Motion for Summary Judgment – Defendant's Offensive

This product is for people being sued by a debt collector who think they could win the case by filing a motion for summary judgment. In other words, you have conducted discovery in your case and are able to prove – by their responses to that discovery – that plaintiff does not have the evidence it needs to win its case against you. We also add a motion for summary judgment on [a made-up] counterclaim under the FDCPA. You may not have such a counterclaim. These materials are designed to show you how to create a motion for summary judgment based on whatever your situation is, but remember that the facts of your case are important just as it is important which jurisdiction you're in. You cannot simply cut and paste these materials – you must apply them to your own case.

First, the Rules

As I constantly tell everybody, the first thing you need when you undertake anything regarding the law or a case, is the rules which control what you are doing. When you want to file a motion for summary judgment, these rules are the ***rules of civil procedure*** for your state regarding motions for summary judgment and the ***rules of evidence***. There could also be ***Local Rules*** regarding motions.

The courts are VERY PARTICULAR about the rules on motions for summary judgment, and in many, if not all, states, failure to follow the rules of civil procedure on msjs is an adequate basis for denial of the motion. You must take that very, very seriously. If your rules call for a "Statement of Uncontroverted Material Facts" including numbered paragraphs with references to "record-evidence," then that's what you have to do. If your Local Rules apply a page limit, as they often do, you must respect that limit or your motion will be denied. If your state or local rules require a Memorandum of Law in addition to the Motion itself (as most do), then you must comply with that rule as well.

For the purposes of this product, we will assume the court has a local rule limiting motions and supporting briefs to 25 pages (not including evidence), and that the rules require a Memorandum of Law in addition to the motion itself. You must check your state's laws. Since we have done considerable research on Arizona law, we will use Arizona law in our sample. Of course you must use law from your state, which is going to require research to come up with equivalent or similar case law citations. If you need help conducting legal research, you might consider our product, Guide to Legal Research and Analysis.

The evidence in our case will be Joe Consumer's affidavits (i.e., what you yourself can swear to) as well as an affidavit produced by Leslie Liar in an earlier proceeding from the case. Arizona also has a mandatory disclosure law which requires the parties to reveal all the witnesses and documents they

intend to use at trial. Our motion and brief will make use of that law. Your state may or may not have such a law. If it does not (or even if it does), you will need to use answers to interrogatories or documents produced in response to your requests for production to establish your case. It is not enough to SAY they don't have evidence – you must prove it. You do that by showing what they answered or produced and gave you so much and no more.

This packet contains a (real) plaintiff's motion for summary judgment, including the affidavits you will use in creating your motion for summary judgment. It also contains an essay on motions for summary judgment – what they do and how they do it – instructions on creating your motion, and a sample motion for summary judgment.

Instructions

Motions for Summary Judgment are the way one party presents evidence to the court which it says cannot be disputed and which, if taken as true, establish all or part of its claim. In debt law, plaintiff suits usually consist of a claim for breach of contract or one for account stated, or for both of these claims. Each of these claims has specific "elements" (parts) that must be proven in order to win the case. To prove that the debt collector cannot win its case, you must prove that it has no evidence supporting at least one element of each claim.

To prove your case, you must prove all of the elements of your claim and show that there is no legitimate dispute regarding any part of it.

If a party bringing a motion for summary judgment cannot prove that all the elements of its claim are beyond dispute, the court should deny the motion and let a trial take place. This is because trials are the proper place for the decision-maker (judge or jury) to weigh the evidence and decide what it believes. On summary judgment the question is simply whether or not there is a legitimate dispute. So, for example, presenting contracting testimony should create a "triable" issue (thus not allowing for summary judgment) unless the testimony can somehow be disqualified and shown to be inadmissible: not "unworthy of belief," but inadmissible. Thus the fact that you have located a court decision finding the plaintiff guilty of perjury (to choose an extreme possibility) only goes to the believability of testimony at trial but cannot disqualify it for purposes of summary judgment.

In creating your motion for summary judgment you must first tell the court what "standard of review" it must use. (That's basically what I discussed in the preceding paragraph.) Next, you tell it what the plaintiff must show (the elements) and why, generally, it cannot do so. Then you show very specifically why this is so.

Then you show what you must show to prevail on your counterclaim. Then you show how you have, in fact, shown just that.

Notice how these things are done in the sample motion, and imitate that process.

Then you ask for your "remedy," which is dismissal of plaintiff's claims with prejudice, and a judgment on yours as to liability (because your damages will always be "triable" in that they require evidence of things that really require actual testimony.

You Memorandum in Support will read mostly like your motion, only it will have more argument – it will be where you really show that, whatever the other side says, you should win. Again, observe the samples.

Remember

What you must remember about these samples is that they are, in fact, samples. Although the sample plaintiff's motion was in fact actually filed in a case, that case is not YOUR case, and the arguments they

made, though typical, may or may not apply in any way to yours. The sample defendant's motion, which is more like what yours should look like, is NOT a real motion and was never filed anywhere. Also, the facts upon which it was based were made up. You will need to establish similar facts for your case, though, and the "facts" were designed to help you see how this might be done. Remember, though, that this sample is for illustrative and teaching purposes. You can use the arguments and much of the language, but you must carefully apply only those parts that apply to your case.

Remember also that summary judgment motions are more about facts than the law. Get the facts right and expect them to be challenged. Then, and only then, are you ready to write the argument part of your motion. In constructing your Statement of Uncontested Facts, you will go back and forth between the statement of facts and the affidavit, altering the form of what you say in your affidavit to the needs of the case.

Sample Affidavit of Joe Consumer

(Note that we use this one as well as the sample affidavit from plaintiff's motion for summary judgment – you will want to create one, longer and more comprehensive affidavit.)

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 hereby swears and affirms the following:

1. I am a male citizen over the age of 21, and I have direct personal knowledge of the things about which I testify today.

2. Plaintiff, Heartless Debt Collector (hereinafter, "Heartless"), through a person identifying herself as "Sassy Susan," one of Heartless's agents, contacted me regarding an alleged debt on April 1, 20xx.

3. Sassy Susan was seeking to collect was allegedly originally due Big Bank, the alleged original creditor. Sassy Susan claimed Plaintiff was an "assignee" of Big Bank.

4. I denied owing the debt and asked Sassy Susan not to contact me further.

5. Following a series of calls from Sassy Susan, I sent Sassy Susan, and Heartless, a "Cease-Communication" letter dated May 1, 20xx. A true and correct copy of that letter is attached as Exhibit __.

6. The cease communication letters were sent certified mail, and the receipt was returned "delivered" on May 11, 20xx.

7. After May 11, Sassy Susan and other people identifying themselves as agents of plaintiff continued to call me, including calls on May 12 at 7:48 a.m., 7: 55 a.m., 8:10 a.m., and several others throughout the day until 9:30 p.m. Plaintiff also continued to call on subsequent days, including May 13, 14 and 15 and all the way until the suit was filed.

8. As part of the discovery in this matter, I submitted interrogatories to plaintiff. Exhibit __ is a true and correct copy of plaintiff's answer to Interrogatory ____. Exhibit __ is a true and correct copy of plaintiff's answer to interrogatory _____, and Exhibit __ is a true and correct

copy of plaintiff's answer to interrogatory _____.

9. In response to my interrogatory __, asking plaintiff to identify "all documentation it [had] concerning or referring to the debt alleged by plaintiff," defendant objected. On further discussion and negotiation, plaintiff admitted that it had NO further documents related to the alleged debts beyond those already made a part of this suit. I sent a letter in physical as well as email format confirming this fact and requesting immediate correction if there were, in fact, other documents. A true and correct copy of that letter is attached as Exhibit __. Plaintiff never responded to that letter.

10. Etc.

Date month, day, year

By: _____
Joe Consumer

[Must also be notarized by a notary public]

Statement of Uncontested Material Facts

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	)	

Defendant hereby submits the following Statement of Facts in Support of its Motion for Summary Judgment.

11. Plaintiff, Heartless Debt Collector (hereinafter, "Heartless") contacted defendant regarding an alleged debt on April 1, 20xx. Affidavit of Joe Consumer, Para. 3.

12. The debt plaintiff seeks to collect was allegedly originally due Big Bank, the alleged original creditor. Plaintiff claims as an "assignee" of Big Bank. (Petition, para. 2).

13. Plaintiff is a "debt collector" as that term is defined by the Fair Debt Collection Practices Act, as its principle business is the collection of debts. See, Affidavit of Joe Consumer, Exhibits __ - __, and Plaintiff's Answers to Interrogatories, #3,4, and 5.

14. Following a series of communications from plaintiff Heartless, defendant sent plaintiff a "cease-communications" letter (attached as Exhibit __) on May 1, 20xx.

15. Plaintiff sent the "cease-communications" letter via certified mail, return receipt requested, and the receipt was returned "delivered" on May 11, 20xx, indicating receipt of the cease communications letter on May 5, 20xx. See Exhibit __, attached.

16. After May 5, plaintiff continued to call defendant, including calls on May 7 at 7:48 a.m., 7: 55 a.m., 8:10 a.m., and several others throughout the day until 9:30 p.m. Plaintiff also continued to call on subsequent days, including May 8, 9, 10 and all the way until the suit was filed. (Affidavit of Joe Consumer, Paras. 5-8).

17. A Complaint was filed against the Defendant on June 11. This Complaint alleges the Defendant owes $7,728.03 plus interest at a supposed "contract rate24%" on an "open account or account stated." (See Complaint in Court file.)

18. Plaintiff alleges that the parties entered into a credit card contract. (See attached Exhibit 1-Itemized Billing Statements; Exhibit 2-Affidavit of Leslie Liar; and Exhibit 3-Bill of Sale, all

in the court records as attachments to plaintiff's petition.)

19. Plaintiff has no terms of agreement of any alleged contract. See Plaintiff's Answers to Interrogatory 6, admitting that it has no such document).

20. Plaintiff alleges defendant used the credit card to purchase goods and services, that plaintiff rendered a statement to the defendant requesting the amount stated, and that defendant failed to object. (See attached Exhibit A- Billing Statements; Exhibit B-Affidavit of Leslie Liar; and Exhibit C-Bill of Sale, Id.).

21. Leslie Liar has no personal knowledge of the billing practices or record-keeping of Big Bank, the alleged original creditor. See, Answers to Interrogatories __ - __, and Affidavit of Leslie Liar.

22. It is clear from examination of the documents presented by plaintiff that plaintiff did none of the things claimed in its alleged evidence. The documents all bear the signature of Big Bank, the alleged original creditor.

23. Defendant filed an answer denying plaintiff's ownership of the alleged debt or any right to collect thereon as well as all substantive allegations of the petition. (See Answer in court file.) Accordingly, ownership and title to the debt are in dispute in this case, as well as all elements of liability and damages, as well as attorney's fees.

24. Plaintiff has no admissible evidence of ownership of the debt, see Exhibit B, Affidavit of Leslie Liar, Exhibit C, Bill of Sale, and Response to Request for Production __ (denying that plaintiff had any other documents demonstrating its ownership of the debt or the assignment thereof.)

25. Plaintiff has no admissible evidence of defendant's alleged liability on any of the alleged debts (See Exhibit B-Affidavit of Leslie Liar; and Exhibit C-Bill of Sale, and Response to Interrogatory No. __ admitting that plaintiff has no other documents demonstrating alleged liability or damages than the alleged "statements" it attached to its petition, which it cannot authenticate.)

26. Plaintiff has no admissible evidence of any damages allegedly owing to it from defendant. See, Id.

Date month, day, year

By: _____
Joe Consumer

I certify that on this __ date of _____, 20xx, I sent a copy of the foregoing, first class postage prepaid, to Real Bad Guy, State Bar #xoxoxox, Super Bad Guy, State Bar #Baah, Law Firm.

Sample Motion for Summary Judgment

[Caption of the Case]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Introduction

This story began when Heartless Debt Collector, L.L.C. (hereinafter, "Heartless") first sought to attempt an alleged debt from Defendant Joe Consumer (hereinafter, "Consumer"). In that first conversation, Consumer denied owing the debt and requested that Heartless not call him again. Heartless did contact Consumer again, many times, and on __ of ____, 20xx, Consumer accordingly sent a "cease-communication" letter to Heartless. Return receipt indicated that Heartless received Consumer's cease communication letter on _____ __, 20xx. Thereafter, in violation of the Fair Debt Collection Practices Act (FDCPA), Heartless continued to contact Consumer attempting to collect the debt.

Eventually, Heartless filed suit, alleging claims for "breach of contract and account stated or open account." During discovery, plaintiff admitted that it had no other documentary or other type of evidence than outlined in Defendant's Statement of Uncontested Facts, to wit: it has two (apparent) credit card statements created allegedly by Big Bank, the original creditor; it has a bill of sale supposedly transferring and assigning the alleged debt from Big Bank to Plaintiff (but missing any indication of any numbers or other identifying factor linking the bill of sale to the account it alleges it owns here, and it has an affidavit by one Leslie Liar, an employee of plaintiff. For the reasons that will be shown, plaintiff's claims against Consumer must be dismissed because plaintiff has failed to provide, and cannot provide, **any** submissible evidence in support of its case, because the supposed "evidence" it does tender is inadmissible, deceptive, false and incompetent. Further, Joe Consumer has shown by uncontroverted evidence that

plaintiff violated the FDCPA in continuing to contact him after a valid cease-communication letter was received. Accordingly, Defendant Consumer requests that this court dismiss with prejudice the claims of Heartless and grant him summary judgment as to liability against Heartless.

I. Standard of Review for Summary Judgment

The settled standard of summary judgment is that 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)***. **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***. 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)***.

The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. ***Celotex v. Catrett, 477 U.S. 317, 323 (1986)***. The moving party can satisfy this burden by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element of his or her claim on which that party will bear the burden of proof at trial. ***Id.at 322–23***. If the moving party fails to bear the initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. ***Adickes v. S.H. Kress & Co., 398 U.S. 144, 159–60 (1970).*** As will be shown, plaintiff does not and cannot provide the court any competent evidence in support of its claims at all, and at the

same time plaintiff is powerless to dispute the claims made by defendant in his counterclaim. Accordingly, the court must grant defendant's motion for summary judgment dismissing plaintiff's claims with prejudice and hold that defendant has prevailed on his claim under the Fair Debt Collection Practices Act for unfair debt collection practices.

II. Plaintiff Cannot Prove 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 fails to demonstrate the existence of a contract, any breach, or damages. Plaintiff's claim for breach of contract must accordingly be dismissed with prejudice.

A. Plaintiff Cannot Show a Contract

Plaintiff alleges in its petition 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. ***See, Statement of Undisputed Material Facts, para. __.*** There is no evidence, competent or otherwise, purporting to state the terms of any contract theoretically existing between the parties. ***See, Id., paras. __ - __ and Exhibits __ - __*** [establishing that plaintiff had provided all its documentary evidence]. Plaintiff produces no evidence whatsoever of a contract or any contractual terms. ***Id***. Defendant has also affirmatively denied any such agreement or use of credit. **See Affidavit of Joe Consumer, Paras. __ - __ (Attached as Exhibit _)**.

Plaintiff also 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 __** (Plaintiff's Rule 26 disclosures), **Exhibit __** (Affidavit of Joe Consumer, paras. __, __ (authenticating Exhibits _ and _), and **Exhibit _** (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. Thus, the court must find that plaintiff has no contract upon which to base its breach of contract claim. Accordingly, plaintiff cannot carry its burden of proof on this issue, and summary judgment for defendant must be granted as to this issue.

B. Plaintiff Cannot Show Either a Breach of any Contact or Damages

Plaintiff petition and evidence gloss 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 competent evidentiary basis for any of this, however. As plaintiff itself claims, these were statements (on somebody's) account that showed an <u>open</u> 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 _, and none of the evidence even purports 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.

More fundamentally, plaintiff cannot show by competent evidence that any money was borrowed by anybody on the alleged account or that it was harmed in any way. This is simply because all of its evidence consists of documents – the alleged statements – that cannot be properly authenticated. Plaintiff's only witness, Leslie Liar, has admitted to "no special knowledge of Big Bank's Records-keeping or accounting practices. ***See, __.*** Further, plaintiff can bring forth no testimony from anyone with personal knowledge of when the records plaintiff

seeks to use as evidence were created or by whom. ***See, __***. The records are hearsay, and the business records exception in Arizona requires that the record be made at or near the time of the entry by or from information transmitted by someone with knowledge, be kept in the ordinary course of business, be made as a regular practice, *and be testified to by a qualified witness*. ***Ariz. R. Evid. 803(6), State v. Parker, 296 P.3d 54,64 (Ariz. 2013)(emphasis added)***. Because none of these qualifications are met, the records cannot be admitted. ***See, Id***.

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 cannot prevail upon its claim, and accordingly defendant is entitled to summary judgment. Plaintiff's claim for breach of contract is fatally defective.

III. Defendant Is Entitled to Summary Judgment Under Account Stated

Realizing how flimsy its claim for breach of contract is, plaintiff brought a claim under account stated. In fact, plaintiff's claims under account stated are entirely without basis and must be dismissed as a matter of law.

In order to show an account stated under Arizona law, a plaintiff must show the existence of some regular billing arrangement and that, pursuant to that arrangement it sent bills which were agreed to as a "final" reckoning of liability. Plaintiff attempts to establish its claims using only printed statements which it alleges were sent to defendant. Defendant objects to these bills as inadmissible hearsay (and will demonstrate why, below), but in any event the bills are insufficient to establish an account stated because they lack "finality."

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.

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' alleges 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 objects to it all and moves to strike it.

Put in a slightly different way, although plaintiff alleges that it sent statements to

defendant, there is no competent evidence whatever that anybody sent statements to defendant – there is simply no testimony on the point. Although plaintiff produces alleged statements it alleges were sent to defendant, it neither properly authenticates the statements nor offers testimony that they were sent to anyone.

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, and can offer, no such proof. Defendant has denied receiving any such statements from plaintiff. **See, Affidavit of Joe Consumer, para. 5**.

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

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.

V. Defendant is Entitled to Summary Judgment Regarding His Claims under the FDCPA

As shown in Defendant's Statement of Uncontroverted Material Facts, plaintiff communicated several times with defendant, ignoring first his oral request to desist, and then his written "cease-communications" letter. This violated the FDCPA. In order to show this violation,

a claimant must plead and prove that he is a consumer, that he sent a valid cease-communication letter that was received by the other party, and that the other party nevertheless communicated with the claimant.

A. Plaintiff is a Debt Collector

The Fair Debt Collection Practices Act defines a party as a "debt collector" one whose principle business is the collection of debts. _____. Defendant has demonstrated this fact regarding plaintiff, having shown that substantially all of its business activities involve debts that were generated by others that it purchased. ***See Statement of Uncontroverted Material Facts*** **__ - __.** Plaintiff could point to no other source of income to any significant degree than came from the collection of debts, nor could it point to any business activities that did not relate to the collection of debts. Although it may claim to have "serviced" those debts, this is only another way of saying that it billed for and collected them, perhaps keeping records of those payments – it certainly provided no "service" to any of those accounts not related to their attempted collection. ***Id.*** It is in the business of buying debts from other companies and attempting to collect them, and thus it is squarely within the definition of debt collector.

B. Plaintiff Illegally Communicated with Defendant after Defendant's Cease-Communications Letter

The FDCPA requires that debt collectors cease dunning alleged debtors after receipt of a cease-communications letter. 15 U.S.C. Sec. 1692c(c). If such notice from the consumer is made by mail, notification shall be complete upon receipt. ***Id.***

This letter need only tell the debt collector to cease contacting the alleged debtor, whereupon the only options available to the debt collector are to inform the debtor that it may sue them but otherwise will not contact them again. Beyond that, no further contact is allowed. Defendant has

shown that, in violation of this requirement, plaintiff contacted him numerous times, including at times that were before 8:00 a.m. and after 9:00 p.m. ***See Affidavit of Joe Consumer, paras. __ - __ and Defendant's Statement of Uncontroverted Material Facts, __ - __.***

Defendant Joe Consumer is a "consumer" within the meaning established by the FDCPA, as he does not operate a business, thus any alleged credit purchases made by him would necessarily be for household use. ***See Affidavit of Joe Consumer, Para. __.***

Plaintiff cannot deny these facts, and they establish plaintiff's liability under the FDCPA. Defendant has alleged damages arising from this violation of the law, and there only remains the issue of damages. The court should award defendant summary judgment as to liability on this claim.

CONCLUSION

For all the reasons argued and proved, this court must grant defendant's motion for summary judgment against plaintiff in its entirety and set this matter for a hearing on defendant's claims for damages against plaintiff.

Defendant submits herewith his Statement of Uncontested Material Facts and supporting evidence, and Memorandum in Support of this Motion.

Sample Memo In Support

[Caption of the Case]

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

Introduction

This story began when Heartless Debt Collector, L.L.C. (hereinafter, "Heartless") first sought to attempt an alleged debt from Defendant Joe Consumer (hereinafter, "Consumer"). In that first conversation, Consumer denied owing the debt and requested that Heartless not call him again. Heartless did contact Consumer again, many times, and on __ of ____, 20xx, Consumer accordingly sent a "cease-communication" letter to Heartless. Return receipt indicated that Heartless received Consumer's cease communication letter on _____ __, 20xx. Thereafter, in violation of the Fair Debt Collection Practices Act (FDCPA), Heartless continued to contact Consumer attempting to collect the debt.

Eventually, Heartless filed suit, alleging claims for "breach of contract and account stated or open account," and defendant filed a counterclaim under the FDCPA. During discovery, plaintiff admitted that it had no other documentary or other type of evidence than outlined in Defendant's Statement of Uncontested Facts, to wit: it has two (apparent) credit card statements created allegedly by Big Bank, the original creditor; it has a bill of sale supposedly transferring and assigning the alleged debt from Big Bank to Plaintiff (but missing any indication of any numbers or other identifying factor linking the bill of sale to the account it alleges it owns here, and it has an affidavit by one Leslie Liar, an employee of plaintiff. For the reasons that will be shown, plaintiff's claims against Consumer must be denied because plaintiff has failed to provide, and cannot provide, **any** submissible evidence in support of its case, because the supposed "evidence" it does tender is inadmissible, deceptive, false and incompetent. Further,

Joe Consumer has shown by uncontroverted evidence that plaintiff violated the FDCPA in continuing to contact him after a valid cease-communication letter was received. Accordingly, Defendant Consumer requests that this court dismiss with prejudice the claims of Heartless and grant him summary judgment as to liability against Heartless.

IV. Standard of Review for Summary Judgment

The settled standard of summary judgment is that 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)***. **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***. 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)***.

The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. ***Celotex v. Catrett, 477 U.S. 317, 323 (1986)***. The moving party can satisfy this burden by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element of his or her claim on which that party will bear the burden of proof at trial. ***Id.at 322–23***. If the moving party fails to bear the initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. ***Adickes v. S.H. Kress & Co., 398 U.S. 144, 159–60 (1970).*** As will be shown, plaintiff does not and cannot provide the court any competent evidence in support of its claims at all, and at the

same time plaintiff is powerless to dispute the claims made by defendant in his counterclaim. Accordingly, the court must grant defendant's motion for summary judgment dismissing plaintiff's claims with prejudice and hold that defendant has prevailed on his claim under the Fair Debt Collection Practices Act for unfair debt collection practices.

V. Plaintiff Cannot Prove 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 showing all the elements of its case. ***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. Defendant's motion for summary judgment must accordingly be granted on this point.

Plaintiff Can Show No Contract

Plaintiff alleges in its petition 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. ***See, Statement of Undisputed Material Facts, para. __.*** There is no evidence, competent or otherwise, purporting to state the terms of any contract theoretically existing between the parties. ***See, Id., paras. __ - __ and Exhibits __ - __*** [establishing that plaintiff had provided all its documentary evidence]. Plaintiff produces no evidence whatsoever of a contract or any contractual terms. ***Id***. Defendant has also affirmatively denied any such agreement or use of credit. **See Affidavit of Joe Consumer, Paras. __ - __ (Attached as Exhibit _)**.

Plaintiff also 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 __** (Plaintiff's Rule 26 disclosures), **Exhibit __** (Affidavit of Joe Consumer, paras. __, __ (authenticating Exhibits _ and _), and **Exhibit _** (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. Thus, the court must find that plaintiff has no contract upon which to base its breach of contract claim. Accordingly, plaintiff cannot carry its burden of proof on this issue, and summary judgment for defendant must be granted as to this issue.

In a desperate attempt to avoid this very basic necessity of showing a contract where it claims the breach of contract, plaintiff may argue that proving the existence of a written contract is unnecessary because 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 (whose terms are unknown). 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. Additionally, it has offered no admissible evidence of any alleged use of the

hypothetical credit card.

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.

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

Plaintiff petition and evidence gloss 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 that it seeks this amount. There is no competent 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.

More fundamentally, plaintiff cannot show by competent evidence that any money was borrowed by anybody on the alleged account or that it was harmed in any way. This is simply because all of its evidence consists of documents – the alleged statements – that cannot be properly authenticated. Plaintiff's only witness, Leslie Liar, has admitted to "no special knowledge of Big Bank's Records-keeping or accounting practices. ***See, __.*** Further, plaintiff can bring forth no testimony from anyone with personal knowledge of when the records plaintiff seeks to use as evidence were created or by whom. ***See, __***. The records are hearsay, and the business records exception in Arizona requires that the record be made at or near the time of the entry by or from information transmitted by someone with knowledge, be kept in the ordinary course of business, be made as a regular practice, and be testified to by a qualified witness. ***Ariz.***

R. Evid. 803(6), State v. Parker, 296 P.3d 54,64 (Ariz. 2013). Because none of these qualifications are met, the records cannot be admitted. ***See, Id***.

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 cannot prevail upon its claim, and accordingly defendant is entitled to summary judgment. Plaintiff's claim for breach of contract is fatally defective.

VII. Defendant Is Entitled to Summary Judgment Under Account Stated

Realizing how flimsy its claim for breach of contract is, plaintiff brought a claim under account stated. In fact, plaintiff's claims under account stated are entirely without basis and must be dismissed as a matter of law.

In order to show an account stated under Arizona law, a plaintiff must show the existence of some regular billing arrangement and that, pursuant to that arrangement it sent bills which were agreed to as a "final" reckoning of liability. Plaintiff attempts to establish its claims using only printed statements which it alleges were sent to defendant. Defendant objects to these bills as inadmissible hearsay (and will demonstrate why, below), but in any event the bills are insufficient to establish an account stated because they lack "finality."

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.

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' alleges 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 (or anyone), 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 objects to it all and moves to strike it.

Put in a slightly different way, although plaintiff alleges that it sent statements to defendant, there is no competent evidence whatever that anybody sent statements to defendant – there is simply no testimony on the point. Although plaintiff produces alleged statements it alleges were sent to defendant, it neither properly authenticates the statements nor offers

testimony that they were sent.

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, and can offer, no such proof. Defendant has denied receiving any such statements from plaintiff. **See, Affidavit of Joe Consumer, para. 5**.

Moreover, as defendant has shown above, plaintiff has not even provided any competent 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.

V. Defendant is Entitled to Summary Judgment Regarding His Claims under the FDCPA

As shown in Defendant's Statement of Uncontroverted Material Facts, plaintiff communicated several times with defendant, ignoring first his oral request to desist, and then his written "cease-communications" letter. This violated the FDCPA. In order to show this violation, a claimant must plead and prove that he is a consumer, that he sent a valid cease-communication letter that was received by the other party, and that the other party nevertheless communicated with the claimant.

C. Plaintiff is a Debt Collector

The Fair Debt Collection Practices Act defines a party as a "debt collector" when their principle business is the collection of debts. _____. Defendant has demonstrated this fact regarding plaintiff, having shown that substantially all of its business activities involve debts that were generated by others that it purchased. ***See Statement of Uncontroverted Material Facts*** **__ - __.** Plaintiff could point to no other source of income to any significant degree than came from the collection of debts, nor could it point to any business activities that did not relate to the collection of debts. Although it may claim to have "serviced" those debts, this is only another way of saying that it billed for and collected them, perhaps keeping records of those payments – it certainly provided no "service" to any of those accounts not related to their attempted collection. ***Id.*** It is in the business of buying debts from other companies and attempting to collect them, and thus it is squarely within the definition of debt collector.

D. Plaintiff Illegally Communicated with Defendant after Defendant's Cease-Communications Letter

The FDCPA requires that debt collectors cease dunning alleged debtors after receipt of a cease-communications letter. 15 U.S.C. Sec. 1692c(c). If such notice from the consumer is made by mail, notification shall be complete upon receipt. ***Id.***

This letter need only tell the debt collector to cease contacting the alleged debtor, whereupon the only options available to the debt collector are to inform the debtor that it may sue them but otherwise will not contact them again. Beyond that, no further contact is allowed. Defendant has shown that, in violation of this requirement, plaintiff contacted him numerous times, including at times that were before 9:00 a.m. and after 9:00 p.m. ***See Affidavit of Joe Consumer, paras. __ - __ and Defendant's Statement of Uncontroverted Material Facts, __ - __.***

Defendant Joe Consumer is a "consumer" within the meaning established by the FDCPA, as he does not operate a business, thus any alleged credit purchases made by him would necessarily be for household use. ***See Affidavit of Joe Consumer, Para. __.***

Plaintiff cannot deny these facts, and they establish plaintiff's liability under the FDCPA. Defendant has alleged damages arising from this violation of the law, and there only remains the issue of damages. The court should award defendant summary judgment as to liability on this claim.

CONCLUSION

For all the reasons argued and proved, this court must grant defendant's motion for summary judgment against plaintiff in its entirety and set this matter for a hearing on defendant's claims for damages against plaintiff.