer Credit

a. Per the Rules of the Chief Judge, the following additional requirements exist in credit card (but not medical bill, student loan, auto loan, or retail installment contract) cases:

(1) Plaintiff must submit to the Clerk, when filing proof of service of the summons and complaint, also submit a stamped envelope containing an additional notice of consumer credit action addressed to the defendant at the address where process was served. The envelope m ust reflect a return address of the clerk's office to which defendant should be directed. No default judgment should be entered absent complaince with this requirement and the passage of 20 days. If the mailing is returned as undeliverable, default judgment should not be entered unless the service address matches that on record for defendant with the NYS DMV.

(2) A plaintiff seeking default judgment will be required to submit enhanced affidavits as proposed by the Chief Judge.

(a) Original creditors will need to provide an affidavit setting forth the name of the debtor, last four digits of the debtor's SSN, date and terms of the original agreement and any modifications thereto, and the date and amount of both the last use and the last payment.

i) Copies of all governing agreements, the last statement showing actual use or payments and the charge-off statement must be appended.

(b) A detailed account of the current balance, broken into principal, interest, and fees, is also necessary.

i) The judge (or clerk) should be careful not to award more damages than were sought in the complaint even if supported by the affidavit.

(c) In a debt buyers action, besides for the above affidavit from the original creditor, plaintiff's predecessors in interest, including the original creditor, will each need to provide an affidavit stating that the records transferred to the next holder in the chain were "business records" and the date of the transfer.

i) All assignment agreements must be appended.

(3) The submission must include an affidavit by the plaintiff of plaintiff's attorney (Statute of Limitations Affidavit) stating:

(a) where and when the cause of action accrued;

(b) the statute of limitations for NY and for any other jurisdiction where the cause of action accrued; and

(c) a statement that after reasonable inquiry, the affiant has reason to belief that the applicable statues of limitations has not expired.

B. Motion to Dismiss

1. 3211(a)(1) [Defense Founded Upon Documentary Evidence]:

a. "A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint,

conclusively establishing a defense to the claims as a matter of law" (*Neckles Builders, Inc. v. Turner*, 117 A.D.3d 923, 924 [2d Dept 2014])

b. " In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as 'documentary evidence,' it must be 'unambiguous, authentic, and undeniable.' Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case. At the same time, neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)." (*Attias v. Costiera*, 120 A.D.3d 1281 [2d Dept 2014][internal citations and quotation marks omitted]; cf. *Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc.*, 120 A.D.3d 431 [1st Dept 2014][correspondence, including emails, are considered documentary evidence if they meet the "essentially undeniable" test])

2. 3211(a)(3)[Standing]

a. "On a defendant's motion pursuant to CPLR 3211(a)(3) to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law. To defeat the motion, a plaintiff must submit evidence which raises a question of fact as to its standing" (*U.S. Bank Nat. Ass'n v. Guy*, 125 A.D.3d 845, 847 [2d Dept 2015] [citations omitted])

b. As discussed, supra, the affirmative defense of lack of standing (and, thus, the right to move for dismissal on that ground) is waived if it is not raised in the answer or a timely pre-answer motion to dismiss.

3. 3211(a)(5) [Statute of Limitations]

a. "A defendant who seeks dismissal of a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired. The burden then shifts to the nonmoving party to raise an issue of fact as to the applicability of an exception to the statute of limitations, or as to whether the statute of limitations was tolled " (*Benjamin v. Keyspan Corp.*, 104 A.D.3d 891, 892 [2d Dept 2013][internal citations and quotation marks omitted])

b. Part of Defendant's burden is to establish when the cause of action accrued and the statute of limitations began to run (*Matteawan On*

Main, Inc. v City of Beacon, 109 A.D.3d 590 [2d Dept 2013]).

4. 3211(a)(7) [Failure to State a Cause of Action]:

   a. "In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court should accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Neckles Builders, Inc. v. Turner*, 117 A.D.3d 923, 924 [2d Dept 2014]; see similarly *Woodhill Elec. v. Jeffrey Beamish, Inc.*, 73 A.D.3d 1421 [3d Dept 2010])

   b. "[A] motion to dismiss made pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (*Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 36 [2d Dept 2008])

      (1) However, "factual allegations which are flatly contradicted by the record are not presumed to be true and, if the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action" (*Deutsche Bank Nat. Trust Co. v. Sinclair*, 68 A.D.3d 914, 915 [2d Dept 2009][citations and internal quotation marks omitted])

   c. "The test of the sufficiency of a pleading is whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (*V. Groppa Pools, Inc. v. Massello*, 106 A.D.3d 722, 723 [2d Dept 2013][internal quotation marks and citations omitted])

   d. In opposition to a motion to dismiss pursuant to CPLR 3211(a)(7), Plaintiff may submit an affidavit to remedy any defects in the complaint (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 [1976])

   e. When evidentiary material submitted by movant is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 274 [1977])

5. 3211(a)(8) [Jurisdiction]

a. See. supra, II.B.1.

6. 3211(a)(10) [Failure to Join a Necessary Party]

a. Under CPLR 3211(a)(10), a motion to dismiss may be made on the ground that "the court should not proceed in the absence of a person who should be a party."

(1) CPLR 1001 states in relevant part: "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." There are some circumstances under which the action should be allowed to proceed without the necessary party.

(2) Further, CLPR 1003 provides in relevant part: "Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of that section."

7. Successive Motions

a. The single motion rule prohibits parties from making successive motions to dismiss a pleading. This does not preclude raising the basis for the proposed second 3211 motion (other than those specified hy the CPLR as waived) in "another form" such as a motion for summary judgment (CPLR 3211[e]; *Ramos v. City of New York*, 51 A.D.3d 753, 754 [2d Dept 2008])

C. Summary Judgment

1. Standard

a. "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence [in admissible form] to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]; *Morreale v Serrano*, 67 AD3d 655 [2d Dept 2009] [citations omitted])

(1) The evidence submitted in support of summary judgment must be in a form admissible at trial (*Midfirst Bank v Agho*, 121 A.D.3d 343, 348 [2d Dept 2014])

b. In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party (*Adams v. Bruno*, 124 A.D.3d 566 [2d Dept 2015]; *Kershaw v. Hospital for Special Surgery*, 114 A.D.3d 75, 82 [1st Dept 2013])

c. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted])

d. If the plaintiff makes a prima facie showing, the burden shifts to the defendants to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*Midfirst Bank v Agho*, 121 A.D.3d 343, 348 [2d Dept 2014])

(1) Non-movant must show the existence of a triable issue of fact, but only as to the elements on which the movant met the prima facie burden (*Gressman v. Stephen-Johnson*, 122 A.D.3d 904, 906 [2d Dept 2014])

(2) "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980])

(3) While hearsay statements may be used to oppose motions for summary judgment, such evidence, standing alone, is insufficient to raise a triable issue of fact such to defeat summary judgment (*Derrick v. North Star Orthopedics, PLLC*, 121 A.D.3d 741, 743 [2d Dept 2014]; *Andron v. Libby*, 120 A.D.3d 1056 [1st Dept 2014]).

e. Summary judgment must be denied if any doubt exists as to a triable issue or where a material issue of fact is arguable (*Rivers v. Birnbaum*, 102 A.D.3d 26, 42 [2d Dept 2012])

2. Successive Motions

a. "Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause... the evidence that was not submitted in support of the previous summary judgment motion must be used to establish facts that were not available to the party at the time it made its initial motion for summary judgment and which could not have been established through alternative evidentiary means. Indeed, successive motions for summary judgment should not be made based upon facts or arguments which could have been submitted on the original motion for summary judgment" (*Vinar v. Litman*, 110 A.D.3d 867 [2d Dept 2013][internal quotation marks

and citations omitted]; see also *MLCFC 2007-9 ACR Master SPE, LLC v Camp Waubeeka, LLC*, 123 A.D.3d 1269 [3d Dept 2014])

b. "Although multiple summary judgment motions in the same action should be discouraged in the absence of a showing of newly discovered evidence or other sufficient cause, a subsequent summary judgment motion may be properly entertained when it is substantively valid and when the granting of the motion will further the ends of justice while eliminating an unnecessary burden on the resources of the courts" (*Valley Nat. Bank v. INI Holding, LLC*, 95 A.D.3d 1108 [2d Dept 2012]; see also, *Rose v. Horton Medical Center*, 29 A.D.3d 977, 978 [2d Dept 2006])

IV. Trial/ Evidence

A. Judicial Notice

1. A court can deem a fact to be established without requiring evidence under certain circumstances, some of which are set out below:

a. Common and General Knowledge: " A court may only apply judicial notice to matters of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain. The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof" (*Dollas v. W.R. Grace and Co.*, 225 A.D.2d 319, 320 [1st Dept 1996][internal quotation marks and citation omitted])

b. Capable of Immediate and Accurate Determination: "To be sure, a court may take judicial notice of facts which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy" (*People v. Jones*, 73 N.Y.2d 427, 431[1989])

(1) Judicial notice can provide a foundation for admitting business records when the records are so patently trustworthy as to be self-authenticating. This has been applied to bank records. (*MRI Enters., Inc. v Comprehensive Med. Care of N.Y., P.C.*, 122 A.D.3d 595, 596 [2d Dept 2014]; *Elkaim v. Elkaim*, 176 A.D.2d 116, 117 [1st Dept 1991])

c. Public Record: A court may, in general, take judicial notice of matters of public record (*Headley v. New York City Transit Authority*, 100 A.D.3d 700. 701 [2d Dept 2012])

B. Hearsay

1. Generally

a. Out–of–court statements offered for the truth of the matters they

assert are hearsay and may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable. In determining reliability, a court must decide whether the declaration was spoken under circumstances which render it highly probable that it is truthful. [*Nucci ex rel. Nucci v. Proper*, 95 NY2d 597, 602 [2001] [internal citations and quotation marks omitted])

(1) Recently, the 1st Department deemed credit card statements to be self-authenticating (see, *Portfolio Recovery Assoc v. Lall*, 127 A.D.3d 576 [1st Dept 2015]). However, the weight of the case law from the other departments does not appear consistent with this position.

2. 4518 [Business Records]

a. Rationale

(1) The essence of the business records exception to the hearsay rule is that records systematically made for the conduct of a business as a business are inherently highly trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them truthful and accurate for purposes of the conduct of the enterprise (see, Williams v Alexander, 309 NY 283, 286). (*People v Kennedy*, 68 NY2d 569, 579 [1986])

b. Elements (3 from Kennedy + 1 from Leon RR)

(1) "These concepts appear as the foundation requirements of CPLR 4518(a): *first*, that the record be made in the regular course of business— essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business; *second*, that it be the regular course of such business to make the record (a double requirement of regularity)—essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record; and *third*, that the record be made at or about the time of the event being recorded—essentially, that recollection be fairly accurate and the habit or routine of making the entries assured." (*People v. Kennedy*, 68 NY2d 569, 579-580 [NY 1986])

(2) "[E]ach participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay

exception. Thus, not only must the entrant be under a business duty to record the event, but the informant must be under a contemporaneous business duty to report the occurrence to the entrant as well. The reason underlying the business records exception fails and, hence, the statement is inadmissible hearsay if any of the participants in the chain is acting outside the scope of a business duty." (*In re: Leon RR*, 48 NY2d 117, 122-123 [1979]).

(a) the concern relating to trustworthiness extends to "each participant in the chain producing the [business] record, from the initial declarant to the final entrant" (see Matter of Leon RR, 48 N.Y.2d 117, 122, 421 N.Y.S.2d 863, 397 N.E.2d 374). (*Hochhauser v Electric Ins. Co.*, 46 AD3d 174, 179 [2d Dept 2007])

c. Foundation

(1) "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" (*Unifund CCR Partners v. Youngman*, 89 AD3d 1377, 1378 [4th Dept 2011])

d. Third-Party Documents

(1) It is true that as a rule, the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insuffieient to qualify the documents as business records. The reason for this rule is that such papers simply are not made in the regular course of business of the recipient, who is in no position to provide the necessary foundation testimony as to the regularity and timeliness of their preparation or the source of information contained in the records. Nor, generally, would the recipient be aware whether the information was imparted by one under a "business duty" to report to the entrant.(People v Cratsley, 86 NY2d 81, 90 [1995][internal citations and quotation marks omitted])

(2) Affidavit of custodian of records of plaintiff debt-buyer found insufficient to allow admissibility of statements allegedly prepared by original creditor (*Unifund CCR Partners v Youngman*, 89 A.D.3d 1377 [4th Dept 2011])

(3) " A document may be admitted as a business record upon proof that it is made and kept in the regular course of

business (see CPLR 4518[a]). 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" (*West Valley Fire Dist. No. 1 v. Village of Springville,* 294 A.D.2d 949, 950 [4th Dept 2002])

(4) "[A]lthough a proper foundation can be established by a recipient of records who does not have personal knowledge of the maker's business practices and procedures, there must still be a showing that the recipient either incorporated the records into its own records or relied upon the records in its day-to-day operations" (*Andrew Carothers, M.D., P.C. v. Geico Indem. Co.*, 79 AD3d 864, 864-865 [2d Dept 2010])

C. Electronic Records (State Tech. Law 306, CPLR 4539[b])

1. "Without an affidavit from an individual with personal knowledge of the care and maintenance of plaintiff's electronic business records, plaintiff cannot satisfy its burden, under State Technology Law 306 and CPLR 4539(b), of laying a proper foundation for submitting the subject reproductions" (*American Express Centurion Bank v. Badalamenti*, 30 Misc.3d 1201[A], 2010 N.Y. Slip Op. 52238[U] [Nassau Dist Ct 2010] [internal citations omitted]; see also *Bank of America, N.A. v. Friedman Furs & Fashion, LLC*, 38 Misc.3d 1201[A], 2012 N.Y. Slip Op. 52306[U] [Sup Ct, Kings County 2012])

a. "Meeting the requirements of Technology Law § 306 and CPLR § 4539(b) does not in any way affect whether a document is hearsay and, to the extent that it is, it must fall within one of the accepted exceptions in order to be admissible." (*American Exp. Bank, FSB v. Zweigenhaft*, 38 Misc.3d 1218[A], 2013 N.Y. Slip Op. 50127[U] [Civ Ct, Kings County 2013])

2. There must be testimony that the records are maintained in such a manner to be tamper-evident.

a. "there is nothing in the affirmation to verify that the requirements of CPLR § 4539 have been complied with so as to insure that the process utilized by plaintiff "does not permit additions, deletions or changes without leaving a record of such...." Such a statement must be made under oath by someone who is aware of the manner in which plaintiff's records are compiled and maintained as well as the system employed by plaintiff to prevent tampering. Plaintiff then has to establish that the records of this particular defendant are maintained in that manner." (*American Exp. Bank, FSB v. Dalbis*, 30 Misc.3d 1235(A), 2011 N.Y. Slip Op. 50366[U] [Civ Ct, Richmond County 2011]).

b. As one leading treatise explains: "The purpose of CPLR 4539(b) is to acknowledge and accept existing and future technologies which accomplish image storage by a variety of different methods, while also recognizing that some of those technologies permit tampering with stored images in ways that were not feasible when photocopies or microfilm images were involved ..." Weinstein–Korn–Miller, New York Civil Practice, ¶ 4539.11. Stated another way, electronically stored images "cannot qualify as a reproduction of an original made in the ordinary course of business unless the enterprise in question has incorporated into its technology security measures sufficient to guarantee that any such alteration leaves an audit trail which at least indicates that a change has been made." Id. *American Express Centurion Bank v. Badalamenti*, 30 Misc.3d 1201[A], 2010 N.Y. Slip Op. 52238[U] [Nassau Dist Ct 2010]

V. Post-Judgment Motion Practice

A. Motion to Vacate Default

1. 5015(a) [Vacating Judgment or Order]

a. (a)(1)

(1) A motion pursuant to this section must be made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry (CPLR 5015[a][1];)

(2) Pursuant to CPLR §5015(a)(1), a defendant seeking to vacate a default in appearing or answering must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action (*Sussman v Jo-Sta Realty Corp.*, 99 A.D.3d 787, 788 [2d Dept. 2012]).

(3) "A motion to vacate is addressed to the sound discretion of the court, which should also consider potential prejudice to the opposing party, whether the default was willful or evinced an intent to abandon the litigation, and whether vacating the default would serve the public policy of resolving actions on their merits" (*Needleman v Tornheim*, 106 A.D.3d 707, 708 [2d Dept 2013])

(4) Reasonable Excuse

(a) The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the Court (*Eastern Savings Bank, FSB v. Charles*, 103 A.D.3d 683, 684 [2d Dept 2014])

(b) Some Specific Excuses

i) Incarceration is not a reasonable excuse absent explanation why he did not apprise attorney or Court in advance of default (*In re Deyquan M.B.*, 124 A.D.3d 644 [2d Dept 2015])

ii) Bare allegation of law office failure insufficient (*Dobbyn-Blackmore v City of New York*, 123 A.D.3d 1083 [2d Dept 2014]). However, a detailed and credible explanation of the specific law office failure that led to the default can be a reasonable excuse (*Madonna Mgt. Servs., Inc. v R.S. Naghavi M.D. PLLC*, 123 A.D.3d 986 [2d Dept 2014])

iii) An unexplained failure to file with the Secretary of State the current address of the agent designated to receive process on the behalf of a corporation is not a reasonable excuse (*Gershman v Midtown Moving & Stor., Inc.*, 123 A.D.3d 974 [2d Dept 2014])

iv) Attorney's claim that she was suffering from a medical condition which required surgery during the time within which her client had to answer, without any proof to substantiate her allegations is insufficient (Wells Fargo Bank, N.A. v Cean Owens, LLC, 110 A.D.3d 872 [2d Dept 2013]). However, if properly substantiated, illness of the attorney can serve as a reasonable excuse (*Loucks v Klimek,* 108 A.D.3d 1037, 1038 [4th Dept 2013])

v) Bare and unsubstantiated claim of lack of service insufficient (*Deutsche Bank Natl. Trust Co. v White*, 110 A.D.3d 759, 760 [2d Dept 2013])

vi) Ignorance of the law and the need to answer and appear is not a reasonable excuse (*Stevens v. Charles*, 102 A.D.3d 763, 764 [2d Dept 2013]; *U.S. Bank Nat. Ass'n v. Slavinski*, 78 A.D.3d 1167 [2d Dept 2010])

vii) The mistaken belief that Defendant did not need to answer the complaint because he was

attempting to settle the action did not constitute a reasonable excuse (*Dimopoulos v. Caposella*, 118 A.D.3d 739, 740 [2d Dept 2014])

(5) Potentially Meritorious Defense/Cause of Action

(a) The movant must set forth a potentially meritorious defense in sufficient detail (*Aydiner v. Grosfillex, Inc.*, 111 A.D.3d 589, 590 [2d Dept 2013]).

(b) This must be done via affidavits of people with knowledge and/or admissible evidence (*King v King*, 99 A.D.3d 672, 673 [2d Dept 2012])

(6) In the Interest of Justice

(a) A motion to vacate and restore can be granted "for sufficient reason and in the interests of substantial justice" when brought soon after default, where movant shows that there will be no prejudice to the opposing party (*In re County of Genesee*, 124 A.D.3d 1330 [4th Dept 2015])

b. (a)(2)

(1) "The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person ... upon the ground of newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404" (CPLR 5015[a][2])

(2) "In order for relief to be granted under CPLR 4404(b) or 5015(a)(2) based on newly-discovered evidence, the movant must show that it could not have previously discovered the evidence, and that the new evidence is in admissible form. (*Da Silva v. Savo*, 97 AD3d 525, 526 [2d Dept 2012][citations omitted])

(3) "[T]he court that issues an order may relieve a party from it upon such terms as may be just where newly-discovered evidence exists which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial. Newly-discovered evidence is evidence which was in existence but undiscoverable with due diligence at the time of judgment. The newly-discovered evidence must be

material, cannot be merely cumulative, and cannot be of such a nature as would merely impeach the credibility of an adverse witness" (*In re Ayodele Ademoli J.*, 57 AD3d 668, 668-669 [2d Dept 2008] [citations omitted])

c. (a)(3)

(1) "The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person ... upon the ground of fraud, misrepresentation, or other misconduct of an adverse party" (CPLR 5015[a][3])

(2) A motion to vacate pursuant to CPLR 5015(a)(3) on the ground of fraud must be made in a "reasonably timely manner" (*Wells Fargo Bank NA v Podeswik*, 115 A.D.3d 207, 214 [4th Dept 2014]; *Indymac Bank, F.S.B. v Yano-Horoski*, 107 A.D.3d 672 [2d Dept 2013]; *Mark v Lenfest*, 80 A.D.3d 426 [1st Dept 2011])

(3) Movant must show that non-movant engaged in fraud, misrepresentation, or other misconduct, of which movant was unaware when the court entered its order (*Dick v. State University Const. Fund*, 125 A.D.3d 1487, 1488 [4th Dept 2015])

(4) When a CPLR 5015(a)(3) motion alleges intrinsic fraud, i.e., that the allegations in the complaint are false, movant must provide a reasonable excuse for the default (*Wells Fargo Bank, N.A. v Braun*, 123 A.D.3d 698 [2d Dept 2014]; *Bank of N.Y. v Lagakos*, 27 A.D.3d 678, 679 [2d Dept 2006])

d. (a)(4)

(1) "The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person ... upon the ground of lack of jurisdiction to render the judgment or order" (CPLR 5015[a][4]).

(a) This section applies both to a lack of personal jurisdiction and a lack of subject matter jurisdiction.

(2) A motion to vacate pursuant to CPLR 5015(a)(4) based on lack of jurisdiction may be made at any time. That is, it does not have the 1-year time limit of (a)(1) (*HSBC Bank USA, N.A. v Ashley*, 104 A.D.3d 975 [3d Dept 2013]; *Caba v Rai*, 63 A.D.3d 578, 580 [1st Dept 2009])

(3) When a defendant seeking to vacate a default judgment

raises both a jurisdictional objection pursuant to CPLR 5015(a)(4) and seeks a discretionary vacatur pursuant to CPLR 5015(a)(1), the court is required to first resolve the jurisdictional question (*HSBC Bank USA, N.A. v Miller*, 121 A.D.3d 1044, 1045 [2d Dept 2014])

(4) "Where, as here, a defendant moves to vacate a judgment entered upon his or her default in appearing or answering the complaint on the ground of lack of personal jurisdiction, the defendant is not required to demonstrate a reasonable excuse for the default and a potentially meritorious defense" (*Prudence v Wright*, 94 AD3d 1073 [2d Dept. 2012]; *see similarly Toyota Motor Credit Corp. v Lam*, 93 AD3d 713, 713-714 [2d Dept. 2012])

(a) When the evidence in the record establishes that movant was not served with process, vacatur of the default judgment is required as a matter of law and due process (*Webb v Pearce*, 114 A.D.3d 671, 672 [2d Dept 2014])

2. 317

a. "A person served with a summons other than by personal delivery to him ...who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense." (CPLR 317)

(1) Time limit can be extended pursuant to CPLR 2004 (*Stern v Warren George, Inc.*, 82 A.D.3d 873 [2d Dept 2011])

b. Pursuant to CPLR 317, when process is served upon a party by some method other than personal delivery, movant must show both a potentially meritorious defense and that the party did not receive actual notice of the summons and complaint in time to defend the action. (*Wassertheil v. Elburg*, LLC, 94 A.D.3d 753, 754 [2d Dept 2012])

c. Lack of Timely Receipt

(1) The mere denial of receipt of the summons and complaint is also insufficient to establish lack of actual notice for the purpose of CPLR 317 (*Wassertheil v. Elburg*, LLC, 94 A.D.3d 753, 754 [2d Dept 2012])

(2) Proof that a copy of the summons and complaint was

properly mailed is sufficient to create a presumption that defendant received actual notice in time to defend (*Burekhovitch v. Tatarchuk*, 99 A.D.3d 653, 654 [2d Depot 2012]).

d. For a discussion of what constitutes a "potential meritorious defense", see supra V.A.1.a.(5).

3. Judgment Already Satisfied

a. A judgment which is satisfied ceases to exist and can no longer be challenged (*See Samuel v Samuel*, 69 AD3d 835, 836 [2d Dept. 2010]; *HDI Diamonds v Frederick Modell, Inc.*, 86 AD2d 561 [1st Dept 1982]

(1) Lower court opinions have differentiated those precedents as relating to voluntary payments rather than levies (see, for example, *Valtech Research, Inc. v. Meridian Abstract Corp.*, 23 Misc.3d 531, 533 [N.Y.City Civ.Ct. 2009]) and as irrelevant in light of a lack of personal jurisdiction (see, for example, *Citibank (South Dakota), N.A. v Farmer*, 166 Misc.2d 145, 146 [N.Y.City Ct. 1995])

B. Motion to Vacate Stipulation/Consent Order

1. Generally

a. A stipulation will not be vacated absent sufficient cause. Only those bases that would warrant vacating a contract such as fraud, collusion, mistake or aecident would allow a party to be relieved from the consequences of its agreement (*Hallock v. State*, 64 NY2d 224, 230 [1984]; *Racanelli Const. Co., Inc. v. Tadco Const. Corp.*, 50 A.D.3d 875 [2d Dept. 2008]).

b. An order entered on consent, effectively a stipulation entered into in open court, will not be vacated absent sufficient cause. Only those bases that would warrant vacating a contract such as fraud, collusion, mistake or accident would allow a party to be relieved from the consequences of its agreement (*Hallock v. State*, 64 NY2d 224, 230 [1984]; *Racanelli Const. Co., Inc. v. Tadco Const. Corp.*, 50 A.D.3d 875 [2d Dept. 2008]; *Department of Housing Preservation And Development v. French Open*, 23 Misc 3d 1138[A], 2009 N.Y. Slip Op. 51179[U][Civ Ct, Kings County 2009] ["The Consent Order entered into between the parties is a contract that sets forth the obligations that must be met in order to fulfill its intent."]; *Aguilar v. Elk Drive, Inc.*, 117 Misc 2d 154, 157 [1982]["The fundamental rule of law is that a stipulation or Consent Order is to remain undisturbed unless a party seeking vacatur can show '... good cause therefor, such as fraud, collusion, mistake,

accident, or some other ground of the same nature.'"][citations omitted]).

2. Specific Grounds

a. Mistake

(1) Court ordered relief based on mistake in entering a contract is rarely granted (*Simkin v. Blank*, 19 NY3d 36, 52 [2012]["We have explained that [t]he mutual mistake must exist at the time the contract is entered into and must be substantial....Court-ordered relief is therefore reserved only for exceptional situations."] [internal quotation marks and citations omitted])

(2) "To void a contract for mistake, the mistake must be mutual, substantial and must exist at the time the parties enter into the contract." (*Thor Properties, LLC v. Chetrit Group LLC*, 91 AD3d 476, 478 [1st Dept. 2012]

(a) "A claim of mutual mistake is stated where the allegations indicate that the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement."(*Aventine Inv. Management, Inc. v. Canadian Imperial Bank of Commerce*, 265 A.D.2d 513, 514 [2d Dept. 1999])

b. Duress

(1) "A contract may be voided on the ground of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of its free will" (*Sitar v. Sitar*, 61 A.D.3d 739, 742 [2d Dept 2009], quoting *Stewart M. Muller Constr. Co. v. New York Tel. Co.*, 40 N.Y.2d 955, 956 [1976])

(2) "A contract may be voided and a party may recover damages when it establishes that it was compelled to agree to the contract terms because of a wrongful threat by the other party which precluded the exercise of its free will. There is no actionable duress, however, where, as here, the alleged menace was to exercise a legal right. (*Madey v. Carman*, 51 AD3d 985, 987 [2d Dept. 2008][internal quotation marks and citations omitted])

(3) "In order to vacate a stipulation on the ground of duress, a party must demonstrate that threats of an unlawful act compelled his or her performance of an act which he or she had the legal right to abstain from performing" (*Dubi v*

Skiros Corp., 66 A.D.3d 954 [2d Dept 2009][internal quotation marks and citations omitted])

(4) "financial pressures, even when coupled with inequality in bargaining position, do not, without more, constitute duress" (*Gubitz v. Security Mut. Life Ins. Co. of New York*, 262 A.D.2d 451, 452 [2d Dept 1999])

(5) "In order to maintain a claim of duress, the aggrieved party must demonstrate that threats of an unlawful act compelled his or her performance of an act which he or she had the legal right to abstain from performing. Additionally, the threat must be such as to deprive the party of the exercise of free will" (*Polito v. Polito*, 121 A.D.2d 614, 615 [2d Dept 1986][internal quotation marks and citations omitted])

c. Unconscionability

(1) "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made. It requires some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Gendot Associates, Inc. v. Kaufold*, 56 A.D.3d 421 [2d Dept 2008], quoting *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10 [1988])

(2) In general, an unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforcible because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. This definition has been broken down into two elements: procedural and substantive unconscionability. Substantive elements of unconscionability appear in the content of the contract per se; procedural elements must be identified by resort to evidence of the contract formation process and meaningfulness of the choice. ... With respect to procedural unconscionability, examples include, but are not limited to, high pressure commercial tactics, inequality of bargaining power, deceptive practices and language in the contract, and an imbalance in the understanding and acumen of the parties. In general, it can be said that procedural and substantive unconscionability operate on a sliding scale; the more questionable the meaningfulness of choice, the less imbalance in a contract's terms should be tolerated and vice

versa. (*Emigrant Mortg. Co., Inc. v. Fitzpatrick*, 95 A.D.3d 1169 [2d Dept 2012][citations and internal quotation marks omitted])

(3) a stipulation of settlement is unconscionable if it is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense (*O'Hanlon v O'Hanlon*, 114 A.D.3d 915 [2d Dept 2014][citations and internal quotation marks omitted)

New York State
Unified Court System
25 Beaver Street
New York, New York 10004

A. Gail Prudenti
Chief Administrative Judge

212-428-2120

September 15, 2014

TO: Administrative Judges

FROM: A. Gail Prudenti

SUBJECT: New rules and affidavits for default judgment applications in consumer credit matters.

As you are aware, at this year's Court of Appeals Law Day ceremony, the Chief Judge announced that, following a public comment period, the court system would adopt major reforms addressing default judgment applications in consumer credit collection cases, including those commenced by third-party debt buyers. As described by the Chief Judge, the new rules and affidavits are intended to ensure a fair legal process and address a number of documented abuses (including entry of default judgments despite insufficient or incorrect factual proof, expiration of the applicable statute of limitations, and failed service of process).

This memorandum outlines the new requirements for default judgment applications in consumer credit collection cases where such applications are made to the clerk under CPLR 3215(a). Effective October 1, 2014, the rules will apply in the Supreme Court, New York City Civil Court, City Courts outside New York City, and District Courts. In debt buyer actions, the new rules will require plaintiffs to submit specific affidavits and documentation, including affidavits from original creditors and intervening debt buyers, that are based on personal knowledge and meet substantive legal and evidentiary standards for entry of a default judgment under New York law. In addition, plaintiffs must submit to the court an additional notice of a consumer credit action which is to be mailed by the court to the debtor at the address where process was served. The administrative order promulgating these new rules and affidavits is attached (Att.1).

Applicability of new affidavit requirements and effective dates

The new rules apply to default judgment applications in consumer credit transactions, defined as revolving or open-end credit extended by a financial institution to an individual primarily for personal, family or household purposes, with terms that include periodic payment provisions, late charges and interest accrual. This definition applies to credit card debt. It does not apply to debt incurred in connection with, among others, medical services, student loans, auto loans or retail installment contracts.

Plaintiffs seeking a default judgment in consumer credit cases must submit the following affidavits, in addition to any other affidavits presently required to obtain a default judgment under New York law.

(1) In original creditor actions, the AFFIDAVIT OF FACTS BY ORIGINAL CREDITOR, **effective October 1, 2014**.

(2) In debt buyer actions involving **debt purchased from an original creditor on or after October 1, 2014**, the AFFIDAVIT OF FACTS AND PURCHASE OF ACCOUNT BY DEBT BUYER PLAINTIFF, the AFFIDAVIT OF FACTS AND SALE OF ACCOUNT BY ORIGINAL CREDITOR and, if applicable, the AFFIDAVIT OF PURCHASE AND SALE OF ACCOUNT BY DEBT SELLER.

While the new affidavit rules do not immediately apply to debt buyer actions involving debt purchased from an original creditor **before October 1, 2014**, the rules do require debt-buyer plaintiffs to affirm that the debt at issue was purchased from the original creditor before October 1, 2014. Furthermore, **effective July 1, 2015**, the new affidavit requirements will apply in **all** debt buyer actions, irrespective of when the debt at issue was purchased from an original creditor.

(3) In all original creditor and debt buyer actions, the AFFIRMATION OF NON-EXPIRATION OF STATUTE OF LIMITATIONS, **effective October 1, 2014**.

In summary, different affidavit requirements apply depending on whether the plaintiff is an original creditor or a debt buyer. Moreover, in debt buyer actions, the new affidavit requirements initially take effect prospectively (except for the affirmation of non-expiration of statute of limitations). However, on July 1, 2015, the new affidavits will be required in **all** debt buyer actions, irrespective of when the debt was purchased from an original creditor.

While the foregoing affidavits may not be combined, individual affidavits may be augmented as necessary to provide explanatory details and supplemental affidavits may be filed for the same purpose. The affidavits in debt buyer actions must be supported by exhibits, including copies of the credit agreement, the bill of sale or written assignment of the account and relevant business records of the Original Creditor that set forth the name of the Consumer, the last four digits of the account number, the date and amount of the charge-off balance, the date and amount of the last payment, and the balance due.

Please note that section 202.6(b) of the Uniform Rules for Supreme Court and County Court has also been amended to require a party to file a Request for Judicial Intervention when making an application for a default judgment in a consumer credit matter in Supreme Court.

Additional Notice Requirement

Section 208.6(h) of the Rules of the New York City Civil Court is being amended and expanded to the Supreme Court and County Court, City Courts outside New York City, and District Courts, **effective October 1, 2014**. The amended rule will require plaintiffs, when filing proof of service of the summons and complaint, to submit to the clerk a stamped envelope containing an additional notice of a consumer credit action addressed to the defendant at the address where process was served. The face of the envelope shall contain as a return address the appropriate clerk's office to which the defendant should be directed. The additional notice is to be mailed promptly by the court to the defendant. No default judgment may be entered unless there has been compliance with this requirement and at least 20 days have elapsed from the date of mailing. The court may not enter a default judgment if the additional notice is returned to the court as undeliverable, unless the address at which process was served matches the defendant's address on record with the New York State Department of Motor Vehicles.

Please note that the content of the additional notice for the New York City Civil Court differs from the additional notice applicable in other courts.

Affidavits

Form affidavits for use by plaintiffs seeking default judgments in consumer credit cases pursuant to these rule changes will be made available on the UCS website and should be made available in the clerk's office for the convenience of litigants. In addition, the Office of the Statewide Director of Access to Justice Programs has developed special forms for use by unrepresented litigants in consumer credit actions which will be distributed shortly.

* * *

If you have questions about the new rules please contact Antonio Galvao of Counsel's Office at (914) 824-5443. Please distribute this memorandum further as you deem appropriate.

cc: Hon. Lawrence K. Marks
Hon. Fern A. Fisher
Hon. Michael V. Coccoma
Ronald P. Younkins, Esq.
Eugene Myers
Maria Logus
Maria Barrington
District Executives
NYC Chief Clerks
County Clerks

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby promulgate, effective October 1, 2014, the following court rules relating to the proof of default judgment in consumer credit matters (as further set forth in Exh. A appended hereto)

§ 202.27-a.	Proof of Default Judgment in Consumer Credit Matters (Uniform Civil Rules for the Supreme Court and the County Court);
§ 202.27-b	Additional Mailing of Notice on an Action Arising from a Consumer Credit Transaction (Uniform Civil Rules for the Supreme Court and the County Court);
§ 208.6(h)	Additional Mailing of Notice on an Action Arising from a Consumer Credit Transaction (Uniform Civil Rules for the New York City Civil Court);
§ 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);
§ 210.14-b	Additional Mailing of Notice on an Action Arising from a Consumer Credit Transaction (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);
§ 212.14-b	Additional Mailing of Notice on an Action Arising from a Consumer Credit Transaction (Uniform Civil Rules for the District Courts);
§ 202.6	Request for judicial intervention (Uniform Civil Rules for the Supreme Court and the County Court).

In addition, I hereby promulgate, also effective October 1, 2014, the following forms for use in implementing these rules (Exh. B):

1. Affidavit of Facts by Original Creditor (Original Creditor Actions);
2. Affidavit of Facts and Sale of Account by Original Creditor (Debt Buyer Actions);
3. Affidavit of Purchase and Sale of Account by Debt Seller (Debt Buyer Actions);
4. Affidavit of Facts and Purchase of Account by Debt Buyer Plaintiff (Debt Buyer Actions); and
5. Affirmation of Non-Expiration of Statute of Limitations (All Actions).

Chief Administrative Judge of the Courts

Dated: September 15, 2014

AO/185/14

§ 202.27-a. Proof of Default Judgment in Consumer Credit Matters (Uniform Civil Rules for the Supreme Court and the County Court)

§ 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) Definitions.

(1) For purposes of this section a consumer credit transaction means a revolving or open-end credit transaction wherein credit is extended by a financial institution, which is in the business of extending credit, to an individual primarily for personal, family or household purposes, the terms of which include periodic payment provisions, late charges and interest accrual. A consumer credit transaction does not include debt incurred in connection with, among others, medical services, student loans, auto loans or retail installment contracts.

(2) Original creditor means the financial institution that owned the consumer credit account at the time the account was charged off, even if that financial institution did not originate the account. Charged-off consumer debt means a consumer debt that has been removed from an original creditor's books as an asset and treated as a loss or expense.

(3) Debt buyer means a person or entity that is regularly engaged in the business of purchasing charged-off consumer debt for collection purposes, whether it collects the debt itself, hires a third party for collection, or hires an attorney for collection litigation.

(4) Credit agreement means a copy of a contract or other document governing the account provided to the defendant evidencing the defendant's agreement to the debt, the amount due on the account, the name of the original creditor, the account number, and the name and address of the defendant. The charge-off statement or the monthly statement recording the most recent purchase transaction, payment or balance transfer shall be deemed sufficient evidence of a credit agreement.

(b) Applicability. Together with any other affidavits required under New York law, the following affidavits shall be required as part of a default judgment application arising from a consumer credit transaction where such application is made to the clerk under CPLR 3215(a).

(1) In original creditor actions, the affidavit set forth in subsection (c), effective October 1, 2014.

(2) In debt buyer actions involving debt purchased from an original creditor on or after October 1, 2014, the affidavits set forth in subsection (d).

(3) Except as set forth in paragraph four of this subsection, the affidavits set forth in subsection (d) shall not be required in debt buyer actions involving debt purchased from an original creditor before October 1, 2014. The plaintiff shall be required to affirm in its affidavit of facts that the debt was purchased from the original creditor before October 1, 2014 and attach proof of that fact.

(4) Effective July 1, 2015, the affidavits set forth in subsection (d) shall be required in all debt buyer actions notwithstanding that the debt was purchased from an original creditor before October 1, 2014.

(5) In all original creditor and debt buyer actions, the affidavit of non-expiration of statute of limitations set forth in subsection (e), effective October 1, 2014.

(c) Where the plaintiff is the original creditor, the plaintiff must submit the AFFIDAVIT OF FACTS BY ORIGINAL CREDITOR.

(d) Where the plaintiff is a debt buyer, the plaintiff must submit the AFFIDAVIT OF FACTS AND PURCHASE OF ACCOUNT BY DEBT BUYER PLAINTIFF, the AFFIDAVIT OF FACTS AND SALE OF ACCOUNT BY ORIGINAL CREDITOR and, if applicable, the AFFIDAVIT OF PURCHASE AND SALE OF ACCOUNT BY DEBT SELLER for each debt seller who owned the debt prior to the plaintiff.

(e) In all applications for a default judgment arising from a consumer credit transaction, the plaintiff must submit the AFFIRMATION OF NON-EXPIRATION OF STATUTE OF LIMITATIONS executed by counsel.

(f) The affidavits required by this section may not be combined. Affidavits may be augmented to provide explanatory details, and supplemental affidavits may be filed for the same purpose.

(g) The affidavits required by this section shall be supported by exhibits, including a copy of the credit agreement as defined in this section, the bill of sale or written assignment of the account where applicable, and relevant business records of the Original Creditor that set forth the name of the defendant; the last four digits of the account number; the date and amount of the charge-off balance; the date and amount of the last payment, if any; the amounts of any post-charge-off interest and post-charge-off fees and charges, less any post-charge-off credits or payments made by or on behalf the defendant; and the balance due at the time of sale.

(h) If a verified complaint has been served, it may be used as the plaintiff's affidavit of facts where it satisfies the elements of the AFFIDAVIT OF FACTS AND PURCHASE OF ACCOUNT BY DEBT BUYER PLAINTIFF.

(i) The County Clerk or clerk of the court shall refuse to accept for filing a default judgment application that does not comply with the requirements of this section.

(j) Nothing in this section is intended to impair a plaintiff's ability to make a default judgment application to the court as authorized under CPLR 3215(b).

Section 202.6 Request for judicial intervention.

(a) At any time after service of process, a party may file a request for judicial intervention. Except as provided in subdivision (b) of this section, in an action not yet assigned to a judge, the court shall not accept for filing a notice of motion, order to show cause, application for ex parte order, notice of petition, note of issue, notice of medical, dental or podiatric malpractice action, statement of net worth pursuant to section 236 of the Domestic Relations Law or request for a preliminary conference pursuant to section 202.12(a) of this Part, unless such notice or application is accompanied by a request for judicial intervention. Where an application for poor person relief is made, payment of the fee for filing the request for judicial intervention accompanying the application shall be required only upon denial of the application. A request for judicial intervention must be submitted, in duplicate, on a form authorized by the Chief Administrator of the Courts, with proof of service on the other parties to the action (but proof of service is not required where the application is ex parte).

(b) A request for judicial intervention shall be filed, without fee, for any application to a court not filed in an action or proceeding, as well as for a petition for the sale or finance of religious/not-for-profit property, an application for change of name, a habeas corpus proceeding where the movant is institutionalized, an application under CPLR 3102(e) for court assistance in obtaining disclosure in an action pending in another state, a retention proceeding authorized by article 9 of the Mental Hygiene Law, a proceeding authorized by article 10 of the Mental Hygiene Law, an appeal to a county court of a civil case brought in a court of limited jurisdiction, an application to vacate a judgement on account of bankruptcy, **an application for a default judgment in a consumer credit matter pursuant to section 202.27-a of this Part,** a motion for an order authorizing emergency surgery, or within the City of New York, an uncontested action for a judgment for annulment, divorce or separation commenced pursuant to article 9, 10 or 11 of the Domestic Relations Law.

(c) In the counties within the City of New York, when a request for judicial intervention is filed, the clerk shall require submission of a copy of the receipt of purchase of the index number provided by the County Clerk, or a written statement of the County Clerk that an index number was purchased in the action. Unless otherwise authorized by the Chief Administrator, the filing of a request for judicial intervention pursuant to this section shall cause the assignment of the action to a judge pursuant to section 202.3 of this Part. The clerk may require that a self-addressed and stamped envelope accompany the request for judicial intervention.

Additional Notice of Consumer Credit Action

§ 208.6(h) Additional Mailing of Notice on an Action Arising from a Consumer Credit Transaction (Uniform Civil Rules for the New York City Civil Court)

(a) Additional mailing of notice on an action arising from a consumer credit transaction.

(1) At the time of filing with the clerk the proof of service of the summons and complaint in an action arising from a consumer credit transaction, or at any time thereafter, the plaintiff shall submit to the clerk a **stamped unsealed** envelope addressed to the defendant together with a written notice, in both English and Spanish, containing the following language:

CIVIL COURT. CITY OF NEW YORK. _____

COUNTY OF _____ INDEX NO. _____

Plaintiff _____ Defendant _____

ATTENTION: A lawsuit has been filed against you claiming that you owe money for an unpaid consumer debt. You should go to the court clerk's office at the address listed on the face of the envelope as soon as possible to respond to the lawsuit by filing an "answer." You may wish to contact an attorney. If you do not respond to the lawsuit, the court may enter a money judgment against you. Once entered, a judgment is good and can be used against you for twenty years, and your personal property and money, including a portion of your paycheck and/or bank account, may be taken from you. Also, a judgment will affect your credit score and can affect your ability to rent a home, find a job, or take out a loan. You cannot be arrested or sent to jail for owing a debt.

It is important that you go to the court clerk's office listed above as soon as possible. You should bring this notice and any legal papers you may have received. Additional information can be found on the court system's website at: www.nycourts.gov

PRECAUCIÓN: Se ha presentado una demanda en su contra reclamando que usted debe dinero por una deuda al consumidor no saldada. Usted debe dirigirse a las ventanillas del secretario del tribunal, localizada en la dirección enumerada en el frente del sobre que recibió, tan pronto como le sea posible, para responder a la demanda presentando una "contestación." Quizás usted quiera comunicarse con un abogado. Si usted no presenta una contestación, el tribunal puede emitir un fallo monetario en contra suya. Una vez emitido, ese fallo es válido y puede ser

utilizado contra usted por un período de veinte años, y contra su propiedad personal y su dinero, incluyendo una porción de su salario y/o su cuenta bancaria, los cuales pueden ser embargados. Además, un fallo monetario afecta su crédito y puede afectar su capacidad de alquilar una casa, encontrar trabajo o solicitar un préstamo para comprar un automóvil. Usted no puede ser arrestado ni apresado por adeudar dinero.

Es importante que se dirija a las ventanillas del secretario judicial antes mencionado tan pronto como pueda. Usted debe presentar esta notificación y cualesquiera documentos legales que haya recibido. Puede obtener información adicional en el sitio web del sistema: www.nycourts.gov.

The face of the envelope shall be addressed to the defendant at the address at which process was served, and shall contain the defendant's name, address (including apartment number) and zip code. The face of the envelope also shall contain, in the form of a return address, the appropriate address of the clerk's office to which the defendant should be directed. These addresses are:

[INSERT APPROPRIATE COURT ADDRESS OR ADDRESSES]

(2) The clerk promptly shall mail to the defendant the envelope containing the additional notice set forth in paragraph (1). No default judgment based on defendant's failure to answer shall be entered unless there has been compliance with this subdivision and at least 20 days have elapsed from the date of mailing by the clerk. No default judgment based on defendant's failure to answer shall be entered if the additional notice is returned to the court as undeliverable, unless the address at which process was served matches the address of the defendant on a Certified Abstract of Driving Record issued from the New York State Department of Motor Vehicles. Receipt of the additional notice by the defendant does not confer jurisdiction on the court in the absence of proper service of process.

§ 202.27-b Additional Mailing of Notice on an Action Arising from a Consumer Credit Transaction (Uniform Civil Rules for the Supreme Court and the County Court)

§ 210.14-b Additional Mailing of Notice on an Action Arising from a Consumer Credit Transaction (Uniform Civil Rules for the City Courts Outside the City of New York)

§ 212.14-b Additional Mailing of Notice on an Action Arising from a Consumer Credit Transaction (Uniform Civil Rules for the District Courts)

(a) Additional mailing of notice on an action arising from a consumer credit transaction.

(1) At the time of filing with the clerk the proof of service of the summons and complaint in an action arising from a consumer credit transaction, or at any time thereafter, the plaintiff shall submit to the clerk a **stamped unsealed** envelope addressed to the defendant together with a written notice, in both English and Spanish, containing the following language:

SUPREME/DISTRICT/CITY COURT. COUNTY/CITY OF _____

COUNTY OF _____ INDEX NO. _____

Plaintiff _____ Defendant _____

ATTENTION: A lawsuit has been filed against you claiming that you owe money for an unpaid consumer debt. You should respond to the lawsuit as soon as possible by filing an "answer." You may wish to contact an attorney. If you do not respond to the lawsuit, the court may enter a money judgment against you. Once entered, a judgment is good and can be used against you for twenty years, and your personal property and money, including a portion of your paycheck and/or bank account, may be taken from you. Also, a judgment will affect your credit score and can affect your ability to rent a home, find a job, or take out a loan. You cannot be arrested or sent to jail for owing a debt. Additional *information can be found on the court system's website at: www.nycourts.gov*

PRECAUCIÓN: Se ha presentado una demanda en su contra reclamando que usted debe dinero por una deuda al consumidor no saldada. Usted debe, tan pronto como le sea posible, responder a la demanda presentando una "contestación." Quizás usted quiera comunicarse con un abogado. Si usted no presenta una contestación, el tribunal puede emitir un fallo monetario en contra suya. Una vez

emitido, ese fallo es válido y puede ser utilizado contra usted por un período de veinte años, y contra su propiedad personal y su dinero, incluyendo una porción de su salario y/o su cuenta bancaria, los cuales pueden ser embargados. Además, un fallo monetario afecta su crédito y puede afectar su capacidad de alquilar una casa, encontrar trabajo o solicitar un préstamo para comprar un automóvil. Usted no puede ser arrestado ni apresado por adeudar dinero. Puede obtener información adicional en el sitio web del sistema: www.nycourts.gov.

The face of the envelope shall be addressed to the defendant at the address at which process was served, and shall contain the defendant's name, address (including apartment number) and zip code. The face of the envelope also shall contain, in the form of a return address, the appropriate address of the clerk's office to which the defendant should be directed. These addresses are:

[INSERT APPROPRIATE COURT ADDRESS OR ADDRESSES]

(2) The clerk promptly shall mail to the defendant the envelope containing the additional notice set forth in paragraph (1). No default judgment based on defendant's failure to answer shall be entered unless there has been compliance with this subdivision and at least 20 days have elapsed from the date of mailing by the clerk. No default judgment based on defendant's failure to answer shall be entered if the additional notice is returned to the court as undeliverable, unless the address at which process was served matches the address of the defendant on a Certified Abstract of Driving Record issued from the New York State Department of Motor Vehicles. Receipt of the additional notice by the defendant does not confer jurisdiction on the court in the absence of proper service of process.

AFFIDAVIT OF FACTS BY ORIGINAL CREDITOR
(Original Creditor Actions)

The undersigned, being duly sworn, deposes and says:

1. I am a/an _____ [*employee/officer/member*] of Plaintiff, and I have personal knowledge of and access to Plaintiff's books and records ("Business Records"), including electronic records, relating to the account ("Account") of _____ [*name of Defendant*]. The last four digits of the Account number are _____. In my position, I have personal knowledge of Plaintiff's procedures for creating and maintaining its Business Records. Plaintiff's Business Records were made in the regular course of business and it was the regular course of such business to make the Business Records. The records were made at or near the time of the events recorded. Based on my review of Plaintiff's Business Records, I have personal knowledge of the facts set forth in this affidavit.

2. Plaintiff and Defendant entered into a credit agreement ("Agreement"). Defendant agreed to pay Plaintiff for all goods, services and cash advances provided pursuant to the Agreement. The amount of the last payment, if any, made by Defendant was $_____, made on _____ [*date*]. Defendant is now in default and demand for payment has been made. A true and correct copy of the Agreement is attached as an exhibit to this affidavit.

3. [*Complete this paragraph if seeking judgment on an account stated cause of action.*] I have personal knowledge of Plaintiff's procedures for generating and mailing account statements to customers. It is the regular practice of Plaintiff's business to provide periodic account statements to its customers. On or about _____ [*date*], Plaintiff sent one or more account statements relating to the Account to Defendant stating the amount due as $_____. The account statement(s) were mailed to Defendant's last known address and Plaintiff's records do not reflect that the statement(s) were returned by the post office or that the Defendant objected to them. A true and correct copy of the final account statement(s) is attached as an exhibit to this affidavit.

4. At this time, Defendant owes $_____ on the Account. This amount includes a charge-off balance of $_____ , post-charge-off interest of $____, post-charge-off fees and charges of $_____, less any post-charge-off credits or payments made by or on behalf of the Defendant of $ _____.

WHEREFORE, deponent demands judgment against Defendant for $_____, (plus interest from _____ [*date*], if applicable), together with the costs and disbursements of this action.

The above statements are true and correct to the best of my personal knowledge.

Dated: _____ _____ [*Name*]

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

_____
Notary Public

AFFIDAVIT OF FACTS AND SALE OF ACCOUNT BY ORIGINAL CREDITOR
(Debt Buyer Actions)

The undersigned, being duly sworn, deposes and says:

1. I am a/an _____ [*employee/officer/member*] of _____[*original creditor*] ("Original Creditor"), and I have personal knowledge of and access to Original Creditor's books and records ("Business Records"), including electronic records, relating to a pool of charged-off consumer credit accounts sold or assigned by _____ [*original creditor*] to _____ [*debt buyer*] ("Debt Buyer"), on _____ [*date*] (the "Sale"), which included the account ("Account") of the consumer ("Consumer") identified in the exhibits attached hereto and incorporated herein. As part of the Sale, Original Creditor assigned all of its interest in the Account, including the right to any proceeds from the Accounts, to Debt Buyer, and it transferred Business Records relating to the Account to Debt Buyer. A true and correct copy of the bill of sale or written assignment of the Account is attached as an exhibit to this affidavit.

2. In my position, I also have personal knowledge of Original Creditor's procedures for creating and maintaining its Business Records, including its procedures relating to the sale and assignment of consumer credit accounts. Original Creditor's Business Records were made in the regular course of business and it was the regular course of such business to make the Business Records. The Business Records were made at or near the time of the events recorded. Based on my knowledge of Original Creditor's Business Records, I have personal knowledge of the facts set forth in this affidavit.

3. Original Creditor and Consumer were parties to a credit agreement ("Agreement"). Consumer agreed to pay Original Creditor for all goods, services and cash advances provided pursuant to the Agreement. The date and the amount of the last payment, if any, made by Consumer are set forth in an exhibit attached hereto and made a part hereof. Consumer defaulted and a demand for payment was made by Original Creditor. A true and correct copy of the Agreement is attached as an exhibit to this affidavit.

4. [*Include this paragraph if seeking judgment on an account stated cause of action.*] I have personal knowledge of Original Creditor's procedures for generating and mailing account statements to customers. It is the regular practice of Original Creditor's business to provide periodic account statements to its customers. Original Creditor sent one or more account statements relating to the Consumer's Account to Consumer on the date(s) and for the amount(s) due set forth in an exhibit attached hereto and made a part hereof. The account statement(s) were mailed to Consumer's last known address and Original Creditor's Business Records do not reflect that the statement(s) were returned by the post office or that the Consumer objected to them. A true and correct copy of the most recent account statement(s) generated and mailed by Original Creditor is attached as an exhibit to this affidavit.

5. At the time of Sale, Consumer owed the amount set forth in the exhibits attached hereto and made a part hereof, which also set forth the name of the Consumer; the last four digits of the Account number; the date and amount of the charge-off balance; the date and amount of the last payment, if any; the total amounts, if applicable, of any post-charge-off interest and post-charge-off fees and charges; any post-charge-off credits or payments made by or on behalf of the Consumer; and the balance due at the time of the Sale. The above statements are true and correct to the best of my personal knowledge.

Dated: _____ _____ [*Name*]

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

_____
Notary Public

AFFIDAVIT OF PURCHASE AND SALE OF ACCOUNT BY DEBT SELLER
(Debt Buyer Actions)

The undersigned, being duly sworn, deposes and says:

1. I am a/an _____ [*employee/officer/member*] of _____ [*debt seller*] ("Debt Seller") and I have personal knowledge of and access to Debt Seller's books and records ("Business Records), including electronic records, relating to a pool of charged-off consumer credit accounts purchased by or assigned to the Debt Seller from _____ [*original creditor or prior debt seller*] on _____ [*date*] (the "Purchase"), which included the account ("Account") of the consumer ("Consumer") identified in the exhibits attached hereto and incorporated herein. As part of the Purchase, _____ [*original creditor or previous debt seller*] assigned all of its interest in the Account, including the right to any proceeds from the Account, to Debt Seller, and it transferred Business Records relating to the Account to Debt Seller.

2. In my position, I also have personal knowledge of Debt Seller's procedures for creating and maintaining its Business Records, including its procedures relating to the purchase, sale and assignment of consumer credit accounts. Debt Seller's Business Records were made in the regular course of business and it was the regular course of such business to make the Business Records. The Business Records were made at or near the time of the events recorded. Based on my knowledge of Debt Seller's Business Records, I have personal knowledge of the facts set forth in this affidavit.

3. On _____ [*date*], Debt Seller sold or assigned a pool of charged-off consumer credit accounts to _____ [*debt buyer*] (the "Sale"), which included the Account of the Consumer. At that time, Debt Seller assigned all of its interest in the Account, including the right to any proceeds from the Account, to _____ [*debt buyer*]. As part of the Sale, Business Records relating to the Account were transferred to _____ [*debt buyer*]. Prior to the Sale, those Business Records had been created and maintained in the ordinary course of Debt Seller's business. A true and correct copy of the bill of sale or written assignment of the Account is attached as an exhibit to this affidavit.

4. At the time of Sale, Consumer owed the amount set forth in an exhibit attached hereto and made a part hereof, which also sets forth the amount of the charge-off balance and, the total amounts, if applicable, of any post-charge-off interest and post-charge-off fees and charges, less any post-charge-off credits or payments made by or on behalf of the Consumer.

The above statements are true and correct to the best of my personal knowledge

Dated: _____ _____ [*Name*]

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

_____
Notary Public

AFFIDAVIT OF FACTS AND PURCHASE OF ACCOUNT BY DEBT BUYER PLAINTIFF (Debt Buyer Actions)

The undersigned, being duly sworn, deposes and says:

1. I am a/an _____ [*employee/officer/member*] of _____[*debt buyer plaintiff*] ("Plaintiff") and I have access to Plaintiff's books and records ("Business Records"), including electronic records, relating to the account ("Account") of _____ [*name of Defendant*]. The last four digits of the Account number are _____ . In my position, I also have personal knowledge of Plaintiff's procedures for creating and maintaining its Business Records, including its procedures relating to the purchase and assignment of consumer credit accounts. Plaintiff's Business Records were made in the regular course of business and it was the regular course of such business to make the Business Records. The Business Records were made at or near the time of the events recorded. Based on my knowledge of Plaintiff's Business Records, I have personal knowledge of the facts set forth in this affidavit.

2. On _____ [*date*], Plaintiff purchased or was assigned the Account from _____ [*original creditor or debt seller*] (the "Purchase"). At that time, _____ [*original creditor or debt seller*] assigned all of its interest in the Account, including the right to any proceeds from the Account, to Plaintiff. As part of the Purchase, Business Records relating to the Account were transferred to Plaintiff. Following the Purchase, those Business Records were maintained in the ordinary course of Plaintiff's business.

3. As set forth in the affidavit(s) of _____, _____, and _____, [*original creditor and all debt sellers*] submitted herewith, the complete chain of title, with the date of each sale or assignment of the Account, is as follows:

a. _____ _____ [*original creditor and date of sale/assignment*]

b. _____ _____ [*debt seller and date of sale/assignment*]

c. _____ _____ [*debt seller and date of sale/assignment*]

4. At this time, Defendant owes $_____ on the Account. This amount includes the charge-off balance of $_____ , post-charge-off interest of $____, and post-charge-off fees and charges of $_____, less post-charge-off credits or payments made by or on behalf of the Defendant of $_____.

WHEREFORE, deponent demands judgment against Defendant for $_____ (plus interest from _____ [*date*], if applicable), together with the costs and disbursements of this action.

The above statements are true and correct to the best of my personal knowledge

Dated: _____ _____ [*Name*]

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

_____
Notary Public

AFFIRMATION OF NON-EXPIRATION OF STATUTE OF LIMITATIONS
(All Actions)

[_____], Esq., pursuant to CPLR § 2106 and under the penalties of perjury, affirms as follows:

1. I am counsel for _____ [*Plaintiff*] in the instant action.

2. The cause(s) of action asserted herein accrued on _____ [*date of default*] in the state of _____. The statute(s) of limitations for the cause(s) of action asserted herein is/are _____ years. Based on my reasonable inquiry, I believe the applicable statute(s) of limitations for the cause(s) of action asserted herein has/have not expired.

The above statements are true and correct to the best of my personal knowledge

Dated: _____ _____ [*Name*]

Appendix B:
AO/198/14
(Redaction of Personal Information)

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby amend the Uniform Civil Rules of the Supreme and County Courts by adding a new section 202.5(e), relating to the omission or redaction of confidential personal information, to read as set forth below, effective January 1, 2015. Compliance with this rule shall be voluntary from January 1 through February 28, 2015, and mandatory thereafter.

§ 202.5 Papers Filed in Court

* * *

(e) Omission or Redaction of Confidential Personal Information.

(1) Except in a matrimonial action, or a proceeding in surrogate's court, or a proceeding pursuant to article 81 of the mental hygiene law, or as otherwise provided by rule or law or court order, and whether or not a sealing order is or has been sought, the parties shall omit or redact confidential personal information in papers submitted to the court for filing. For purposes of this rule, confidential personal information ("CPI") means:

i. the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof;

ii. the date of an individual's birth, except the year thereof;

iii. the full name of an individual known to be a minor, except the minor's initials; and

iv. a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof.

(2) The court sua sponte or on motion by any person may order a party to remove CPI from papers or to resubmit a paper with such information redacted; order the clerk to seal the papers or a portion thereof containing CPI in accordance with the requirement of 22NYCRR §216.1 that any sealing be no broader than necessary to protect the CPI; for good cause permit the inclusion of CPI in papers; order a party to file an unredacted copy under seal for in camera review; or determine that information in a particular action is not confidential. The court shall consider the pro se status of any party in granting relief pursuant to this provision.

(3) Where a person submitting a paper to a court for filing believes in good faith that the inclusion of the full confidential personal information described in subparagraphs (i) to (iv) of

paragraph (1) of this subdivision is material and necessary to the adjudication of the action or proceeding before the court, he or she may apply to the court for leave to serve and file together with a paper in which such information has been set forth in abbreviated form a confidential affidavit or affirmation setting forth the same information in unabbreviated form, appropriately referenced to the page or pages of the paper at which the abbreviated form appears.

(4) The redaction requirement does not apply to the last four digits of the relevant account numbers, if any, in an action arising out of a consumer credit transaction, as defined in subdivision (f) of section one hundred five of the civil practice law and rules. In the event the defendant appears in such an action and denies responsibility for the identified account, the plaintiff may without leave of court amend his or her pleading to add full account or CPI by (i) submitting such amended paper to the court on written notice to defendant for in camera review or (ii) filing such full account or other CPI under seal in accordance with rules promulgated by the chief administrator of the courts.

* * *

Chief Administrative Judge of the Courts

Dated: November 6, 2014

AO/198/14

Appendix C:
AO/88/15
(Forms for Use by Unrepresented Litigants in Consumer Credit Actions)

NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

HON. A. GAIL PRUDENTI
CHIEF ADMINISTRATIVE JUDGE

RONALD P. YOUNKINS, ESQ.
EXECUTIVE DIRECTOR

April 22, 2015

TO: Administrative Judges

FROM: Ronald Younkins RY

SUBJECT: Forms for Use by Unrepresented Litigants in Consumer Credit Actions

Attached please find a copy of Administrative Order (AO/88/15), promulgating the following forms for use by unrepresented litigants in consumer credit actions in Supreme Court, the New York City Civil Court, the District Courts and the City Courts Outside New York City.

- Written Answer Consumer Credit Transaction (UCS-CC-1)
- Order to Show Cause to Vacate Default Judgment (UCS-CC-2)
- Affidavit in Support of Order to Show Cause to Vacate Default Judgment (UCS-CC-3)
- Order to Show Cause Information Sheet on Defenses (UCS-CC-4)

Copies of these forms should be maintained in the clerk's office and other appropriate courthouse locations and should be made available to litigants who are representing themselves in consumer credit matters. Copies of the forms are available on the UCS web site in fillable format at: http://www.nycourts.gov/Rules/CCR/ and http://www.nycourts.gov/forms/index.shtml and http://www.nycourts.gov/courthelp/MoneyProblems/WhenYouOwe.shtml.

These forms were approved as part of the Unified Court System's adoption of reforms addressing default judgments in consumer actions, including new rules and enhanced affidavit requirements that took effect on October 1, 2014. Questions about these forms may be directed to the Office of the Statewide Director of Access to Justice Programs, at lmilder@nycourts.gov or (646) 386-4200.

Please distribute this memorandum further as appropriate.

Enclosure

cc. Hon. Lawrence Marks
Hon. Fern A. Fisher
Hon. Michael V. Coccoma
Eugene Myers
Maria Barrington
Maria Logus
District Executives
NYC Chief Clerks
Antonio Galvao
Laurie Milder

25 BEAVER STREET, NEW YORK, NEW YORK 10004 • PHONE: 212-428-2120 • FAX: 212-428-2188 • RYOUNKIN@NYCOURTS.GOV

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, I hereby promulgate the following forms for use by unrepresented litigants in consumer credit transactions (Exh. A), effective May 1, 2015:

- Written Answer Consumer Credit Transaction (UCS-CC-1)
- Order to Show Cause to Vacate Default Judgment (UCS-CC-2)
- Affidavit in Support of Order to Show Cause to Vacate Default Judgment (UCS-CC-3)
- Order to Show Cause Information Sheet on Defenses (UCS-CC-4)

Chief Administrative Judge of the Courts

Dated: April 22, 2015

AO/88/15

EXHIBIT A

UCS-CC-1

STATE OF NEW YORK
COUNTY OF_____
----------x

_____,

Index No. _____

Plaintiff(s),

- against -

WRITTEN ANSWER
CONSUMER CREDIT
TRANSACTION

_____,

Defendant(s).
----------x

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.____ I do not owe this debt.

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

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

7.____ I dispute the amount of the debt.

8.____ I had no business dealings with Plaintiff (Plaintiff lacks standing).

9.____ There is no record of plaintiff having a license to collect debt (only for cases filed in New York City, Buffalo and other municipalities requiring debt collectors to be licensed).

10.___ Plaintiff does not allege a debt collector's license number in the Complaint (only for cases filed in New York City, Buffalo and other municipalities requiring debt collectors to be licensed).

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

12.___ This debt has been discharged in bankruptcy.

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

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

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

UCS-CC-1

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

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

18.___ Unconscionability (the contract is unfair).

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

20-a. ____ **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).

20-b. ____ **SUFFOLK COUNTY:** Lack of personal jurisdiction; the defendant is not a resident and/or was not served in, or there was no transaction of business in, that portion of Suffolk County for which a District Court has been established (Towns of Huntington, Babylon, Islip, Smithtown and Brookhaven).

21.___ Defendant is in the military.

OTHER

22.___ Other Reasons _____

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

COUNTERCLAIM(S)

24.___ 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

Defendant's address

This case is scheduled to appear on the calendar as follows:

Date: _____ Part: _____ Room: _____ Time: _____ Both sides notified _____

UCS-CC-2

COURT
County of Part

Index Number:

ORDER TO SHOW CAUSE
To restore case to the calendar, and vacate any judgement, liens and income executions on this defendant, allow answer or dismissing the action

UPON the annexed affidavit of sworn to on and upon all papers and proceedings herein:

Let the Plaintiff(s) or Plaintiff(s) attorney(s) show cause at:
Court:County
Court:Address:
Part **Room**
on **At** **AM**
or as soon as counselor parties may be heard, why an order should not be made:

1. restoring the case to the calendar
2. vacating the Judgment, and all liens, income executions and restraining notices,
3. accepting the proposed answer as filed or allowing defendant to file an answer and/or
4. dismissing the action if warranted, and/or
5. granting such and further relief as may be just.

PENDING the hearing of this Order to Show Cause and the entry of an Order, ALL proceedings on the part of Plaintiff(s), Plaintiff(s) attorney and agent(s) and any Marshal or Sheriff of the City of New York for the enforcement of said Judgment are stayed (stopped).

PLAINTIFF shall provide a copy of the summons and complaint and affidavit of service to the defendant on the return date of this order to show cause. ____ **(Judge to initial or strike)**

SERVICE of a copy of this Order to Show Cause, and attached Affidavit, on the:

Plaintiff(s) or named attorney(s): (Judge to Initial)	Sheriff or Marshal: (Judge to Initial)
_____by Personal Service by "In Hand Delivery"	_____by Personal Service by "In Hand Delivery"
_____by Certified Mail, Return Receipt Requested	_____by Certified Mail, Return Receipt Requested
_____by First Class Mail with official Post Office	_____by First Class Mail with official Post Office
	Certificate of Mailing

on or before_____, shall be deemed good and sufficient

PROOF OF SUCH SERVICE may be filed with the Clerk in the Part indicated above on the return date of this Order to Show Cause.

Mail to Attorney or Party

Mail to Sheriff or Marshall

Dated:

_____
Judge Signature

UCS-CC-3

of New York
COUNTY OF_____
_____

[PLEASE PRESS HARD]
Index No._____
AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE
To Vacate a Default Judgment for failure to appear and answer and to file an answer or to dismiss the case

Plaintiff(s).

against

Defendant(s),

Address:_____
_____

_____
State of New York, County of _____ ss.:
_____, being duly sworn, deposes and says:

Put your initials in the sections that apply to you

1. PARTY _____ a) I am the party named as defendant in the above entitled action.

2. SERVICE _____ a) I was not served in the right way as required by the law with a summons and complaint in this action

_____ b) I was not served a summons and complaint, and my first notice of legal action was
_____ a notice from the Clerk's office
_____ a notice of Default Judgment mailed to me.
_____ a Restraining Notice on my bank account.
_____ a copy of an Income Execution_____
_____ Other:
_____

_____ c) I have read the Affidavit of Service, and I disagree with it because:_____
_____

_____ d) I requested the Summons and Complaint and Affidavit of Service from the court, but it was not available.

3. EXCUSABLE DEFAULT (You must tell the Judge a reason why you did not come to court to answer)

I did not come to court and answer in the Clerk's Office because: (Initial all sections that explain why you did not come to court)

1. I was sick___ 2. I am disabled___ 3. I had an illness in my family___ 4. I had a death in the family___
5. I was out of town___ 6. I did not receive the court papers___ 7. I received the court papers too late___
8. The plaintiff told me not to worry about the case or not to answer___ 9. I was on military duty___

ADDITIONAL OR OTHER EXPLANATION (You can write down any other reason why you did not come to court to answer in your case:

4. **DEFENSES** (You must tell the Judge a reason or reasons why you do should not have to pay the money the plaintiff is suing for.)
Look at the defense information sheet to see what defenses you may have and write them down here. I have a good defense because:

5. PRIOR APPLICATION _____ a) I have not had a Order to Show Cause before in this case.
_____ b) I have had a Order to Show Cause before in this case but I am making another application because_____
_____

6. _____ I request that the Judgment be vacated. I ask that I be allowed to file an answer or this case be dismissed. I ask permission to serve these papers.

Sworn to before me this _____ day of _____, 20___ _____
(Signature of Defendant)

Notary or Signature of Court Employee and Title (New York City only) _____

UCS-CC-4

Order to Show Cause Information Sheet on Defenses

A defense is a reason you can tell the Judge why the other side should not win the case. Below are possible defenses:

1.___ I was not served in the right way as required by law with a summons and complaint in this action.

2.___ I do not owe this debt.

3.___ It is not my debt. I am a victim of identity theft or mistaken identity.

4.___ I have paid all or part of the alleged debt.

5.___ I dispute the amount of the debt.

6.___ I had no business dealings with Plaintiff (Plaintiff lacks standing).

7.___ The NYC Department of Consumer Affairs shows no record of plaintiff having a license to collect debt (only for cases filed in NYC, Buffalo or other municipalities requiring debt collectors to be licensed).

8.___ Plaintiff does not allege a debt collector's license number in the Complaint (only for cases filed in NYC, Buffalo or other municipalities requiring debt collectors to be licensed).

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

10.___ This debt has been discharged in bankruptcy.

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

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

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

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

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

16.___ Unconscionability (the contract is unfair).

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

18. _____ **OUTSIDE 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) you are not a resident of a town next to that city within the same county)

18-a. ____ **SUFFOLK COUNTY:** Lack of personal jurisdiction; the defendant is not a resident and/or was not served in, or there was no transaction of business in, that portion of Suffolk County for which a District Court has been established (Towns of Huntington, Babylon, Islip, Smithtown and Brookhaven).

19.___ Defendant is in the military.

OTHER

20.___ Other _____

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

For more information on these defenses please see http://nycourts.gov/courthelp//MoneyProblems/defenses.shtml

Appendix D:
4/23/15 Advisory Notice and Related Forms
(Unavailable Files)

CIVIL COURT OF THE CITY OF NEW YORK

ADVISORY NOTICE	Class:	AN-17
Subject: Unavailable files in Consumer Debt cases	Category:	GP-10
	Eff. Date:	April 23, 2015

BACKGROUND:

Court files in Consumer Debt cases can be unavailable for many reasons. A Defendant who is seeking to assert lack of personal jurisdiction is at a disadvantage when attempting to raise the issue if the affidavit is unavailable for review to determine how service was alleged to have been made. The Plaintiff's attorney is the only source of the affidavit of service other than the court file. In light of this issue, it is advised that the following steps should be followed.

ADVISORY:

1. If a file is unavailable, the file will be marked by a clerk with such an indication.

2. If the defendant is raising lack of personal jurisdiction, the Order to Show Cause should order that the Plaintiff's attorney shall produce a copy of the affidavit of service on the return date of the motion.

3. The defendant should be offered the opportunity to submit a supplemental affidavit in support of the defense of lack of personal jurisdiction by an adjourned date of the motion. If the defendant does not wish an adjournment, then you may allow the defendant to review the affidavit of service and submit to the court a supplemental affidavit before the end of the call of the calendar. A form supplemental affidavit will be provided in the courtroom which should be provided to the defendant. The Plaintiff should be afforded a reasonable opportunity to respond to any supplemental affidavit.

4. Any temporary relief, such as a stay on the enforcement of the judgment should be continued until the motion is decided.

Date: April 23, 2015

Hon. Fern A. Fisher
Deputy Chief Administrative Judge
New York City Courts

Information Sheet on Service

The plaintiff is the person who starts the case. The plaintiff must **serve** the defendant (the person who is being sued) with court papers. **Service** of the papers means giving a copy of the **summons** and **complaint** to the defendant. The papers must be served exactly as the law says or service is not good and the case can be dismissed (thrown out).

A "summons" is a paper from the person suing you (the plaintiff) that has these words at the top: CONSUMER CREDIT TRANSACTION. It says you must answer the plaintiff's complaint by a certain time. The complaint shows all of the information that the plaintiff will have to prove is true in court in order to win the case against the defendant.

The court papers starting the case have to be given to you ("served") exactly as the law says in one of these ways:

1. **Personal Delivery**
Hand it to you. Service is good if it is handed to you. No other steps have to be followed. **OR**

2. **Substituted Service**
The law allows service on another person who is called a "substituted person." The papers must be handed to someone who lives with you, or works for you in your home, or works with you at your usual place of business. This person must be someone who understands the importance of giving you the papers and is old enough to be responsible. Also, a copy of the summons and complaint must be mailed to you by first class mail to where you live or work in an envelope marked "Personal and Confidential" within 20 days of the date the papers were given to the substituted person that took the papers for you. The envelope may not say that it is from an attorney or that it is about a case against you. Proof that the papers were served on you must be filed with the court by the plaintiff within 20 days of the date the substituted person was handed the papers or of the date the papers were mailed to you, whichever is later. All these steps must be followed to have good service. **OR**

3. **Conspicuous (Nail and Mail) Service**
The plaintiff must try to serve you with the papers three times and at different times of the day when you (or someone who lives with you, or works for you in the home, or works with you at your usual place of business) are most likely to be around to take the papers. If nobody can be found on the third try, the plaintiff can tape the papers on the door and mail you a copy by first class mail to where you live or work in an envelope marked "Personal and Confidential" within 20 days of leaving the papers at your door. The envelope may not say that it is from an attorney or that it is about a case against you. Proof that the papers were served on you must be filed with the court by the plaintiff within 20 days of the date the papers were put on your door or when the papers were mailed, whichever is later. All these steps must be followed to have good service.

_____ COURT COUNTY OF _____ Part: _____

_____,
Plaintiff(s)

-against-

_____,
Defendant(s)

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

Index Number: _____

I, _____, being duly sworn, hereby deposes and says:
(Your Name)

1. I am the defendant in this matter, and I am familiar with the facts that are contained in this affidavit.
2. I have filed an Order to Show Cause to vacate a default judgment, which is now before the Court. When I filed the Order to Show Cause, the file was unavailable, and I was unable to review the file including the affidavit of service.
3. I have now reviewed the file and the affidavit of service, and I would like to supplement my affidavit in support of the Order to Show Cause with additional information concerning why I believe service upon me was not good and why the case should be dismissed.
4. I believe service upon me was not good for the following reasons: (Check off all that apply and add any further information on the lines at the end of this affidavit.)

Personal Delivery

- ☐ I am not the person that is described in the affidavit of service.
- ☐ I did not live or work at that address on the date the process server says I was served.
- ☐ The papers were never handed to me by anyone.
- ☐ Other (Explain below)

Substituted Service

- ☐ I did not live or work at that address on the date the process server says the papers were served.
- ☐ The person served does not live with me.
- ☐ The person served does not work for me in my home.
- ☐ The person served does not work with me.
- ☐ The person served was too young to accept legal papers. (Explain below)
- ☐ The person served was not suitable because he/or she was not able to understand the importance of legal papers. (Explain below)
- ☐ The person served was not suitable for other reasons. (Explain below)
- ☐ The mailing of the papers was not done exactly as required by the law. (Explain below)
- ☐ The filing of the affidavit of service in Court was not done exactly as required by the law. (Explain below)
- ☐ Other (Explain below)

Conspicuous Service

- ☐ I did not live or work at that address on the date the process server says the papers were served. (Explain below)
- ☐ The papers were not taped or otherwise stuck on my door.
- ☐ The process server's attempts to make service before the papers were put on my door were not exactly as required by law. (Explain below)
- ☐ The mailing of the papers was not done exactly as required by the law. (Explain below)
- ☐ The filing of the affidavit of service in Court was not done exactly as required by law. (Explain below)
- ☐ Other (Explain below)

EXPLANATION

Explain your answers below. You may use additional pages. You may also give the Court any other written proof of your answers along with this affidavit.

_____ _____

Signature Date

Sworn to before me on the _____day

of_____, _____.

_____

Notary Public or Court Clerk