IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SNOHOMISH COUNTY

Evil Bank (USA), N.A.	)	No. XXXXXXXX
Plaintiff,	)	DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
vs.	)	
JOE OR JANE DEFENDANT	)	
Defendant	)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITH MEMORANDUMS OF LAW

COMES NOW JOE OR JANE DEFENDANT, Defendant herein, who objects to the Motion for Summary Judgment, filed by Plaintiff, Evil Bank (USA), N.A., as follows:

ESTOPPAL

1. Doctrine of estoppel applies, to-wit:

Plaintiff asserts in its complaint under part V. that "We are debt collectors". The Fair Debt Collection Practices Act (hereinafter FDCPA) defines "Debt Collectors" as "any person who uses any instrumentality of interstate commerce or the mails in any business

the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *FDCPA 1692a*

The FDCPA also says, "(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the **debt collector shall cease collection of the debt**, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector." *1692g(b)* (Emphasis added) Defendant did write such a letter of dispute, requesting the above noted specific information, on several occasions, to none of which were responded. (See AFFIDAVIT in SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, herein after "Opposition Affidavit").

2. In addition, the Washington Collection Agency Act (hereinafter WCAA) defines "Person" and "Collection Agency" as "(1) "Person" includes individual, firm, partnership, trust, joint venture, association, or corporation.

(2) "Collection agency" means and includes:

(a) Any person directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person;", *WCAA 19.16.100* This is the same definition as the FDCPA except where the Federal law covers interstate while the Washington state law does not need to

do so. The WCAA also includes conditions under which a debt collector must cease all collection activities that closely parallel the FDCPA. They can be found at WCAA 19.16.250.8(e). Defendant included demand for specific information under these provisions of WCAA in the dispute letter(s). (See Opposition Affidavit)

3. Plaintiff has failed to cease all collection activities and is attempting to have this court aid and abet in the violation of the FDCPA and the WCAA, therefore, summary judgment should not be granted.

GENUINE ISSUES OF MATERIAL FACT

4. In case this court finds that the doctrine of estoppal does not apply, Defendant will show that there are genuine issues of material fact and therefore Summary Judgment should not be granted.

5. A motion for summary judgment may be granted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. CR 56 (c) "A material fact is one that affects the outcome of the litigation." ***Owen v. Burlington N. & Santa Fe R.R. Co.,153 Wash. 2d 780, 789, 108 p.3d 1220 (2005) (quoting Barrie v. Hosts of Am.,Inc., 94 Wash.2d 640, 642, 618 P.2d 96 (1980)).*** When considering a summary judgment motion, the court construes all facts and reasonable inferences in the light most favorable to the non-moving party. ***Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).***

6. In a Recent Appellate case, ***Discover v Bridges, 154 Wash.App, 722, 226 P.3d 191 (2010)*** Division II of the Court of Appeals of the State of Washington reversed a lower court Summary Judgment ruling stating;

"…the Bridges argue that genuine issues of fact preclude summary judgment here. We agree."

The instant case closely parallels ***Discover v. Bridges***. Which states;

"The record contains only monthly statements summarizing the Bridges' alleged account balance and payments purportedly made thereon and an affidavit from DFS employees, who were familiar with the Bridges' purported account records…

…Because Discover bank did not produce any similar evidence of the Bridges' personal acknowledgment of the account. It produced only a generic summary of the purported account balance and payments made on it. Therefore, material issues of fact preclude summary judgment."

7. Defendant denies all allegations in Plaintiff's complaint including any alleged obligation to any amount owed claimed by Plaintiff, and to any agreement to pay pre-judgment interest, plaintiff's costs, or post judgment interest. Plaintiff has not filed in the case any evidence of a signed contract or agreement of any kind. Plaintiff alleges agreement, defendant denies agreement. Plaintiff alleges an obligation, an amount owed, and an agreement, Defendant denies an obligation, an amount owed, and any agreement. This raises a genuine issue of material fact, therefore summary judgment should not be granted. (See AFFIDAVIT in SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, herein after "Opposition Affidavit").

8. Plaintiff asserts in paragraph 1 of their motion "The defendant has become indebted to the plaintiff on account of goods and services rendered at defendant(s) request and use of credit card within six years last past, on which there is now due and owing the principle sum of $XXXXX.XX, no part of which has been paid, though payment has often been demanded. Interest accrues on said account at the contract rate." Defendant denies all allegations in Plaintiff's paragraph 1 of their motion. Further, Defendant denies Plaintiff's "Facts" because they are based on inadequate and unauthenticated documents, rely on an improper and deceptive affidavit, and are unsupported by any admissible evidence. This raises a genuine issue of material fact, therefore summary judgment should not be granted. (See Opposition Affidavit)

9. Plaintiff asserts in paragraph 2 of their motion, "the complaint is for a sum certain which is justly due and owing". Defendant has denied in Defendants Answer and Affirmative Defenses and its attached Affidavit of Defendant filed in the instant case all allegations in Plaintiff's Complaint. Plaintiff alleges a "sum certain which is justly due and owing. Defendant denies being obligated to any "sum certain which is justly due and owing". This raises a genuine issue of material fact, therefore summary judgment should not be granted. (See Opposition Affidavit)

10. Defendant denies the pertinence of Plaintiff's Exhibit A "Affidavit" by Ms Affiant, to-wit:

(a) In item 1 of Ms Affiant's affidavit Ms Affiant states that she is an "authorized agent of Plaintiff Evil Bank (USA), N.A. … for purposes of this affidavit." Ms Affiant admits to being an "agent" for Evil Bank, not an employee, and for only the purposes of this affidavit. Not being employed by Evil Bank, Ms Affiant is not a party to

the action and cannot testify for Evil Bank as Ms Affiant does not have firsthand knowledge and can't authenticate any of Plaintiff's exhibits. Therefore Ms Affiant's testimony is third party hearsay. Plaintiff offers an affidavit for evidence. Defendant denies Plaintiff's affidavit is pertinent to the case. This raises a genuine issue of material fact, therefore summary judgment should not be granted.

(b) In item 2 of Ms Affiant's Affidavit, Ms Affiant admits that the records are kept **"*by a person with knowledge of the acts and events*"** not by Ms Affiant. (Emphasis added) That "person" would be the only person with actual firsthand knowledge of the accuracy and validity of the alleged account, not Ms Affiant. Ms Affiant's only personal knowledge is of the records afforded to Ms Affiant by Evil Bank. Ms Affiant can only attest to what Ms Affiant sees in the records of Evil Bank. Ms Affiant cannot attest to the accuracy or validity of what the records say. Even more telling, is that Ms Affiant is relying on records rather than Ms Affiant's own personal knowledge. Ms Affiant does not maintain those records, therefore does not have firsthand knowledge of, and cannot authenticate the following,

(i) The accuracy of validity of the data that may or may not have been entered into the alleged account shown in Evil Bank's records. Because Ms Affiant doesn't testify personally knowing who recorded the alleged "events" Ms Affiant can't testify that the **"**events" were recorded correctly.

(ii) Whether or not the alleged account had been "hacked" into, and if they were restored afterward. The Ninth Circuit, in excluding computer-generated evidence, held that when one retrieves an electronic file, there

must be some showing that the computer system ensures the integrity of the original because "digital technology makes it easier to alter the text of documents that have been scanned into a database, thereby increasing the importance of audit procedures designed to ensure the integrity of the records". ***Am. Express Trav. Rel. Servs. v Vinhee, 336 B.R.437, 445 (B.A.P. 9th Cir. 2005).***

(c) In item 3 of Ms Affiant's affidavit Ms Affiant states that "according to the books and record" certain things occurred. In appellate case *GE Capital Hawaii, Inc. v.Yonenaka, 25P.3d 807-Haw: Intermediate Court of Appeals 2001* the Appellate Judges agreed with Yonenaka's argument that rulings in *Pacific Concrete Fed. Credit Union v. Kauanoe, 62 Haw. 334,336-37, 614 p.2 936, 938 1980,* and *Fuller v. Pacific Medical Collections, Inc., 78 Hawaii 213, 223-24, 891 P.2d 300, 310-11 (App.1995),* require that a lender must place in evidence account general ledgers and cannot give mere opinion evidence such as in affidavits in support of summary judgment motions, merely attesting to what the lender's records show[.] ***"We agree".*** (emphasis added) Also Court rule 56(e) requires that "supporting and opposing affidavits shall be made on personal knowledge". Since Ms Affiant does not have firsthand personal knowledge of the alleged account Ms Affiant's Affidavit is contradicting, frivolous, and a fraud before the Court. Instead of complying with the rules regarding personal knowledge, Ms Affiant's affidavit very carefully attempts to deceive the court and this defendant into believing that it complies. Accordingly, Ms Affiant can only testify that Ms Affiant made the affidavit based on "according to the books and records" not on personal knowledge. This

raises a genuine issue of material fact, therefore summary judgment should not be granted.

11. Plaintiff offered an affidavit as evidence. Defendant denies that the affiant attested to any pertinent testimony. This raises a genuine issue of material fact, therefore summary judgment should not be granted.

12. CR 56(e) requires that affidavits submitted in a summary judgment motion set forth facts as would be admissible in evidence**. *Passovoy v. Nordstrom, Inc.. 758 P.2d 524 – Wash: Court of appeals, 1st Div. 1988.*** Clearly Ms Affiant has not done so. This raises a genuine issue of material fact, therefore summary judgment should not be granted.

13. Defendant denies that the photocopies of alleged checks in Plaintiff's Exhibit B are Bona Fide. The alleged checks are not authenticated by firsthand testimony and therefore are inadmissible as per court rule *ER 901(a)(1).* Plaintiff offers photocopies of checks as evidence. Defendant denies that the checks are Bona Fide or properly authenticated. This raises a genuine issue of material fact, therefore summary judgment should not be granted.

14. Defendant denies that Plaintiff's Exhibit C, are Bona Fide. Not being authenticated with firsthand testimony, the copies of the alleged account statements are inadmissible as per court rule *ER 901(a)(1).* Plaintiff offers account statements as evidence. Defendant denies the authenticity of the "account statements" and denies that they are Bona Fide. This raises a genuine issue of material fact, therefore summary judgment should not be granted.

15. Defendant denies Declaration of Plaintiff's attorney is binding.

Defendant denies having ever entered into a "contract" or "agreement" with Plaintiff or Plaintiff's Attorney that would cause Defendant to be liable for any attorney's costs. Plaintiff has not filed in the case any evidence of such "contract" or "agreement". Defendant denies existence of any "contract" or "agreement". (See Opposition Affidavit) Also Plaintiff has not filed in the case any evidence that Defendant assented to any contract or agreement of any kind. This raises a genuine issue of material fact, therefore summary judgment should not be granted.

16. Defendant denies Plaintiff's "Records and files herein" for the same reasons stated in paragraphs 4 through 11. This raises a genuine issue of material fact, therefore summary judgment should not be granted.

LEGAL AUTHORITY

17. Defendant concurs that the legal authority is the Laws of the State of Washington.

CONCLUSION

18. When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the non-moving party. ***Lybbert v. Grant County, 141 Wash.2d 29,34, 1 P.3d 1124 (2000).***

19. Doctrine of estoppal applies and this motion is in violation of FDCPA and WCAA.

20. Plaintiff has not produced any evidence that is authenticated and admissible at trial.

21. Defendant has shown that there are controversies, and has raised genuine issues of material fact.

22. Again quoting ***Discover v Bridges, 154 Wash.App, 722, 226 P.3d 191 (2010)*** the Division II of the Court of Appeals of the State of Washington states;

> "To establish a claim, Discover Bank had to show that
> the Bridges mutually assented to a contract by
> accepting the cardmember agreement and
> personally acknowledged their account…"
> "…nor do they show that the Bridges acknowledged the debt"

The Appellate Court established the criteria, now known as the "Bridges Standard". Capital One has failed to meet that standard.

23. For reasons stated above Evil Bank's Motion for Summary Judgment should not be granted because of the doctrine of estoppal and/or there are controversies and genuine issues of material fact.

WHEREFORE, Defendant, JOE OR JANE DEFENDANT, pray that Plaintiff's Motion for Summary Judgment be denied, at its cost.

DATED this _____ day of June, 2012

_____
JOE OR JANE DEFENDANT

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and complete copy of the above and foregoing document DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT has this date been served upon opposing counsel, Evil Bank at Any Address, Any City, WA 90000 by Certified Mail
RRR# XXXX XXXX XXXX XXXX on this _____day of June, 2012.

_____
JOE OR JANE DEFENDANT, in proper person (pro se)
Another Address
Another City, WA 90000