

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 (2<sup>nd</sup> 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, and plaintiff's cross-motions for dismissal and a finding of liability under the FDCPA must be granted.