

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

Heartless Debt Collector, LLC
Plaintiff,

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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

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 plaintiff's responses to defendant's Request for Production.
10. Exhibit D 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.

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.

Defendant files herewith a Cross-motion for Summary Judgment as to plaintiff's claims against him. He has also filed a Motion to Amend his Answer to allege violations of the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. (FDCPA) and a Cross-Motion for Summary Judgment as to his claims under the FDCPA. Because plaintiff's violations are part of the record of this case and the relevant facts are fully established, undeniable and undisputed, and because judgment is appropriate under the law, the court should grant defendant's Motion to Amend as well as his Cross-Motions for Summary Judgment as to both plaintiff's claims and defendant's counterclaims.

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. On the other hand, the factual record as to Defendant's cross-motion for summary judgment are established beyond dispute. Accordingly, the court must deny plaintiff's motion and grant defendant's cross-motion for summary judgment.

Plaintiff Is Not Entitled to Summary Judgment for Any Alleged Breach of Contract by Defendant, but Defendant Is Entitled to Dismissal of the Claim

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 halfheartedly 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. On the other hand, defendant's cross-motion for summary judgment and dismissal of this claim are established by the record and must be granted.

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. *See 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. There is no genuine issue regarding defendant's Cross-Motion for Summary Judgment on this point, and plaintiff's claim for breach of contract must be dismissed. Further, because

the record establishes beyond dispute that plaintiff is seeking in this collection suit an interest rate to which it has no right, defendant's Cross-Motion for Summary Judgment under the FDCPA must be granted, and the court must rule that plaintiff has violated 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. On the contrary, since the incompetent evidence provided does not demonstrate any credit transactions even allegedly entered by defendant, and since plaintiff has no evidence in support of its claims that defendant breached any contract with it or that it was damaged, and since defendant has denied any such credit transactions, the court must grant defendant's cross-motion for summary judgment. Plaintiff cannot offer any competent evidence to contradict defendant, and the facts demonstrate that there is no triable issue: it is uncontroverted that defendant did not enter into any contract with plaintiff, either through a credit card application and agreement or through any use of any credit card, or any other means. Plaintiff's claim for breach of contract is fatally defective and must be dismissed with prejudice, and the court should find that plaintiff violated the Fair Debt Collection Practices Act.

**Plaintiff Is Not Entitled to Summary Judgment Under the Account Stated or Open Account
“Theory,” but the Court Must Grant Defendant's Cross-Motion for Summary Judgment to
Dismiss this Claim**

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. The court must therefore grant defendant's cross-motion for summary judgment and dismiss this claim.

THE COURT MUST GRANT SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIM PURSUANT TO THE FAIR DEBT COLLECTION PRACTICES ACT

Defendant brings his claims under the FDCPA for two violations of the Act by plaintiff in its conduct in this case: its submission of the affidavit of Leslie Liar, and its claim for an interest rate not expressly authorized either by contract or law. As defendant has demonstrated above in argument and in his Statement of Facts, there exist no triable issues of material fact regarding plaintiff's violations of the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692 et seq. (FDCPA). The facts supporting defendant's counterclaim were all made a part of this court's record by plaintiff and accordingly

constitute admissions which cannot be disputed. Applying the law to these uncontested facts demonstrates equally that defendant is entitled to judgment as a matter of law.¹

Plaintiff's Submission of the Affidavit of Leslie Liar Constituted an Unfair Debt Collection Practice

As defendant went to some pains to demonstrate in his Motion to Strike, the affidavit of Leslie Liar was incompetent. Arizona Rule of Civil Procedure 56 sets the standard for affidavits used for summary judgments: “supporting and opposing affidavits 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.” On summary judgment, a witness testifying by affidavit must provide a foundation for personal knowledge and affirmatively demonstrate that the affiant is competent to testify. *Chess v. Pima County*, 126 Ariz. 233, 235, 613 P.2d 1289, 1291 (App. 1980). 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). Leslie Liar's affidavit fulfills none of these requirements.

Instead of complying with the rules regarding personal knowledge, Leslie Liar's affidavit very carefully attempts to deceive the court and this defendant into believing that it complies. Accordingly, Liar testifies that she makes her affidavit “based upon a review of the business records of the Account Assignee and those account records transferred to Account Assignee from [seller], which have become part of and have been integrated into Account Assignee's business records, in the ordinary course of business.” **Affidavit of Leslie Liar, Para. 2** (emphasis added). This averment is plainly attempting to

¹ The only wrinkle in this case is that defendant had not previously filed a counterclaim but is filing a Motion for Leave to Amend his Answer and Add Counterclaims contemporaneously with the filing of this motion. The court should grant defendant that leave for purposes of judicial economy and justice and should for the same reason permit his Cross-Motion for Summary Judgment based on the Amended Answer and Counterclaim. All the facts necessary to establish Plaintiff's violation of the FDCPA are proven indisputably in pleadings already before this court. No amount of discovery could avail plaintiff in this matter, and requiring defendant to plead and prove all the facts already established here in some other court would be an enormous waste of judicial resources and an unfair burden on defendant.

buffalo the court and defendant into believing that records created by some third party are records about which Leslie Liar is competent to testify. In fact, there is no basis for believing that Liar has any personal knowledge of the person who created the records or how it was done, and it is clear that she has none. She also makes no allegation that the records were created at or about the time of the transactions theoretically reported as would be necessary to authenticate the records. She shows no basis for any such knowledge.

Having created a false impression that the documents are all part of plaintiff's business records, Liar testifies repeatedly that the "business records" are "maintained in the ordinary course of business." **See, Liar Affidavit, Para. 3.** Liar repeats the mantra "maintained in the ordinary course of business" in paragraph 4 of her affidavit, where she avers that there are "no known un-credited payments, counterclaims or offsets against the said debt as of the date of the sale." This attempts to reinforce the false characterization of the business records and also seeks to deceive the court and defendant as to any "*uncredited payments.*" Liar testifies that there are no "known" uncredited payments, but since Liar knows nothing about the account or the records, *she is in reality testifying to nothing at all.* Hauled into court and shown a list of 500 uncredited payments, Liar could shrug and say (truthfully, possibly) that "I didn't know about them." And yet the affidavit seeks to create the impression in the courts mind, and with the defendant, that her statement is evidence that there are no uncredited payments—a requirement of plaintiff's prima facie case.

Liar underlines the false conclusion of Paragraph 4 in Paragraph 5 of her affidavit, testifying that "...there is currently due and owing the sum of \$7728.03." Careful examination of the affidavit reveals Liar's incompetence to testify to the sum currently due and owing, and yet this is the supposed evidentiary basis for all of plaintiff's claims against defendant.

The affidavit itself is deceptively phrased, demonstrating that plaintiff and its counsel *knew* that Leslie Liar was incompetent to testify as to the matters she was testifying. This constitutes an unfair debt collection practice because Arizona's Rules of Civil Procedure Rule 11(a), Ariz. R. Civ. P.,

requires attorneys to make reasonable inquiry before signing a pleading to assure, *inter alia*, that the pleading is “well grounded in fact and is warranted by existing law.” This affidavit would not survive scrutiny under Rule 11, and the careful and deceptive phrasing of the testimony constitute an attempt to deceive this court and defendant as to the limitations of the affidavit. That violates the lawyer's obligation to be candid with the court and constitutes yet another violation of the FDCPA

Defendant asks that the court take judicial notice of the careful wording of the affidavit. It is clearly the product of either a lawyer or a sophisticated commercial collector, and the affidavit was carefully crafted to create the false impression in the court's mind and with defendant, that plaintiff's claim has an evidentiary basis that would satisfy Rule 11 of Arizona Rules of Civil Procedure and provide this court a factual basis for a judgment. Such a deception clearly cannot have been accidental but instead reflects a callous and cynical attempt to manipulate the court.

Whether or not the court agrees with this characterization of a method undoubtedly used to bilk potentially thousands of defendants of an untold number of dollars, the FDCPA requires only that a collection method be “deceptive” for liability to attach. “Deceptive” is defined in the FDCPA as “capable of misleading an unsophisticated person” regarding the true nature of the document. This court must find that the affidavit used here by plaintiff was deceptive, and its use in the collection process both by plaintiff and its lawyer on plaintiff's behalf, violated the FDCPA. The clear intent of plaintiff to deceive the court and this defendant should be considered in determining the amount of the statutory penalty appropriate under the law.

Defendant Has Demonstrated that Plaintiff Violated the FDCPA When It Sought an Amount Not Authorized by Contract

Plaintiff seeks by its lawsuit an amount it claims as “interest at the contract rate.” There is no evidence supporting the rate plaintiff ultimately settles on (24.74%) and seeks to add to the judgment by means of its proposed Order. As defendant has shown above, there is no contract proven or even alleged which would justify this rate of interest, and even the affidavit of Leslie Liar fails to mention,

much less support or establish any rate of interest.

Culling through the records, defendant believes he spots the lone hypothetical basis for this interest rate. One of the (unauthenticated) documents that appear to be monthly billing statements contains a section entitled “Rate Information,” and this section purports to show that the interest rate is 24.7%. **See, Exhibit A**, referring to a closing date of 3/31/09, and **Exhibit D**, a true and correct copy of this document which is a part of Exhibit A and identified as a separate exhibit for the convenience of the court. This “statement” is not authenticated, and its appearance and existence, which are unlike all the other supposed statements, are extremely suspicious given the plaintiff’s willingness to deceive the court and this defendant as shown above. Although there is no testimony as to the form or state in which these theoretical records were maintained, defendant states that they *look* to defendant like they were generated by computer.

If that is true, and especially where, as here, the document appears to have been tampered with, and given a deceptive plaintiff as shown by its disingenuous affidavit, this court should apply a heightened scrutiny to supposed business records. The Ninth Circuit, in excluding computer-generated evidence, held that when one retrieves an electronic file, there must be some showing that the computer system ensures the integrity of the original because “digital technology makes it easier to alter the text of the documents that have been scanned into a database, thereby increasing the importance of audit procedures designed to ensure the continuing integrity of the records.” *Am. Express Trav. Rel. Servs v. Vinhee*, 336 B.R. 437, 445 (B.A.P. 9th Cir. 2005). It *almost* goes without saying that the affidavit of Leslie Liar does not, and could not, testify as to any such procedures regarding integrity of records maintained by another business entity of which she has no knowledge. To be clear, however, defendant *does* state that Liar’s affidavit is defective in these matters. Nor does she even testify as to her own company in that regard.

In any event, even if the document—which is the only document in the records which indicates an interest rate of 24.74% (a highly improbable rate) *were* properly authenticated--and even if it *were*

referenced by plaintiff's motion for summary judgment so as to provide a theoretical basis for its claim--and even if it *could be shown* that a contract existed between the parties, none of which has been proven or conceded, the document *still* would not provide a basis for the interest rate claimed. And that is because, *by its own terms*, it does not refer to a rate of interest intended to be applied on a continuing basis to the amount owed according to the statement. Instead, it says in conspicuous print that, "YOUR RATE MAY VARY ACCORDING TO THE TERMS OF YOUR AGREEMENT." (All capital letters in original.) This establishes **first** that the document is not, and does not purport to be, an agreement (yet another argument against plaintiff's Account Stated claim), and second, that the rate may vary according to the terms of some agreement. Whether that means that the rate applied will change over time, as seems likely, or that the rate is some abstract rate different from the rate applying to the person whose statement this theoretically is, *what is abundantly clear is that the rate is not intended to be applied on a permanent basis to the amount supposedly due in the statement*. That rate requires that there be an agreement, and there is none in evidence in this case. Therefore the document, even if all its flaws and deficiencies were forgiven (which they are not), still provides no basis for the interest rate sought by plaintiff.

The claim for interest is, accordingly, completely unfounded, and seeking an amount not explicitly allowed in a debt collection action violates the FDCPA, 15 U.S.C. Section 1692e(2). Therefore the court must award defendant summary judgment as to this issue and find that plaintiff violated the FDCPA.

CONCLUSION

For all the reasons argued and proved, this court must deny plaintiff's motion for summary judgment against defendant in its entirety and must sustain defendant's cross-motion for summary judgment dismissing all of plaintiff's claims and establishing liability under the Fair Debt Collection Practices Act.