Motion for Summary Judgment Defense Pack

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Motion for Summary Judgment Defense Pack Instructions

Although motions for summary judgment don't happen in every debt case, they are usually major turning points when they do. That is because, even for a debt collector, they represent a significant investment of time and money. For the plaintiff (if they're the ones filing), the motion for summary judgment is a chance to win the case outright without trial – and without giving you a chance to grow into your defense. For you (if they're the ones filing), it is a chance to lose the case very suddenly and early. On the other hand, if you defeat the debt collector's motion for summary judgment, there's a good chance they'll settle for little or nothing. We'll discuss the reasons for these things below, but for now, the key takeaway is that you must take msjs seriously and give your defense every effort because you might not get another chance. There's no "saving for a rainy day." Their motion IS the rainy day.

What is a Summary Judgment?

A summary judgment is a judgment made by the judge without trial. It is "summary" because it brings to a conclusion, not because it is simple or anything like that. A "motion" for summary judgment is the formal request by a party that the judge enter summary judgment, and motions for summary judgment have their own special set of rules in the rules of civil procedure. Your first step in defending a motion is to get the rules. They tell you how much time you have to respond, what the form of the motion is supposed to be, what you're supposed to do, when you're supposed to do it, and what the evidence needs to be. You must get the rules for your state *immediately* if you have not already done it.

An "Evidentiary" Motion

Summary judgment motions are evidentiary motions. That means, the "movant" – the person bringing the motion – must present evidence to support his case. In debt cases, that evidence will normal be affidavits and documents. If the debt collector sent you requests for admissions which you did not answer, then those admissions may form the entire basis of the motion. The debt collectors will say that

whatever they use is "undisputed." It is NOT ENOUGH for you to say, "Oh yes it is disputed!" You will either have to attack the evidence they use and show that it cannot be used, or you must present evidence of your own that at least casts some legitimate doubt as to the debt collector's case. Your testimony (by affidavit or answers to interrogatories) that you never received the underlying money associated with the debt may be enough. The judge isn't supposed to decide which evidence is more believable.

In responding to a motion for summary judgment, your job is to demonstrate (point to) facts in the record which show that there is a legitimate dispute about what the outcome of the case should be. In legalese, that's: you have to show "*genuine* issues of *material* fact." You show it by attaching evidence to your response and telling the court how it matters, or by defeating the evidence the debt collector is using.

Pull No Punches

Some people think it's a good idea not to "tip their hand" to the other side in responding to a motion for summary judgment. So they only respond with what they think is "enough" to defeat the motion, but they keep something back for trial. I doubt this is a good plan for any kind of law in any kind of situation, but for a pro se defendant in a debt law case it is likely to be disastrous. It is a fact that as a pro se party you will have a little more trouble getting the judge to pay attention to you than a lawyer would. You're not likely to know the exact point where enough is enough. And if you win the motion for summary judgment the debt collector will probably drop the case anyway. Against that is the slight chance you'll win and they'll proceed anyway, but then you will win at trial because of your surprise evidence. Trials are always risky. A response to a motion, on the other hand, can be done over time, at your leisure, so to speak, and without surprises. I think you should do everything possible to win.

They're about Evidence, not Argument

Pro se defendants often want to rely on some smart argument. Then they neglect the facts. This is backwards. Instead, focus extremely upon the evidence – attacking theirs, presenting yours. A court is required to apply the law correctly to the facts presented, but it has no obligation at all to look at facts not before it. In fact, it is reversible error for a court to look beyond the record for facts supporting either side. So spend most of your time on the facts.

That said, you will want to drill in the arguments, too – the arguments attacking their facts or showing why your facts matter.

When you look at the sample response, you should notice the extreme amount of attention paid to attacking every single fact alleged by the plaintiff in its motion.

In Theory, you only Have to Knock out One Part of their Case

In order to get a summary judgment, a party must demonstrate there are no material issues regarding any part of its essential case (its "prima facie" case). In a debt case brought under the breach of contract law by a debt buyer, where you have disputed their ownership of the debt, they have to show they own the debt, that you owe it, and that you didn't pay when you were supposed to. And they have to show how much the debt was. If you can successfully attack their evidence on any one of these issues, you should win. (Warning: if they allege you owe a hundred, but you successfully attack fifty of it, the court might give them a judgment for the fifty you didn't attack).

Judges are human, though. They don't want you to escape paying what you really owe on a "technicality," and they do suspect you owe the debt. They should know that many debt cases are baseless, but… maybe they don't. Moreover, like anyone else they are impressed by a thorough defense

that attacks every part of the case. Thus, again, you will note that the sample response thoroughly attacks every possible part of the case from every possible direction. Again we say, "pull no punches."

Give Yourself Time

You have whatever time allowed by the rules to respond to the motion. It's probably twenty to thirty days (check your rules of civil procedure). However many days it is, it won't be enough if you don't spend time on your case on specific days. The days really melt away when you aren't doing anything, and they go fast enough when you are working hard. When I was a lawyer, I don't think I ever spent less than twenty-five hours on a response to a motion for summary judgment, although debt cases are quite similar, so after a few of them they probably took less time. You have a sample response, but even so, you must give yourself plenty of time to respond. This is NOT a thing to wing, and it is NOT a thing to wait until the last minute to do. Start early and keep at it. It is likely to be the most important part of the case. Win it and the case probably goes away. Lose it and… you lose.

Legal Research

Motions at law require legal research. As you will note in the sample, each of the legal arguments is supported (where possible) by some case authority. That is, by a judge who, looking at similar facts, has ruled in the way we suggest. Courts can be swayed by logic, but there's nothing like a case citation to let the judge know what to do. A case citation lets the judge know that he isn't just relying on your argument, but that other courts have taken the idea seriously and followed it. This is a concern of every lawyer, but even much more so a pro se defendant: you struggle to get the judge to understand your position and take it seriously. A case citation does a lot of that work.

And of course you need to know the law to argue it, just as you need to know the law to know what facts are important. For all of these things, legal research is necessary. Give yourself time to do it.

We have a product that can help you understand and research more effectively, our Legal Research and Analysis product. If you decide you need that product and purchase it, you will be refunded half off the purchase price if you let us know that you also bought the motion for summary judgment defense pack.

High Hand Justice Court
55 E. Civic Center Drive,
County of X, State of Y

Heartless Debt Collector, LLC	)	
Plaintiff,	)	
	)	Case No. 000000000
vs.	)	
	)	
Joe Consumer, Defendant	)	

Comes now Defendant, pro se, and hereby submits the following Statement of Facts and Issues Requiring Denial of Plaintiff's Motion for Summary Judgment and award of Summary Judgment to Defendant on his claims brought pursuant to his Amended Petition submitted simultaneously with this Statement of Facts and Issues.

By: _____
Joe Consumer, Defendant pro se
address

STATEMENT OF FACTS AND ISSUES REQUIRING DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING GRANT OF SUMMARY JUDGMENT TO DEFENDANT

1. Defendant admits that plaintiff filed a complaint against him alleging he owed "$7,728.03 plus interest at the contract rate on an open account or account stated." Defendant further states that plaintiff has at no time produced the contract upon which its claims were supposedly based although required by Rule 26.1(a)(1) to disclose all evidence and documents relevant to its claim. Defendant attaches true and correct copies of Plaintiff's Rule 26 Disclosures in their entirety. See, Exhibit A, B, para. 2, and C, attached. Plaintiff has no such contract, and defendant requests the court to take judicial notice that plaintiff is seeking interest that is unsupported by any contract in its attempt to collect an alleged debt.

2. Defendant has denied entering into any contract with plaintiff under any circumstances, for any purposes. See, Affidavit of Joe Consumer (attached as Exhibit B), para. 3. Defendant also **objects** to Paragraph 2 of Plaintiff's Statement of Facts because it is unsupported by any admissible evidence. It purports to rely on billing exhibits which are improperly authenticated but which in any event are not a credit card contract and the testimony of one Leslie Liar. Liar's testimony establishes that she has no first-hand knowledge of the matters about which she is testifying, as she repeatedly claims to be relying on certain, unidentified business records. Where a records custodian is testifying, it is the business records that constitute the evidence, not the testimony of the witness referring to them. ***In re A.B., 308 Ill. App. 3D, 227, 236, 719 N.E.2d 348 (2d Dist. 1999)***. Plaintiff has not attached any of these supposed records, and accordingly this allegation is entirely without evidentiary foundation. **See, Motion to Strike**, submitted simultaneously with this Memorandum in Opposition. Defendant requests that the court take judicial notice of the fact that plaintiff is attempting to rely on the affidavit of Leslie Liar in an attempt to collect an alleged debt.

3. Plaintiff does not allege any specific credit card in its statement of facts, and Defendant denies using any credit card issued by plaintiff to make any purchases. **See Affidavit of Joe Consumer**, para.

4. Defendant also **objects** to Paragraph 3 of Plaintiff's Statement of Facts because it is based on unauthenticated documents and an improper and deceptive affidavit. **See, Motion to Strike**, submitted simultaneously with this Memorandum in Opposition and Statement of Facts and Issues. Defendant requests that the Court take judicial notice of the fact that plaintiff is attempting to rely on the affidavit of Leslie Liar in an attempt to collect an alleged debt.

Defendant further notes that plaintiff claims that "Defendant used the credit card to purchase...Plaintiff rendered a statement to the defendant requesting the amount stated, and the Defendant failed to object." This statement is made without any support in the record, even in the fictitious and deceptive affidavit of Leslie Liar. Defendant objects to this "evidence." **See Defendant's Motion to Strike**, submitted herewith. Defendant also denies having ever received any statement of account from plaintiff. **See, Exhibit B, Affidavit of Joe Consumer, Para. 5**.

4. Defendant agrees that he filed an Answer, and he files herewith his **Motion to Amend Answer**, a **Proposed Amended Answer**, and a **Cross-Motion for Summary Judgment**.

5. Defendant is without knowledge of any charges or payments on any account allegedly owned by plaintiff and therefore denies this allegation. **See affidavit of Joe Consumer, Exhibit B, para. 6, attached**. Defendant also **objects** to Paragraph 5 of Plaintiff's Statement of Facts because it is unsupported by any admissible evidence. It purports to rely on billing exhibits which have not been authenticated and the testimony of one Leslie Liar. Liar's testimony establishes that she has no first-hand knowledge of the matters about which she is testifying, as she repeatedly claims to be relying on certain, unidentified business records. Where a records custodian is testifying, it is the business records themselves that constitute the evidence, not the testimony of the witness referring to them. ***In re A.B., 308 Ill. App. 3D, 227, 236, 719 N.E.2d 348 (2d Dist. 1999)***. Plaintiff has not attached any of these supposed records, and accordingly this allegation is entirely without evidentiary foundation. **See, Motion to Strike**, submitted simultaneously with this Memorandum in Opposition. Defendant requests that the court take judicial notice of the fact that plaintiff is attempting to rely on the affidavit of Leslie

Liar in an attempt to collect an alleged debt.

6. Defendant is without knowledge of any charges or payments on any account supposedly owned by plaintiff and therefore denies this allegation. **See affidavit of Joe Consumer, Exhibit B, para. 6, attached.** Defendant also **objects** to Paragraph 6 of Plaintiff's Statement of Facts because it is unsupported by any admissible evidence. It purports to rely on billing exhibits which were not authenticated and are not properly before the court, and on the testimony of one Leslie Liar. Liar's testimony establishes that she has no first-hand knowledge of the matters about which she is testifying, as she repeatedly claims to be relying on certain unidentified business records. Where a records custodian is testifying, it is the business records themselves that constitute the evidence, not the testimony of the witness referring to them. ***In re A.B., 308 Ill. App. 3D, 227, 236, 719 N.E.2d 348 (2d Dist. 1999)***. Plaintiff has not attached any of these supposed records, and accordingly this allegation is entirely without evidentiary foundation. **See, Motion to Strike**. Defendant requests that the court take judicial notice of the fact that plaintiff is attempting to rely on the affidavit of Leslie Liar in an attempt to collect an alleged debt.

7. Defendant denies this allegation or that he owes plaintiff any money at all. **See affidavit of Joe Consumer, Exhibit B, para. 7**, attached. Defendant also **objects** to Paragraph 7 of Plaintiff's Statement of Facts because it is based on an inadequate "bill of sale," unauthenticated documents and an improper and deceptive affidavit and is unsupported by any admissible evidence. **See, Motion to Strike**, submitted simultaneously with this Memorandum in Opposition. Defendant requests that the court take judicial notice of the fact that plaintiff is attempting to rely on the affidavit of Leslie Liar in an attempt to collect an alleged debt and that it is attempting to collect an interest rate unsupported by any contract.

8. Defendant objects to this conclusion, which is not a fact. Defendant **objects** to Paragraph 8 of Plaintiff's Statement of Facts because it is based on an improper and deceptive affidavit and lacks any evidentiary basis whatever for reasons stated above regarding this affidavit. See, **Motion to Strike**, submitted simultaneously with this Memorandum in Opposition. Defendant requests that the court take

judicial notice of the fact that plaintiff is attempting to rely on the affidavit of Leslie Liar in an attempt to collect an alleged debt.

Defendant's Statement of Additional Facts

9. Really Bad Guy is an attorney representing Heartless Debt Collector, LLC in this matter. **See, Affidavit of Attorney's Fees,** apparently signed by Really Bad Guy and filed in support of Plaintiff's request for attorney fees, para. 1.

10. Really Bad Guy "practices in the area of collections and represents other collection clients" and "maintains an office for the purposes of handling collection matters." **Affidavit of Attorney's Fees**, signed by Really Bad Guy and filed in support of plaintiff's request for attorney fees, **para. 2, 5**. Accordingly, Really Bad Guy is a debt collector.

11. Defendant requests that the court take judicial notice that in representing plaintiff in this debt collection matter, Really Bad Guy has been attempting to collect on an alleged debt on behalf of his client. See also, **Affidavit of Attorney's Fees**, signed by Really Bad Guy and filed in support of plaintiff's request for attorney fees, **para. 1, 12**, and Itemization of Services.

12. Defendant is an individual consumer who does not own or operate a commercial business and is therefore a consumer within the meaning of the FDCPA. **Affidavit of Joe Consumer, para. 9**.

13. Plaintiff's evidence proffered in support of its Motion for Summary Judgment is all the evidence it provided Defendant in its Rule 26 Disclosures. **See, Exhibit A (the disclosures), attached, and Exhibit B, para. 2**.

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Heartless Debt Collector, L.L.C. (hereinafter, "Heartless"), by and through its debt collector lawyer, Really Bad Guy, brought claims for breach of contract and account stated or open account. After an abbreviated period of discovery, during which plaintiff failed to respond fully to a single interrogatory propounded by defendant or produce any of the documents sought by defendant,

plaintiff brings its Motion for Summary Judgment. For the reasons that will be shown, plaintiff's Motion for Summary Judgment must be denied because plaintiff has failed to provide **any** submissible evidence in support of its case, because the supposed "evidence" it does tender is deceptive, false and incompetent, and because defendant denies material facts and offers contradicting testimony which demonstrate the existence of genuine issues of material fact, at the very least, regarding plaintiff's claims.

Standard of Review for Summary Judgment

Defendant agrees with plaintiff as to the settled standards of summary judgment: the movant must prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. ***National Housing Indus., Inc. v. E.A. Jones Dev. Co., 118 Ariz 374, 576 P.2d 1374 (Ariz. App. 1978)***. Defendant emphasizes that **Arizona Rule of Civil Procedure 56(e)** permits the grant of a motion for summary judgment ***only*** when the moving party has presented evidence entitling it to judgment as a matter of law. ***Schwab v. Ames Constr., 207 Ariz. 56, 60, 83 P.3d 56, 60 (Ariz. App. 2004)(emphasis added)***. Only if the movant does present such evidence, then the respondent must come forward with evidence demonstrating the existence of genuine issues of material fact. If there are disputed issues of material fact they cannot be disposed of with summary judgment but must be determined at trial. ***Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953)***. As will be shown, plaintiff does not and cannot provide the court any competent evidence in support of its claims at all. Accordingly, the court must deny plaintiffs's motion for summary judgment.

Plaintiff Is Not Entitled to Summary Judgment for Any Alleged Breach of Contract by Defendant

It is well established that, in an action based on breach of contract, the plaintiff has the burden of proving the existence of a contract, breach of the contract, and resulting damages. *Chartone, Inc. v. Bernini, 83 P.3d 1103, 1111 (Ariz. Ct. App. 2004).* As will be shown, plaintiff has not provided

competent, or even relevant, evidence in support of any part of its prima facie case. It waves half-heartedly at the requirements to demonstrate the existence of a contract and its breach and dispenses entirely with any evidence of, or even reference to, damages. Its motion for summary judgment must accordingly be denied.

Plaintiff alleges in its brief that it entered into an agreement with defendant when he used some unspecified "line of credit." There is no competent evidence supporting the contention that plaintiff entered into any agreement with defendant or that defendant ever used any line of credit at all, much less one coming from plaintiff. There is no evidence, competent or otherwise, purporting to state the terms of any contract theoretically existing between the parties. Plaintiff produces no evidence whatsoever of a contract or any contractual terms. Defendant has also affirmatively denied any such agreement or use of credit. **See Affidavit of Joe Consumer, Paras. 3,4 (Attached as Exhibit B)**. Accordingly, summary judgment for plaintiff is clearly not appropriate for this issue.

Plaintiff failed to provide any document purporting to be a contract between defendant and any other party in its Rule 26 disclosures or in response to defendant's discovery. **See, Exhibit A** (Plaintiff's Rule 26 disclosures), **Exhibit B** (Affidavit of Joe Consumer, paras. 2,9 (authenticating Exhibits A and C), and **Exhibit C** (plaintiff's Responses to Defendant's Request for Production of Documents). The purpose of Rule 26.1 disclosure is "to give each party adequate notice of what arguments will be made and what evidence will be presented at trial." ***Clark Equip. Co., v. Ariz. Prop. & Cas. Ins. Guar. Fund, 189 Ariz. 433, 440, 943 P.2d 793, 800 (App. 1997)***. **Rule 37(c)** provides that if a party fails to timely disclose information, it shall not be used. S***ee also, Allstate Ins. Co. v. O'Toole, 182 Ariz. 284, 896 P.2d 254 (1995)***(information not disclosed in a timely manner not permitted to be used unless there is good cause for granting relief from the exclusion). None of the materials provided to defendant in disclosure or discovery even purport to be a contract between him and any other party. Accordingly, the court must find that plaintiff has no contract upon which to base its breach of contract claim or any claim to a "contractual rate of interest."

In a desperate attempt to avoid this very basic necessity of showing a contract where it claims the breach of contract, plaintiff argues that proving the existence of a written contract is unnecessary because, as it spins its yarn, defendant entered a series of unilateral contracts with it by using the hypothetical credit card allegedly issued by plaintiff. But plaintiff seeks to have its cake and eat it, too. It claims that any use of the mythical credit card would subject defendant to the terms of some contract (and specifically a "contract" interest rate). This argument is absurd. Plaintiff must *show* a contractual right if it wishes to *assert* a contractual right. It clearly has no evidence whatever of any contract, and its claim for interest is therefore wholly unsupported by any contract and is a violation of the Fair Debt Collection Practices Act.

Plaintiff's vague and theoretical discussion of unilateral contracts formed by "each individual credit card transaction" shows how desperate it is. *Plaintiff does not point to or mention, much less offer competent evidence of, a single alleged individual credit card transaction*. The record is entirely devoid of any evidence whatsoever of individual credit card transactions. The incompetent evidence proffered by plaintiff consists *only* of (apparent) statements apparently claiming an overdue balance, but showing no credit transactions at all. All of plaintiff's evidence in support of this point is incompetent, and defendant objects to it and moves to strike it, but even if it were not incompetent, it would still be irrelevant to its claim of any unilateral contract that would be formed by any use of credit. Defendant has also denied using any such credit card to make any purchase. **See Exhibit B, Affidavit of Joe Consumer, para. 4.**

Plaintiff's Claim for Breach of Contract Must Be Dismissed because It Cannot Show Either a Breach of Contract or Damages

Plaintiff's motion and brief glosses over the questions of breach and damages, stating a purported account balance of $7,728.03, that this amount wasn't paid when due, and claiming airily that it seeks this amount. There is no evidentiary basis for any of this, however. As plaintiff itself claims, these were statements (on somebody's) account that showed an open account. Since the account was

still open, further activity certainly could have occurred. And of course someone could have made payments on the account at any time, whether the account was open or not.

There is no document (competent or otherwise) in the record that shows a final accounting or any statement of money owed as a final tally. Defendant has submitted to the court all of the documents plaintiff ever furnished him in Exhibit A, and none of the evidence plaintiff submits in its motion even purport to be a final reckoning or liquidation of account. The documents all seem to reflect an open account.

Plaintiff appears to be relying on the statement of Leslie Liar, custodian of records, to say, as best she can, that the sum owing at the time of suit was $7,728.03 and that the money had not previously been paid. Liar's testimony, however, is incompetent. As defendant has shown, the records upon which Liar relies were not created by her or her company, and she has no familiarity with them that would permit their authentication. Even more telling, however, is that Liar repeatedly *states* she is relying on records rather than her own knowledge. If there are in fact any other records, which defendant doubts, they not only were not provided to defendant in plaintiff's Rule 26 disclosures or its responses to Requests for Production, but they are not made a part of the record before the court now. Under the business records exception to the hearsay rule, it is the business record itself, not the testimony of a witness who makes reference to the record, which is admissible. ***In re A.B., 308 Ill. App. 3D 227,236, 719 N.E.2d 348 (2nd Dist. 1999)***. Accordingly, plaintiff has no admissible evidence of either breach of contract by failure to pay, or damages in this, or any of its claims against defendant.

Since plaintiff can show neither a written contract nor any supposedly unilateral contract, nor any other basis for a contract, nor any breach of contract or any damages, it has failed to demonstrate any evidence in support of its claim and is accordingly not entitled to summary judgment. Plaintiff's claim for breach of contract is fatally defective.

Plaintiff Is Not Entitled to Summary Judgment Under the Account Stated or Open Account "Theory,"

Realizing how flimsy its claim for breach of contract is, plaintiff argues that it is entitled to summary judgment under the account stated or open account "theory." In fact, not only is plaintiff not entitled to judgment under either of these alternatives, but its admissions establish defendant's right to dismissal of this claim as a matter of law. Moreover, as defendant has shown, plaintiff has not provided any evidence of defendant's supposed failure to pay, or any evidence in support of its claim of damages.

Plaintiff's Claim for an Account Stated Must Be Dismissed

Plaintiff states that "[D]efendant was sued on a balance owed on an *open* account which can be proved by the evidence of the itemized statements." (Emphasis added.) This admission that the account was "open" establishes as a matter of law that Plaintiff cannot show an account stated. As the Arizona Supreme Court sitting en banc stated, "[T]he monthly bills sent to appellants obviously cannot be considered as an account stated. There was no element of finality because the parties were still transacting business." ***Holt v. Western Farm Services, Inc., 110 Ariz. 276, 517 P.2d 1272, 1274 (AR Banc 1974).*** An account stated requires finality, ***id***., and the only evidence (objected to by defendant in any event) offered in support of Plaintiff's claim for account stated reveals that the account was not final. Just as in ***Holt***, the bills offered were *monthly* bills. And plaintiff itself asserts that the account was an open account.

Additionally, as the court in ***Holt*** also noted, "the element of agreement is an absolute requisite to the legal claim of account stated, " ***Id.***, *citing* ***Builders Supply Corp. v. Marshall, 88 Ariz. 89, 352 P.2d 982 (1960)***. An account stated is an "agreed balance between the parties to a settlement; that is, that they have agreed after an investigation of their accounts that a certain balance is due from one to the other. ***Id. at 1273-4***, *citing* ***Chittenden & Eastman Company v. Leader Furniture Co., 23 Ariz. 93, 201 P. 843 (1921)***. Plaintiff does not even remotely suggest, much less prove, any of the facts necessary to prove this claim.

Plaintiff' asserts in its motion that "[I]temized statements were sent to the Defendant" and "[D]efendant has not provided evidence to indicate that Defendant made objection known to plaintiff concerning any billing disputes." **One** problem with this argument is that nowhere in plaintiff's supposed evidence is there any sworn testimony or other evidence (competent or otherwise) that anyone sent itemized statements to defendant, nor are there any itemized statements. An attorney's statements are not evidence that can be considered by a court in deciding a motion for summary judgment, ***see, e.g., Trinsey v. Pagliaro, 229 F. Supp. 647 (E.D. Pa. 1964)***, and the record is otherwise entirely devoid of anything purporting to be an itemized statement or reference to itemized statements being sent. And of course none of plaintiff's evidence is properly authenticated, and defendant has objected to it all and moved to strike it.

A **second** problem with plaintiff's argument is that even if there *were* finality as to any account, and even if plaintiff *had* provided competent evidence supporting its claims that itemized statements were sent to defendant, none of which is true, it would still be plaintiff's burden to demonstrate *agreement* to the statements by defendant. Just as plaintiff has no evidence of statements existing or being *sent*, it likewise has no evidence, competent or otherwise, of defendant receiving and retaining the statements without objecting to them for some period of time as would be necessary under ***Trimble Cattle Co. v. Henry & Horne, 122 Ariz. 44, 592 P.2d 1311 (Ariz. App. Div. 1 1979)***. It is *plaintiff's* obligation to prove an agreement, and it has offered nothing but vague references to inapplicable case law. Defendant has denied receiving any such statements from plaintiff. **See, Affidavit of Joe Consumer, para. 5**.

Moreover, as defendant has shown, plaintiff has not provided any evidence of defendant's supposed failure to pay, or any evidence in support of its claim of damages.

Accordingly, this part of plaintiff's claim must be dismissed. The evidence and admissions of plaintiff establish as a matter of law that it has no right under account stated.

Plaintiff's Claim for an Open Account Must Be Dismissed

Plaintiff's claim for an open account is equally without merit. In Arizona "it is the settled rule that the burden is on the person seeking to recover on an open account to prove the correctness of the account and each item thereof." **Holt, supra at 1274**. Plaintiff's evidence, even if it were legitimate and properly authenticated, *does not reveal a single transaction, much less the correctness of the account and each item thereof.* Additionally, as defendant has shown, plaintiff has not provided any evidence of defendant's supposed failure to pay, or any evidence in support of its claim of damages. Therefore, plaintiff's claim for an account stated must be dismissed

Plaintiff's Rule 26 disclosures reveal that plaintiff's difficulties go far beyond not understanding the difference between claims for open account and account stated, although one might expect more of a collection attorney theoretically charging $250 per hour for engaging in debt collection litigation. **See, Affidavit of Really Bad Guy in Support of Attorney's Fees, para 8**. Plaintiff's disclosures show that it cannot bring forth any evidence to prove the correctness of the account upon which it is suing or any item thereof. Its entire evidence consists of a few unauthenticated, very dubious statements which cannot be linked to either plaintiff or defendant, and these statements do not, as has been pointed out, reflect a single transaction, much less each item of the supposed account.

CONCLUSION

For all the reasons argued and proved, this court must deny plaintiff's motion for summary judgment against defendant in its entirety.

High Hand Justice Court
55 E. Civic Center Drive,
County of X, State of Y

Heartless Debt Collector, LLC	)	
Plaintiff,	)	
	)	Case No. 000000000
vs.	)	
	)	
Joe Consumer, Defendant	)	

AFFIDAVIT OF JOE CONSUMER

Comes now Joe Consumer, and being duly deposed and sworn, states as follows.

1. I, Joe Consumer, am over 18 years of age and have personal knowledge of the following facts to which I testify.
2. Exhibit A, attached to defendant's Response to Motion for Summary Judgment, is a true and correct copy of all the documents provided to me by Plaintiff Heartless Debt Collector in its Rule 26 Disclosures.
3. I have never entered into any credit transaction, borrowed money, or entered any contract with Heartless Debt Collector.
4. I have never possessed a credit card issued by Heartless Debt Collector, LLC, and have never used credit furnished by Heartless Debt Collector, LLC. for any purpose.
5. I have never received any “Statement of Account” from Heartless Debt Collector.
6. I am not aware of any charges or payments on any account owned by Heartless Debt Collector, either supposedly on my behalf or otherwise.
7. I do not owe Heartless Debt Collector money for any service or product.
8. I am an individual consumer and not operating a business.
9. Exhibit C is a true and correct copy of a document received from Heartless Debt Collector as

part of its Rule 26 Disclosures. It consists of one page that is (also) part of Exhibit A.

High Hand Justice Court
55 E. Civic Center Drive,
County of X, State of Y

Heartless Debt Collector, LLC Plaintiff,	)	
	)	Case No. 000000000
vs.	)	
Joe Consumer, Defendant	)	

JOE CONSUMER'S MOTION TO STRIKE AFFIDAVIT OF LESLIE LIAR AND UNAUTHENTICATED DOCUMENTS USED IN PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Heartless Debt Collector, LLC has filed a motion for summary judgment against defendant Joe Consumer which relies extensively upon two pieces of improper and inadmissible evidence: the affidavit of Leslie Liar and certain unauthenticated documents (labeled Exhibit 1 in Plaintiff's brief) which appear to be some sort of financial statements. Because the affidavit of Leslie Liar does not, as required by Arizona law, affirmatively show personal knowledge of the matters about which she is testifying, her testimony is inadmissible either as to the facts about which she is testifying or for purposes of authenticating any business records. Because the documents in Exhibit A are not authenticated, they are not properly before the court and cannot be considered as evidence. Accordingly, the court must strike the testimony and the exhibit from the record.

Substantive Testimony of Leslie Liar Must Be Stricken

Leslie Liar testifies as a custodian of records. She precedes every factual statement with "according to the business records" (see **Exhibit B of Plaintiff's Motion for Summary Judgment, attached here as Exhibit 1, paras. 3, 4 and 5**), and she reveals no basis of personal knowledge regarding the matters about which she is testifying. According to Arizona Rule of Civil Procedure 56, affidavits used for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the matters stated therein." *See also,* ***Chess v. Pima County, 126 Ariz. 233, 235, 613 P.2d 1289,***

1291 (App. 1980). Any substantive testimony by Liar fails to meet the requirements of Rule 56 and must be stricken.

It would appear that Liar is attempting to base her testimony on business records created by another business entity and about which she, in reality, knows nothing. Thus, when Liar testifies in paragraphs 2, 3, and 4 that her testimony is "according to the business records," she is relying on records about which she is entirely ignorant. In any event, under the business records exception to the rule against hearsay, it is the business record itself, not the testimony of a witness who makes reference to the record, which is the evidence. ***In re A.B., 308 Ill. App.3d 227, 236, 719 N.E.2d 348 (2nd Dist. 1999).*** Liar is not permitted to testify what the business records say; they must speak for themselves. But if they exist, which defendant doubts, they are not attached or properly made a part of the record before the court.

Since plaintiff's claims of defendant's breach of any contract, defendant's failure to pay any certain amount, and plaintiff's claims for damages rest on Liar's substantive testimony, plaintiff's motion for summary judgment must be denied on that basis alone. Regarding Liar's testimony attempting to authenticate Exhibit A, please see below.

Plaintiff's Exhibit A Must Be Stricken as the Constituent Documents Are Not Authenticated

Plaintiff's **Exhibit A** is represented by plaintiff in its Motion for Summary Judgment as credit card statements sent to defendant reflecting (some) credit card account. There is no evidence of any sort regarding the documents having been sent to defendant, and no evidence of any sort regarding his supposed failure to pay them, either. But in any case the documents comprising **Exhibit A** must be stricken from the record as not authenticated.

Exhibit A is presented without any authentication whatsoever. Exhibit B, the affidavit of Leslie Liar, makes no reference to Exhibit A or the documents of which it is composed, and there is no other affidavit made a part of the record of this case which identifies and authenticates the documents comprising Exhibit A at all. Thus the documents are entirely unauthenticated and not properly before

the court.

Even if Leslie Liar's affidavit (Exhibit B) *did* mention the documents in Exhibit A, her testimony as to the records maintained in the account for which plaintiff is suing before 12/31/09 (allegedly the date of purchase of this account by plaintiff) is incompetent. Where the party is seeking to authenticate documents, the affiant must affirmatively show (1) familiarity with the person who prepared the document, and (2) the manner in which it was prepared. ***Villas at Hidden Lakes Condos Ass'n. v. Geupel Constr. Co., 174 Ariz. 71, 82, 847 P.2d 117, 127 (App. 1992)***. *And see, Ariz. R. Evid., 901(b)(1)*(authentication includes testimony that a matter is what it is claimed to be). Liar's testimony includes none of these things regarding records supposedly maintained by another, unrelated business entity. She would be unable to authenticate the documents under any circumstances.

Conclusion

For the reasons shown above, all of Leslie Liar's substantive testimony must be stricken from the record, and Plaintiff's Exhibit A in its entirety must also be stricken from the record. As plaintiff has presented no other evidence in support of its motion for summary judgment, that motion must be denied.

High Hand Justice Court
55 E. Civic Center Drive,
County of X, State of Y

Heartless Debt Collector, LLC Plaintiff,	)	
	)	Case No. 000000000
vs.	)	
Joe Consumer, Defendant	)	

RESPONSE TO PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES

Comes now Defendant, pro se, and hereby submits the following Response to Plaintiff's request for attorney's fees.

Introduction

Like most of the pleadings emanating from plaintiff in this matter, the "Affidavit of Attorney Fees" is a peculiarly flawed document, ambiguous about key provisions, blatantly wrong and deceptive about others, and merely inadequate in other respects. The fee request must be denied in its entirety both because of its complete lack of evidence and because plaintiff has unclean hands.

Who Is the Affiant?

It seems strange to be objecting to an affidavit because it is unclear who is making the affidavit, but in this case, and considering the general way plaintiff's counsel has conducted this case, there is a substantial question as to by whom the affidavit supposedly was created. It appears that this ambiguity was created by plaintiff as a means to foist a higher attorney hourly rate upon defendant, to justify an improper contingent fee, or to cover up for the complete lack of evidentiary support for the request for fees. For whatever reason, it is impossible to determine from the affidavit who the affiant is, and accordingly defendant does object.

Paragraph 1 of the affidavit states that the "undersigned" is "*the plaintiff's attorney"* (singular) in Pima County. The signature block, however, contains two names, that of Really Bad Guy, State bar #

xoxoxo, and Super Bad Guy, State Bar # baah. The actual signature of the undersignee is utterly illegible and provides no clue as to which of the people identified in the signature block signed the affidavit, if either of them did. Significantly, the sworn part of the affidavit does not include a name or any other identifying information, or any personal reference to education, experience, or personal accomplishment in any way and so this affidavit is fatally defective even in the simple requirement of identifying by whom it was sworn. It is significant also that the "undersigned" identifies himself or herself as the singular attorney for plaintiff when every pleading coming from plaintiff in this case has borne two signatures, proof positive that plaintiff's attorney was not a single individual. Defendant objects and moves that the affidavit be stricken from the record and the attorney's fee request be denied for lack of any evidentiary basis.

The Supposed Attorney Hourly Rate Alleged in Plaintiff's Attorney Fee Affidavit Is Wrong

Defendant has had significant conversations primarily with Really Bad Guy, and it would appear from defendant's perspective at least that Really Bad Guy did at least the lion's share of the actual work involved in this case on behalf of plaintiff. The court can take judicial notice, based on Really Bad Guy's bar number, that he is not a senior attorney and is, in any event, substantially junior in experience to Super Bad Guy- apparently the principal in the firm representing plaintiff (Super Bad Guy & Associates). According to Super Bad Guy & Associates' website, Really Bad Guy graduated from law school in 2010. The records are incomplete as there are no time slips or other fundamental records, and the record as a whole does not provide the court a basis for determining who did what work or when it was done, and there is accordingly no basis for an award of attorney's fees even if the affidavit were accepted. See, *Schweiger v. China Doll Restaurant, Inc., 138 Ariz. 183, 188 (App.), 673 P.2d 927 (1983)* ("An attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent."); and LRCiv. 54.2(e)(2)("The party seeking an award of fees must adequately describe the services rendered so that the

reasonableness of the charge can be evaluated.")

If Really Bad Guy was the actual undersigned, as defendant believes[1] then allegation **Number 5** "[t]he affiant maintains an office for the purposes..." is unlikely to be true, and the hourly rate of $250.00 per hour stated in allegation **Number 8** would seem to be grossly overstated if not outright fraud. Likewise, a junior associate's standing and experience to evaluate the reasonableness of charging a contingent fee (**Number 9**) is dubious at best, as would be his knowledge of what is a customary and reasonable (the "current standard") fee in the area of collections for the State of Arizona. An affidavit is required by the Rules of Civil Procedure to provide an affirmative basis for establishing the affiant's personal knowledge of the matters testified about, and this affidavit fails to provide such a basis regarding those matters even if it were possible to determine whose affidavit it was.

As has been pointed out, there are no time slips or fundamental records showing when any time was expended, and, very peculiarly, plaintiff does not appear to have included in the calculations any of the time which actually involved defendant or the court. The question of whose affidavit this is is accordingly impossible to verify in any way other than the testimony of Really Bad Guy or Super Bad Guy. This lack of accountability must be deliberate in a firm that, according to the affidavit, maintains a computer, not to mention a staff.

To put it bluntly, it appears that Really Bad Guy did the work in this matter and plaintiff seeks to charge for it at the rate charged by Super Bad Guy. In any event, the factual basis for any claim of attorney's fees is inadequately established, and defendant objects to any award of attorney's fees whatever on that basis.

[1]Defendant believes this because Really Bad Guy was the only person to whom he spoke at Super Bad Guy & Associates, because RBGuy was the person appearing by telephone at conferences including the court, and because the brief in support of plaintiff's motion revealed a lack of understanding of the difference between an open account and an account stated, which is unlikely in a senior attorney, even for a brief that was hastily drafted.

Upon What Basis Is Plaintiff Seeking Attorney's Fees?

Another thing peculiarly left unclear by plaintiff's motion for attorney's fees is upon what basis plaintiff is seeking attorney's fees. It claims in its brief to be seeking fees pursuant to ARS Section 12-341.01, but it does not even mention any of the standards required by the Arizona Supreme Court for determining how much, if anything, to award as attorneys fees. **See, *Assoc. Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985)**. Thus the claim for attorney's fees must be denied on that basis as well, for it is the fee applicant's burden to demonstrate a right to any fees under applicable legal standards.

Plaintiff does request fees in the amount of its supposed contingency rate of 23.75%. Defendant notes the lack of documentary evidence regarding the existence of such an agreement, if any, and objects on that basis. The affidavit claims that the unknown affiant has actually expended 4.2 hours in pursuit of a judgment on a collection action for $7,728.03. In exchange for 4.2 hours of *some* (if any) attorney's time, plaintiff seems to be asking for attorney's fees of at least $1,835. Even at the grossly inflated rate of $250 per hour claimed by the unknown affiant, the contingency fee would obviously be paying for something other than the attorney's time spent on the case at bar. Fees awarded under ARS Sec. 12-341.01 are designed to reduce the burden of legal fees on a plaintiff, not to reward contingent fee-seeking lawyers or offset risks to the law firms presented by other litigation.

Plaintiff argues, strangely, that “in commercial litigation between fee-paying clients” there is no need to determine the reasonable hourly rate prevailing in the community for similar work because the rate charged by the lawyer to the client is the best indication of what is reasonable, *citing Schweiger v. China Doll Restaurant, Inc., supra*. However, the unknown affiant's testimony establishes that Heartless Debt Collectors, Inc., is not a “fee-paying” client.

The affidavit establishes that the fee arrangement is *contingent* upon fees actually collected from defendant, and any fee paid will be paid by defendant. Plaintiff cannot be said to be a "fee-paying client," therefore, and it was incumbent on plaintiff to provide evidence of community standards for similar work.[2] Its failure to do so deprives the court of an evidentiary basis for decision, and the request must be denied on that basis as well.

No doubt the awareness of its extravagant fee is why plaintiff has taken the trouble to try to establish the hours it worked *or will conceivably* work on the case and an inflated hourly rate. Unfortunately, it really does neither. The affidavit does not establish an appropriate hourly rate for the attorney time spent on this case. The unknown affiant claims his or her fee is $250 per hour, but the record does not establish which lawyer did what work in this case or provide the court any real basis in education, experience or accomplishment for an evaluation of the hourly fee allegedly charged. There is no evidence as to how often the unidentified affiant receives the rate of $250 per hour he or she claims she gets for collection work on a fee-paid basis, or even if he or she ever has. There is no evidence in the record that anyone has ever paid that rate to the unknown affiant, for what work that rate is theoretically charged, or to whom it is or has been charged. And there is no evidence that anyone has ever *paid* that rate.

Defendant also wonders if any paying client has ever paid plaintiff's unidentified attorney that hourly rate for "*anticipated and estimated post judgment services*." Here the affiant has really larded up the records, seeking $250 per hour for such things as "instructing on skip trace efforts" and "reviewing skip trace efforts," garnishing wages, preparing orders and

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[2] The China Doll court also noted that in cases where fees are not paid on an hourly basis, such as public rights and contingency fee litigation, the most popular formula for calculating fees is the lodestar analysis. Id. at 931 n. 5. The lodestar analysis is used where fees are not actually paid on an hourly basis and where the prevailing party does not have an agreement with counsel setting the attorneys' billing rate for the representation. Id.

appearing at supplemental hearings as well as engaging in significant negotiations with defendant by phone. It seeks payment for everything but the yearly Christmas party, but none of it has happened, and perhaps none of it will. The Arizona Supreme Court has explained that the purpose of awarding fees to a successful litigant is "to mitigate the burden of the expense of litigation to establish a just claim or just defense," not to provide the lawyer with a payment bonus. ***In re Struthers, 179 Ariz. 216, 877 P.2d 789, 795 (Ariz. 1994)(citing A.R.S. §12-341.01(B)***. As the Supreme Court stated in ***Pennsylvania v. Delaware Citizen's Counsel for Clean Air, 478 U.S. 546, 565-66 (1986)***(a case brought under the Clean Air Act) and considering its earlier decision in ***Blum v. Stenson, 465 U.S. 886, 897-901 (1984)***:

> As explained by the Pennsylvania Court, in ***Blum***, the Court found that "[w]hen . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is *presumed* to be the reasonable fee" to which counsel is entitled.

Whatever else plaintiff is doing, it has not carried its burden of showing the claimed rate and number of hours are reasonable, and it is seeking extravagant pay for minimal work.

<u>The Doctrine of Unclean Hands</u>

Why, then, is plaintiff including unworked hours in the record and seeking them from this defendant? The unknown affiant would know best, of course, but it appears to defendant that it amounts to nothing more than simple attempted theft. Or else to justify the award of a contingency fee that plainly rewards the lawyer for matters other than fee-generating activities or work on the case at hand. Unsurprisingly, plaintiff offers no case law in support of its larcenous fee application. Defendant's research has turned up no cases confronting facts like these, either; it would appear that no other fee applicant has been bold enough to seek fees for work conceivably to be done at some time in the unspecified future, by lawyers whose identity

is unknown, on records devoid of any verifiable detail. In civil rights litigation, where fee-shifting statutes have been much litigated, the courts have established that fee applications must be based on fees actually earned by the lawyer. See, discussion of ***Pennsylvania v. Delaware Citizen's Counsel for Clean Air, 478 U.S. 546 (1986),*** *above.*

Defendant therefore invokes the doctrine of unclean hands, as well as the complete absence of appropriate evidence presented, as a basis for denial of plaintiff's fee request. Although it is not precisely clear what plaintiff is doing, it is clear that it is seeking to impose the cost of unearned fees on defendant in an underhanded way. Like the affidavit of Leslie Liar, submitted in support of plaintiff's case in chief, the unknown affiant's affidavit and fee request are clearly deceptive and manipulative at best, are not candid with the court or defendant, and would not survive scrutiny under Rule 11. The court should not reward this sort of behavior.

CONCLUSION

For all the reasons stated above, defendant requests that plaintiff's request for fees be denied in its entirety.

By: _____
Joe Consumer, Defendant pro se
address