SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

MIDLAND FUNDING LLC, Plaintiff/Respondent, vs. ROBERTA BORDEAUX, Defendant/Appellant.	Docket No. A-0850-14-T3 CIVIL ACTION **ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, SPECIAL CIVIL PART, BERGEN COUNTY.** SAT BELOW: **HON. JOSEPH R. ROSA, JR., J.S.C.**

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Midland Funding LLC is one of the largest debt buyers in the United States. It purchases debts for pennies on the dollar that banks and other creditors no longer wish to pursue, and then it seeks to recover the full value of those unpaid debts. Over the past ten years, according to the New Jersey Superior Court's Automated Court Management System, it has been a named party in over 260,000 lawsuits in New Jersey state courts. Most of these lawsuits, like lawsuits filed by other debt buyers around the country, end in default judgments against defendants who never respond to the complaint and are not represented by counsel.

Midland Funding's lawsuit against Roberta Bordeaux on April 25, 2014 has not followed this pattern. Midland Funding filed the action in the Special Civil Part of the Law Division for an amount less than $3,000; making it cognizable in the Small Claims Section. The action sought the alleged unpaid balance on a Dell Preferred Account that Ms. Bordeaux had opened in 2005 to finance purchases of computer equipment from Dell, which Midland Funding claimed had been assigned to it by an entity named WEBBANK (an entity whose name appears in none of the documents in the record related to the account). The account could only be used to purchase Dell products. The last payment on the Dell Preferred Account was made in 2009.

Ms. Bordeaux filed a counterclaim under the Fair Debt Collection Practices Act ("FDCPA"), alleging that Midland Funding was violating that statute by attempting to collect a time-barred debt it had no legal right to collect. After Ms. Bordeaux filed this counterclaim, served discovery requests judgment and filed a motion to strike Midland Funding's answer to counterclaim; Midland Funding apparently decided that the pace and vigor of Ms. Bordeaux's defense of her rights was not to its liking. Although it had initially chosen the forum, it now looked for an exit—and pursued it in a motion to compel arbitration. The sole exhibit it offered in support of that motion was a two-page excerpt of a longer document. First plaintiff's attorney, and then a "legal specialist" certified, without personal knowledge to do so, that this was part of a contract that Ms. Bordeaux supposedly entered into when she obtained her Dell Preferred Account. This excerpt is undated, unsigned, and contains no reference to Ms. Bordeaux or Midland Funding. It does, however, contain an arbitration provision that explicitly excludes from its scope actions brought "in small claims court or an equivalent court." Ms. Bordeaux declared in a sworn statement that she never received any arbitration agreement in connection with her Dell Preferred Account.

Despite the fact that Midland Funding 1) waived its right to arbitration by initiating the action in court, stating in its

complaint and its answer to the counterclaim that no arbitration proceedings were contemplated, and then changing course one month and twelve days before trial for strategic reasons, prejudicing Ms. Bordeaux; 2) presented no competent, admissible evidence that Ms. Bordeaux had received or agreed to the arbitration provision and no competent, admissible evidence that it had the right to enforce that agreement through a valid contract of assignment; and 3) invoked an arbitration provision that specifically exempted actions cognizable in small claims court like the instant case, the trial court nevertheless granted the motion and sent this case to arbitration. That was error.

Nearly two months later, and after it had divested itself of jurisdiction by sending the case to arbitration, the trial court compounded the error by issuing supplemental findings of fact and conclusions of law that touched upon the merits of defendant's FDCPA counterclaim by suggesting that plaintiff's claims were not in fact time-barred. These statements on the merits (of a case that was now supposedly to be decided by an arbitrator) were both incorrect as a matter of settled New Jersey law and in the style of an advisory opinion because no motion was before the court at the time. This Court should reverse the order compelling arbitration and vacate the supplemental findings of fact and conclusions of law so that the

parties may resume the litigation on a clean record in the judicial forum that Midland Funding first chose.

PROCEDURAL HISTORY

On April 25, 2014, plaintiff, Midland Funding LLC ("plaintiff" or "Midland Funding"), filed an action cognizable in the Small Claims Section in the Special Civil Part against defendant, Roberta Bordeaux ("defendant" or "Ms. Bordeaux"), demanding $1018.04 to collect on a defaulted Dell Preferred Account; wherein plaintiff's counsel certified that "the matter in controversy is not the subject of any other . . . arbitration proceeding, now or contemplated . . . ." (Da2; 3T3-8 to 13).[1] Defendant filed an answer and counterclaim alleging that plaintiff violated the Fair Debt Collection Practices Act by suing upon a debt which was time-barred by the four-year statute of limitations of N.J.S.A. 12A:2-725. (Da3-Da9; 3T3-17 to 19). Plaintiff filed an answer to defendant's counterclaim on July 1, 2014. (Da10-Da11). Plaintiff did not plead arbitration in its answer to counterclaim and plaintiff's counsel again certified that "[n]o other . . . arbitration proceeding is contemplated. (Da10-Da11).

[1] The transcripts are designated as follows:
"1T" refers to the transcript of August 22, 2014 (motion hearing);
"2T" refers to the transcript of September 19, 2014 (motion hearing); and
"3T" refers to the transcript of November 5, 2014 (Supplemental Findings of Fact and Conclusions of Law).

On July 22, 2014, plaintiff filed a motion to compel arbitration and to stay proceedings pending arbitration. (Da12-Da23; 3T3-25 to 3T4-3). Defendant filed a timely opposition. (Da24-Da27; 3T4-4 to 11). Oral argument was requested by defendant and thereafter scheduled for August 22, 2014. (1T).

On August 22, 2014, the parties appeared before the Hon. Joseph R. Rosa, Jr., J.S.C. for argument on plaintiff's motion to compel arbitration and defendant's motion to strike answer to counterclaim. (1T6-7 to 10; Da18). At oral argument, defendant objected and argued that plaintiff's counsel cannot certify as to the existence and the authenticity of the alleged arbitration agreement because plaintiff's counsel lacked personal knowledge. (1T3-14 to 1T4-6; Da14-Da15). Thus, Judge Rosa adjourned the motion hearing and instructed plaintiff to submit a supplemental certification in support of plaintiff's motion to compel arbitration. (1T3-14 to 1T4-6; 1T5-12 to 17; 1T6-3 to 20).

On September 10, 2014, plaintiff submitted a certification of Ashley Lashinski in support of plaintiff's motion to compel arbitration. (Da60-Da62). In response, defendant filed a supplemental certification of Roberta Bordeaux on September 15, 2014. (Da171-Da172).

On September 19, 2014, the parties appeared for the adjourned motion hearing and Judge Rosa granted plaintiff's motion to compel arbitration and denied all other outstanding

motions[2] as moot. (Da173; Da174; 2T3-13 to 2T4-6; 3T7-1 to 6; 3T7-19 to 3T8-3).

Ms. Bordeaux filed a Notice of Appeal on October 15, 2014 which appealed from the September 19, 2014 order compelling arbitration. (Da173; Da176-Da182; 3T3-25 to 3T4-3; 3T7-1 to 6; 3T8-1 to 3).

On November 5, 2014, Judge Rosa made supplemental findings of fact and conclusions of law (3T). These findings not only addressed the arbitration issue but also contained findings of fact and conclusions of law regarding the underlying merits of the case, i.e., whether plaintiff's complaint, seeking to collect the unpaid price of computer goods, filed more than four years after default, was time-barred by Article 2 of the Uniform Commercial Code; and whether plaintiff Midland Funding LLC, a debt collector, violated the FDCPA by filing a complaint against Ms. Bordeaux in an effort to enforce a time-barred and unenforceable claim. (3T3-8 to 13; 3T4-20 to 3T5-17; 3T7-8 to 18). Thus, on December 9, 2014, defendant amended her Case Information Statement to include the proposed issue of whether the phrase "breach of any contract for sale" in N.J.S.A. 12A:2-725 includes the sale of computer goods on credit via a computer

[2] Other motions were: defendant's motion to strike plaintiff's answer to counterclaim (1T6-7 to 10; Da18); defendant's motion to compel discovery (2T4-5 to 6; Da49); and defendant's motion for summary judgment (Da28-Da59; Da63-Da170; Da174-Da175; 2T4-5).

store charge account; and if the computer store charge account is a *contract for sale*, whether plaintiff sued after the four-year statute of limitations had expired. (Da185-Da191).

STATEMENT OF FACTS

Since 2005, Ms. Bordeaux purchased various computer goods from Dell, Inc., including a printer, printer ink/cartridges, paper, a desktop computer, a keyboard and mouse, a laptop computer, a wireless router and a widescreen monitor for personal, family and household purposes. (Da31; Da63-Da153; 3T4-20 to 25). To help pay for the computer goods, Ms. Bordeaux obtained credit from Dell, called a Dell Preferred Account. (Da31; Da63-Da153). The Dell Preferred Account was an account where Ms. Bordeaux could buy computer goods by deferred payment from Dell. (Da31-Da32; Da63-Da64; Da67-Da151). She received monthly statements for the Dell Preferred Account starting with the statement dated June 7, 2005. (Da71-Da151). She was given a Dell Preferred Account number (6879 4501 2903 5413 619) but there was no "credit card" or "store card." (Da67). She did not receive a card with a magnetic strip that can be "swiped" at a credit card processing machine or at an automated teller machine; she did not receive a Visa, MasterCard, American Express or Discover card.[3] (Da31-Da32; Da63-Da64; Da67-Da153).

[3] The Dell Preferred Account has nineteen digits, unlike Visa, MasterCard or Discover (which have sixteen digits in the account

The Dell Preferred Account could be used only to buy computer goods from Dell; it could not be used to obtain loans or cash advances, nor pay for services such as air travel, nor could it be used anywhere else in the world besides Dell. (Da31-Da32; Da63-Da153). Thus, the sole purpose of the Dell Preferred Account was to buy computer goods from Dell. (Da31-Da32; Da63-Da153).

The last payment made on this Dell Preferred Account was in 2009. (Da32; Da65; Da153). Plaintiff admits that four years have passed since defendant's last transaction, payment, purchase or use of the Dell Preferred Account. (Da55; Da155-Da162).

Midland Funding, a "debt collector" (Da55; Da155-Da170) subject to obey the FDCPA, allegedly purchased this defaulted Dell Preferred Account and has sued Ms. Bordeaux in an attempt to collect on the Dell Preferred Account. (Da2; 3T3-8 to 13).

After Ms. Bordeaux answered, counterclaimed under the FDCPA for filing a time-barred complaint, propounded discovery to plaintiff, and filed a motion to strike plaintiff's answers to the counterclaim, plaintiff filed a motion to compel arbitration relying solely on the deficient certification of plaintiff's counsel attaching the incomplete, undated and unsigned alleged arbitration agreement. (Da12-Da23; 3T3-25 to 3T4-3). Since

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numbers) or American Express (which have fifteen digits). (Da67).

plaintiff's counsel's certification lacked personal knowledge, rendering his statements inadmissible (1T3-14 to 1T4-6; 1T5-12 to 17; 1T6-3 to 20), plaintiff submitted a supplemental certification of Ashley Lashinski, which did not contain the verification required in certifications in lieu of oath.[4] (Da60-Da62). Ms. Lashinski stated she was a "Legal Specialist" of a nonparty Midland Credit Management, Inc. and that the attached incomplete, undated and unsigned document was the arbitration agreement to which Ms. Bordeaux and Dell had agreed. (Da60-Da62). Ms. Lashinski did not state how the agreement was made, when the agreement was made, whether notice was given to Ms. Bordeaux, whether there were any amendments to the agreement, how the rights under the agreement were assigned to Midland Funding, or whether Midland Funding was also assigned the right to enforce the arbitration agreement; she simply stated that the attached excerpt was the applicable agreement and that plaintiff had a right to enforce it. (Da60). There was also no document evidencing any assignments between Dell and subsequent assignees to Midland Funding, nor was there any document establishing that Midland Funding owned the Dell Preferred Account at issue. (Da60-Da62).

[4] Ms. Lashinski's certification fails to state "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment" as required by R. 1:4-4(b).

Ms. Bordeaux certified that she never received an arbitration agreement or any document containing the terms and conditions of the account. (Da171). She was never provided with the arbitration agreement, she was never aware of the arbitration agreement and she never agreed to an arbitration agreement. (Da171-Da172).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF, MIDLAND FUNDING LLC, DID NOT WAIVE ARBITRATION WHEN IT VOLUNTARILY CHOSE TO SUE DEFENDANT IN STATE COURT, RATHER THAN PURSUING ARBITRATION.

"An arbitration agreement is a contract, and is subject, in general, to the legal rules governing construction of contracts." McKeeby v. Arthur, 7 N.J. 174, 181 (1951) (citation omitted); see also Atalese v. U.S. Legal Servs. Group, 219 N.J. 430, 441 (2014) (arbitration agreements are construed under normal contract principles). As such, parties may waive their right to arbitrate based on "the same principles govern[ing] . . . waiver of any other right." Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276 (2013). "Waiver is a voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003). Waiver need not be stated expressly but may be implied, "provided the circumstances clearly show that the party

knew of the right and then abandoned it, either by design or indifference." Ibid.

The paradigmatic way for a party to imply, through a clear circumstantial showing, that it is abandoning any right it may have had to arbitrate a claim is by bringing that claim in court instead. As the New Jersey Supreme Court explained:

> It is generally considered that the bringing of an action at law is a revocation of an agreement to arbitrate, and although our former Supreme Court, in Knaus v. Jenkins, supra, held that a suit at law by one of the parties was not a revocation, we are of the opinion that the bringing of action by both parties on the subject matter of the agreement manifests a mutual change of mind and does accomplish a revocation. When all parties to an agreement to arbitrate elect to prosecute their respective claims by actions at law, and institute and carry forward the course thus elected, the logical, indeed the necessary, result of that course is an abandonment of arbitration and a revocation of the agreement to pursue that form of adjudication.
>
> [McKeeby v. Arthur, supra, 7 N.J. at 182.]

This Court has previously instructed that a showing of waiver must be supported by "clear and convincing evidence that the party asserting" arbitration first "chose to seek relief in a different forum." Spaeth v. Srinivasan, 403 N.J. Super. 508, 514 (App. Div. 2008). Filing a complaint in state court to collect an alleged debt, where the complaint says nothing about an applicable arbitration agreement, (Da1-Da2), is clear and

convincing evidence that Midland Funding chose a different, judicial, forum before changing its mind and seeking to arbitrate this dispute.[5]

The distinction between the party who first chose the judicial forum and the party who may simply be participating in the judicial process to protect its rights is one that this Court has found significant in ruling on questions of waiver in past cases. Compare Framan Mech., Inc. v. Lakeland Reg'l High Sch. Bd. Of Educ., No. A-4062-04, 2005 WL 2877923, 2005 N.J. Super. Unpub. LEXIS 354 (App. Div. Nov. 3, 2005) (finding waiver where plaintiff did not mention arbitration in its complaint, which "sought substantive resolution of its claims"), with Lucier v. Williams, 366 N.J. Super. 485, 500 (App. Div. 2004) (finding no waiver where "defendants answered the complaint against them to prevent default judgment" which was "an acceptable effort to preserve the status quo pending arbitration.").[6]

[5] Moreover, plaintiff's answer to counterclaim does not plead arbitration either. (Da10-Da11).

[6] Other courts have ascribed similar significance to this distinction. See, e.g., La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 626 F.3d 156, 160-61 (2d Cir. 2010) ("If [the plaintiff] had sufficient information to hail [the defendant] into federal court, it should also have been aware that it could arbitrate its claims against" that defendant); Gold Coast Mall, Inc. v. Larmar Corp., 468 A.2d 91, 113-114 (Md. 1983) ("A party asserting a claim who sues instead of seeking arbitration is in essence refusing to arbitrate and is itself in default of the arbitration agreement."); Jetts

But Midland Funding here did more than simply file a complaint that made no reference to arbitration. It stated in its complaint that "the matter in controversy is not the subject of any . . . arbitration proceeding, now or contemplated (Da2); it filed an answer to Ms. Bordeaux's counterclaim failing to plead arbitration while affirmatively stating:

> Pursuant to R. 4:5-1, it is hereby stated that the matter in controversy is not the subject of any other action pending in any other Court or of a pending arbitration proceeding. **No other action or arbitration proceeding is contemplated.**
>
> [(Da11) (emphasis added).]

Other courts confronted with identical litigation conduct have found it to constitute a double waiver of the right to arbitrate. In Finish Line, Inc. v. Patrone, an employer brought suit in municipal court in Ohio for money it claimed a former employee owed on a corporate credit card issued to her during her employment. 7th Dist. No. 12 MA 92, 2013-Ohio-5527, 2013 WL 6672416, 2013 Ohio App. LEXIS 5768 (Ct. App. Dec. 13, 2013). The

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Recycling, Inc. v. Watts, 71 S.W.3d 224, 229 (Mo. Ct. App. 2002) ("There is . . . no question that [the plaintiff] acted inconsistently with its right to arbitrate, given that it first initiated suit for breach of contract . . . in Jackson County, Missouri."); Mills v. Jaguar-Cleveland Motors, Inc., 430 N.E.2d 965, 967 (Ohio Ct. App. 1980) ("[W]hen the plaintiff in the present case filed his complaint in United States District Court, he waived arbitration."); Otis Hous. Ass'n v. Ha, 201 P.3d 309, 312 (Wash. 2009) ("Simply put, we hold that a party waives a right to arbitrate if it elects to litigate instead of arbitrate.").

employer's complaint made no reference to an arbitration agreement. Id. at *2. The employee filed an answer along with a counterclaim alleging gender and pregnancy discrimination. Ibid. The employer responded to this counterclaim with fourteen affirmative defenses, none of which mentioned arbitration. Ibid. More than four months later, the employer moved to compel arbitration and stay the court proceedings based on an arbitration provision the employee purportedly agreed to as part of her employment. Id. at *1.

On these facts, the Ohio Court of Appeals ruled that "Appellant not only waived arbitration by filing the original complaint against Appellee, but waived it a second time when it filed a response to Appellee's counterclaim" that said nothing about arbitration. Id. at *2. Here, the case for waiver is even stronger than it was in Patrone because Midland Funding affirmatively represented twice, once in its complaint (Da2) and again in its answer to defendant's counterclaim, that "[n]o . . . arbitration proceeding is contemplated." (Da11).

However, no single action on plaintiff's part—neither its filing of the complaint in state court stating that arbitration is not contemplated nor the omission of arbitration from its answer to the counterclaim—can be viewed in isolation to determine whether or not it has waived any right it might have

had to arbitrate its dispute with Ms. Bordeaux. Instead, the New Jersey Supreme Court has explained:

> Any assessment of whether a party to an arbitration agreement has waived that remedy must focus on the totality of the circumstances. That assessment is, by necessity, a fact-sensitive analysis. In deciding whether a party to an arbitration agreement waived its right to arbitrate, we concentrate on the party's litigation conduct to determine if it is consistent with its reserved right to arbitrate the dispute. Among other factors, courts should evaluate: (1) the delay in making the arbitration request; (2) the filing of any motions, particularly dispositive motions, and their outcomes; (3) whether the delay in seeking arbitration was part of the party's litigation strategy; (4) the extent of discovery conducted; (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; (6) the proximity of the date on which the party sought arbitration to the date of trial; and (7) the resulting prejudice suffered by the other party, if any. No one factor is dispositive.
>
> [Cole v. Jersey City Med. Ctr., supra, 215 N.J. at 280-281.]

With respect to factors 1 (length of delay), 4 (extent of discovery conducted), 6 (proximity to trial) and 7 (prejudice to the non-moving party), it is of paramount significance that Midland Funding brought its action in the Special Civil Part of the Law Division, and Ms. Bordeaux did not seek to transfer the action when she filed her counterclaim. The Special Civil Part

follows an accelerated schedule under which many of the time periods specified under the New Jersey Court Rules for actions pending in other trial courts are reduced or eliminated altogether. See, e.g., R. 6:3-1(2) (eliminating sixty-day consensual extension for responsive pleading provided by R. 4:6-1(c)); R. 6:3-1(3) (reducing the ninety-day periods set in R. 4:6-3 for defenses raised by motion, in R. 4:7-5(c) for cross claims, and in R. 4:8-1(a) for third party complaints, to thirty days each); R. 6:3-1(4) (reducing the forty-five-day time period set in R. 4:8-1(b) for amending a complaint involving a third party defendant to thirty days); R. 6:4-3(a) (reducing the forty-day and sixty-day time periods set in R. 4:17-2 and R. 4:17-4 for serving and responding to interrogatories, respectively, to thirty days). Indeed, pursuant to R. 6:4-5, all discovery proceedings regarding a defendant in special Civil Part actions must be completed within ninety days of that defendant having served its answer, unless the court orders an extension upon noticed motion and for good cause shown.

In this case, Ms. Bordeaux served her answer and counterclaim on plaintiff's counsel on June 5, 2014. (Da3-Da9). Under the accelerated schedule of the Special Civil Part, then, the limited discovery period was already well under way and in fact more than half over when Midland Funding filed its motion to compel arbitration on July 22, 2014. (Da12-Da13). Moreover,

despite the motion practice on the arbitration issue, the case was set for a jury trial on September 3, 2014; just one month and twelve days after plaintiff filed its motion to compel arbitration. (Da29)

This case is therefore analogous to Farese v. McGary, where this Court found that the plaintiff landlord waived its right to arbitrate when it filed a complaint alleging a claim for damages to the property and then answered the defendant's counterclaim without invoking arbitration as a defense, only amending its answer to add the arbitration issue nine months later and two weeks before trial. 237 N.J. Super. 385, 394 (App. Div. 1989). Although the time periods are somewhat shorter in this case than in Farese, the entire lifespan of the litigation was correspondingly shorter in this Special Civil Part action than in the Farese case, which was brought in the Law Division. The key facts are the same in both cases, however: the plaintiff filed the action in court, responded to a counterclaim without including arbitration as a defense, and then interposed an alleged arbitration agreement after discovery had been conducted (Da34-Da55) and when trial preparations were well under way. This supports a finding of waiver under the first, fourth, sixth and seventh factors identified in the Cole decision.

Similarly, the second Cole factor regarding the extent of motion practice also favors a finding of waiver here. Although

it is true that Midland Funding did not file any motions other than its motion to compel arbitration, defendant filed several motions including a motion to strike plaintiff's answer, (1T6-7 to 10; Da18); a motion to compel discovery responses, (2T4-5 to 6; Da49); and a motion for summary judgment. (Da28-Da59; Da63-Da170; Da174-Da175; 2T4-5). Ms. Bordeaux's situation is thus very different from that of the plaintiff in Angrisani v. Financial Technology Ventures, L.P., who was found not to be prejudiced by the defendants' delay in moving to compel arbitration because "defendants' motion to strike plaintiff's jury demand specifically indicated that defendants would be moving to compel arbitration and, except for opposing defendants' motion to strike his jury demand, plaintiff did not actively litigate this case during the four-month interval between the filing of his complaint and the filing of defendants' motion to compel arbitration." 402 N.J. Super. 138, 150-51 (App. Div. 2008).

Here, by contrast, Midland Funding did not provide notice in its answer to defendant's counterclaim that it intended to move for arbitration—rather, it stated the precise opposite in both its complaint and its answer to counterclaim—and Ms. Bordeaux actively litigated the case under the compressed Special Civil Part schedule both before and after Midland Funding made its motion to compel arbitration. Indeed, failing

to actively litigate the case, with a trial date set for early September, would have been antithetical to Ms. Bordeaux's interests in the event that plaintiff's motion to compel arbitration had been denied. The consequent expenditure of time and resources is a type of prejudice that the federal Third Circuit Court of Appeals has recognized as giving rise to a finding of waiver, and it is the type of prejudice that defendant here has suffered. See Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 223-25 (3d Cir. 2007) (party opposing arbitration need not show that its legal position has been substantively affected by the waiving party's conduct, as the time and expense associated with the continued litigation is sufficient to establish prejudice).

As to the fifth Cole factor of whether notice has been given in the pleadings of the intent to arbitrate, that clearly did not occur here. (Da2; Da10-11). Further, the case of Spaeth v. Srinivasan, where this Court reversed a finding of waiver despite the defendant not pleading arbitration as a defense in her answer, is distinguishable on several fronts. First, the Court found it significant that the defendant in that case was proceeding pro se at the trial court, 403 N.J. Super. at 512; and specifically held that "given defendant's uncounselled status, we assume the relatively short delay in asserting her right to arbitration was more inadvertent than deliberate, more

the result of unfamiliarity with court procedure than planned strategy." Id. at 516. Here, Midland Funding, a repeat litigant in the New Jersey courts who at all times in this action was represented by counsel, should not be afforded the same lenient assumptions. Moreover, this Court noted:

> Unlike Farese, defendant here-the party who is asserting the right to arbitrate-did not initiate the subject legal action or choose the judicial forum selected by her adversary. Instead, she simply answered a complaint filed against her in the Law Division, and while she asserted a counterclaim to which plaintiff never responded and on which default had been rendered, defendant's participation remained more passive than active, more reluctant than assertive.
>
> [Ibid.]

Midland Funding cannot, in any imaginable sense, be described as a "reluctant" or "passive" participant in New Jersey state court proceedings. In addition to filing the complaint against Ms. Bordeaux on April 25, 2014, (Da1-Da2), it *filed* 507 other civil actions in New Jersey state courts that same day, 49 of which were filed in Bergen County.[7] (Comparable

[7] These statistics were derived by conducting a search of the New Jersey Superior Court Automated Case Management System ("ACMS") on December 20, 2014. The Court may take judicial notice of these figures from ACMS as state court records under N.J.R.E. 201(b)(4), or under N.J.R.E. 201(b)(3) as "specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned." See also N.J.R.E. 202(b) (permitting judicial notice on appeal).

figures for longer time periods, derived from LexisNexis® searches, are estimated to be: for the one-year period from April 25, 2013 to April 25, 2014, 30,265 actions statewide and 2,650 in Bergen County; and since June 1, 2004, 261,398 actions statewide and 22,012 in Bergen County.). Although it is possible that Midland Funding was the defendant in some of the estimated 261,398 actions, the plausible inference from its status as a debt purchaser (Da163) is that the vast majority of these cases were debt collection actions that Midland Funding filed in state court. Accordingly, Midland Funding is a far more active litigant than even the plaintiff in Farese, and the logic applied by this court in Spaeth should not apply here.

Finally, turning to the third Cole factor of whether the delay in seeking arbitration was part of the party's litigation strategy, Midland Funding's broader course of litigation in New Jersey courts must be considered in evaluating this factor as well. Notably, of the fifty actions filed by Midland Funding in Bergen County on April 25, 2014, according to ACMS, five cases were dismissed by the clerk of the court per R. 1:13-7(d) because the summons and complaint remained unserved.[8] Out of the remaining forty-five cases, forty-two resulted in defaults (93%); two defendants filed answers pro se in their respective

[8] See R. 6:2-3(d), for a detailed description of the Service by Mail Program.

cases (4%); and one (Ms. Bordeaux) retained an attorney (2%). We suspect that further investigation of Midland Funding's collection suits in all New Jersey counties will illustrate similarly high default rates, and the rare represented consumer.

Studies of collection actions brought by the debt buyer industry as a whole provide larger samples of the same trend, and suggest the strategic considerations that may have informed Midland Funding's actions here. The first of these studies, conducted in 2010 in New York City, sampled 365 cases, of which 336 had reached a final judgment. Peter A. Holland, Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers, 26 Loy. Consumer L. Rev. 179, 200 (2014). The New York study found that 94% of the cases resulted in a judgment for the debt buyer, with 81% of the cases resulting in a default judgment. Ibid. Moreover, not one of the defendants in those cases was represented by an attorney, and not a single one of the cases went to trial. Ibid. A 2012 study of 645 cases filed by debt buyers in Indiana found the default judgment rate to be 73%. Id. at 201-202.

A larger study in Maryland surveyed a random sample of 400 cases filed in that state's district, or small claims, courts in 2009 and 2010 by the eleven debt buyers with the highest volume of cases, including Midland Funding, for a total of 4,400 cases. Id. at 203. Of the sample of 4,400 cases, 2,947 were served and

reached a final outcome. Id. at 210. Of these 2,947 cases, 2,498 defendants, or 85%, did not file a response to the complaint; 397, or 13%, filed a pro se response; and 52, or 2%, had a lawyer who entered an appearance. Ibid. For the 85% of cases where the defendant filed no response, debt buyers obtained a judgment by affidavit, consent, default, or trial 73% of the time, and recovered 82% of the amount sought in the complaints. Ibid. But in the 2% of cases where the defendant was represented by counsel, the debt buyer obtained an affidavit, consent or default judgment only 15% of the time, and recovered only 21% of the principal amount sought in the complaints. Id. at 210-11.

Assuming that Midland Funding's experience in New Jersey is representative of these larger trends, and we have no reason to doubt that it would be, its efforts to obtain judgments on the collection actions it brings in state court are seldom contested, let alone met with the sort of resistance that Ms. Bordeaux has shown in this case. Indeed, out of the fifty cases filed by Midland Funding in Bergen County on April 25, 2014, only one defendant (Ms. Bordeaux) retained an attorney to represent her. Once plaintiff found itself confronted with the rare adversary who was not only represented by counsel but was willing to hold Midland accountable for illegal and improper actions through a counterclaim seeking damages and attorney's fees, litigating this particular claim in state court may have

stopped looking like such a good bet. Although only Midland and its counsel know their motivations, this would certainly explain the 180-degree change of course and demand for arbitration after explicitly stating in both the complaint and answer to counterclaim that no arbitration proceeding was anticipated.

But "[a]rbitration may not be used as a strategy to manipulate the legal process." Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 775 (D.C. Cir. 1987); see also La. Stadium & Exposition Dist., 626 F.3d at 161 ("a litigant is not entitled to use arbitration as a means of aborting a suit that did not go as planned in the district court."); Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 391 (7th Cir. 1995) (a party may not delay in invoking arbitration to first "see how the case was going in federal district court" in order to "play heads I win, tails you lose."). Or as the New York Court of Appeals put it: "The courtroom may not be used as a vestibule to the arbitration hall so as to allow a party to create his own structure combining litigation and arbitration." Sherrill v. Grayco Builders, Inc., 475 N.E.2d 772, 777 (1985) (internal quotations omitted). Midland Funding's actions in this case smack of just such procedural gamesmanship, and they should not be tolerated.

Perhaps responding to these equitable considerations as well as the legal principles of waiver, courts both within and

outside New Jersey have refused to allow corporations to bring collection actions in court and then move the proceedings to arbitration when the defendant filed a counterclaim or related action against them. See, e.g., Levonas v. Regency Heritage Nursing & Rehab. Ctr., L.L.C., No. A-4995-11, 2013 WL 4554509, 2013 N.J. Super. Unpub. LEXIS 2155 (App. Div. Aug. 29, 2013) (nursing home that filed collection action against former resident's estate for allegedly unpaid bills waived right to arbitrate subsequent wrongful death action brought by estate); see also Liberty Credit Servs. v. Yonker, 11th Dist. No. 2012-P-0096, 2013-Ohio-3976, 2013 WL 5221219, at *4-6, 2013 Ohio App. LEXIS 4158, *13-15 (Ct. App. Sept. 16, 2013) (holding that debt buyer who filed collection action in federal court, did not assert arbitration as an affirmative defense to the consumer's counterclaim, and litigated in both state and federal court before moving to compel arbitration waived its right to do so, characterizing its conduct as "attempts at forum shopping"); Checksmart v. Morgan, 8th Dist. No. 80856, 2003-Ohio-163, 2003 WL 125130, 2003 Ohio App. LEXIS 111, at *10 (Ct. App. 2003) (instituting a previous lawsuit to recover on a dishonored check waived defendant's right to arbitrate counterclaim brought against it under the Payday Loan Act); Kirk v. Credit Acceptance Corp., 829 N.W.2d 522, 532-33 (Wis. Ct. App. 2013) (by filing an action for deficiency judgment against plaintiff, defendant had

waived its right to arbitrate the plaintiff's claims against it brought nine months later under the Wisconsin Consumer Act).

Just like the plaintiffs in Levonas, Yonker, Morgan and Kirk, Midland Funding should not be permitted to bring a collection action in court and then run to another forum now that Ms. Bordeaux exercised her legal rights and litigated the case vigorously rather than allowing a judgment to be entered against her. The totality of the circumstances under Cole reveal a party whose litigation conduct, both in this case and the tens of thousands of cases it files every year in this state, is inconsistent with any right to arbitrate. Midland Funding chose to file this case in court, Ms. Bordeaux has been prejudiced by that choice, and this court should find that arbitration has been waived.

POINT II

> THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF, MIDLAND FUNDING LLC, PROVED THAT DEFENDANT, ROBERTA BORDEAUX, AGREED TO A PARTICULAR ARBITRATION AGREEMENT, WHERE THE PROPONENT HAD NO PERSONAL KNOWLEDGE OF THE DOCUMENT SHE ATTEMPTED TO INTRODUCE; THE PROPONENT WAS AN EMPLOYEE OF A DIFFERENT COMPANY, NOT THE COMPANY WHICH DRAFTED THE DOCUMENT; THE DOCUMENT WAS UNRELIABLE BECAUSE IT WAS UNDATED, UNSIGNED, UNTITLED, AND WAS A FRAGMENT OF A LARGER DOCUMENT WHICH WAS NOT PRODUCED; AND THE PROPONENT'S CERTIFICATION HAD NO EVIDENTIARY VALUE SINCE IT FAILED TO INCLUDE THE VERIFICATION LANGUAGE REQUIRED BY R. 1:4-4(b).

The Federal Arbitration Act ("FAA"), which the alleged arbitration agreement introduced by Midland Funding references,

(Da16; Da61), "requires courts to place arbitration agreements on an equal footing with other contracts and enforce them on their terms." Atelese v. U.S. Legal Servs. Group, L.P., 219 N.J. 430, 441 (2014) (internal quotations omitted). This means that arbitration agreements may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2; see also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985, 993 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state law principles that govern the formation of contracts.").

One of the ordinary New Jersey law principles governing the formation of contracts is that to be enforceable, a contract "must be the product of mutual assent." NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div.), certif. granted, 209 N.J. 96 (2011), appeal dismissed per settlement, 213 N.J. 47 (2013). There must be "a meeting of the minds." Id. at 425 (internal quotations omitted). Conversely, parties should not be forced "to arbitrate when they did not agree to do so." Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S. Ct. 1248, 1255, 103 L. Ed. 2d 488, 499 (1989).

Under ordinary principles of New Jersey contract law, the party asserting a contractual right bears the burden of proof. Gionti v. Crown Motor Freight Co., 128 N.J.L. 407, 412 (E. & A. 1942). Thus, as the party seeking to compel arbitration, plaintiff had the burden of showing that a valid, enforceable agreement to arbitrate existed—one that evidences mutual assent between Ms. Bordeaux and the issuer of the Dell Preferred Account. Merrill Lynch v. Cantone Research, Inc., 427 N.J. Super. 45, 59 (App. Div.), certif. denied, 212 N.J. 460 (2012); Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 34, 40 (App. Div. 2010) (applying the Brill summary judgment standard-i.e., the facts and reasonable inferences must be considered in the light most favorable to the non-moving party-since trial court considered matters outside the pleadings when compelling arbitration (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995))); Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 (3d Cir. 1980) ("The district court, when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise"). As a purported assignee, Midland Funding additionally had to show that although not a party to the original agreement, it is capable of enforcing the

agreement against Ms. Bordeaux now. See Triffin v. Quality Urban Hous. Partners, 352 N.J. Super. 538, 543 (App. Div. 2002) (purchaser of dishonored check who sought to recover on that check must prove that assignment was valid). Plaintiff has fallen far short of meeting either of these burdens, and the trial court erred in granting plaintiff's motion in spite of these failures of proof.

The document on which Midland Funding relied in advancing its demand for arbitration was a two-page excerpt of a longer document that refers to Dell Financial Services LLC and CIT Bank. (Da16-Da17; Da61-Da62). It does not refer to either Midland Funding or Ms. Bordeaux. Nor does it refer to WEBBANK, the entity plaintiff listed in its complaint as the original owner/assignor of the debt. (Da2). The fragmentary document introduced by plaintiff is neither signed nor dated. (Da16-Da17; Da61-Da62). And at one of the motion hearings in this case, the trial court judge commented that he would need to "go[] over it with a magnifying glass" in order to read it. (1T6-15 to 20).

To introduce and attempt to authenticate this document, plaintiff first submitted the certification of its attorney, Glenn S. Garbus, in which he stated in conclusory fashion that "[t]he account agreement associated with the account in this complaint contains an arbitration clause that is unambiguous." (Da14). Mr. Garbus gave no indication of how this document came

into his possession or of how he purported to know that it had ever been sent to, let alone received or agreed to by, Ms. Bordeaux. Mr. Garbus's "testimony" offers no foundation for his statements whatsoever; one wonders how he is in a position to be attesting to these "facts" under penalty of perjury. This document has none of the normal indicia of actual evidence.

As a rule of general applicability in all New Jersey courts, affidavits must be "made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify." R. 1:6-6(b). Courts have repeatedly found that attorney certifications like the one submitted by Mr. Garbus here do not provide competent evidence because they are not based on personal knowledge of the factual statements they contain. See, e.g., Higgins v. Thurber, 413 N.J. Super. 1, 21 n.19 (App. Div. 2010) ("Attorney affidavits or certifications that are not based on personal knowledge constitute objectionable hearsay."); Gonzalez v. Ideal Tile Importing Co., 371 N.J. Super. 349, 358 (App. Div. 2004), aff'd, 184 N.J. 415 (2005), cert. denied, 546 U.S. 1092, 126 S. Ct. 1042, 163 L. Ed. 2d 857 (2006) ("Even an attorney's sworn statement will have no bearing on a summary judgment motion when the attorney has no personal knowledge of the facts asserted."); Venner v. Allstate, 306 N.J. Super. 106, 111 (App. Div. 1997) (attorney's certification that fails to comply with R. 1:6-6 "is

hearsay and not based on the affiant's personal knowledge of the facts" and "the facts set forth in the certification should not have been considered by the motion judge"); Cafferata v. Peyser, 251 N.J. Super. 256, 263 (App. Div. 1991) (attorney's certification "is gross hearsay and a clear violation of R. 1:6-6."); Murray v. Allstate Ins. Co., 209 N.J. Super. 163, 169 (App. Div. 1986), appeal dismissed per stipulation, 110 N.J. 293 (1988) (attorney's affidavit is not competent evidence of the client's intentions).

The subsequent certification submitted by Ashley Lashinski fares no better. Ms. Lashinski describes herself as a "legal specialist" for Midland Credit Management, Inc., (Da60), a different (though related) entity from plaintiff. (Da159; Da163-Da170). All Ms. Lashinski says to further authenticate the two-page fragment containing arbitration provisions is that it "is a true and correct copy of the credit agreement provided to plaintiff by its predecessor in interest as the actual agreement applicable to Defendant's account." (Da60). She does not name the "predecessor in interest" from whom plaintiff obtained the document, nor does she state how or when Midland Funding obtained it. More importantly, she says nothing about what she personally knows of the practices of Dell Financial Services, CIT Bank or WEBBANK (assuming that CIT Bank and WEBBANK are two separate entities, something which is not at all clear from

plaintiff's submissions) that would enable her to speak with authority about whether this particular agreement applied to Ms. Bordeaux's Dell Preferred Account, let alone whether it was sent to her and whether she received it.

In addition to these problems of lack of personal knowledge, Ms. Lashinski's certification suffers from a further fatal deficiency: it lacks the verification required in lieu of oath by R. 1:4-4(b), namely, "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment." This Court has held that certifications lacking this verification statement "have no evidentiary value." Pascack Cmty. Bank v. Universal Funding, LLP, 419 N.J. Super. 279, 288 (App. Div. 2011). Thus, the alleged "credit agreement" appended to an unverified statement of no evidentiary value, must be rejected. See New Century Fin. Servs. v. Oughla, 437 N.J. Super. 299, 332 (App. Div. 2014); Celino v. Gen. Accident Ins., 211 N.J. Super. 538, 544 (App. Div. 1986) (documents merely annexed to a brief, unsupported by any affidavits, is improper and goes against "the heart of procedural due process").

Finally, plaintiff has utterly failed to prove how it came to be in possession of the rights to this alleged debt. No document linking plaintiff to this particular account was ever

introduced, nor has plaintiff explained or introduced documents describing the chain of assignment from the original account holder (which may be CIT Bank, as the purported arbitration agreement says, or WEBBANK as the complaint says, or presumably some other entity altogether). Also missing from the record is a document setting forth the scope of the rights assigned to plaintiff along with this debt, which is necessary to determine whether the right to enforce the arbitration agreement is included within any purported assignment. At least some of these questions might have been answered if plaintiff had responded to Ms. Bordeaux's discovery requests, which it largely refused to do, (Da27; Da49), or if it had provided a copy of the contract of assignment, which long-standing New Jersey law requires an assignee to do when the obligor demands it. Cullen v. Woolverton, 63 N.J.L. 644 (E. & A. 1899). However, to date plaintiff has produced no such contract or any other evidence of assignment.

A closer look at the workings of the debt buyer industry suggests why plaintiff may have found it difficult to come forward with competent evidence of an arbitration agreement received by Ms. Bordeaux, or of any other details of her Dell Preferred Account. A federal district court in Michigan outlined some of these systemic evidentiary shortcomings in a recent opinion denying motions to compel arbitration in three of

sixteen consolidated cases brought by consumers as putative class actions under the FDCPA:

> Upon review of the supplemental documents, it is not especially surprising that they fail to fill the gap. It was not the debt buyers who originated the relationship with the cardmember. And when the debt buyer purchased the charged off accounts from Chase, cardmember terms, arbitration agreements and even the prospect of active litigation were not important to the debt buyers. At least that is the story the relevant Purchase Agreements tell. The debt buyers expressly warrant to Chase that their "primary purpose . . . is not to commence an action or proceeding against chardholders." [sic] In fact, the only information the debt buyers really cared about were the dollars and cents of each account: specifically, how much did the cardmember owe at charge off? This and related collection information is all Chase was obligated to provide. If the debt buyer ever wanted additional documentation-including the original cardmember agreement-it would have to ask Chase and possibly pay extra to obtain it. Moreover, Chase would only have to provide such a document if it was "reasonably available," and then only for 3 years post closing, a date that has passed. Chase made no representation or warranty about the cardmember terms, and the debt buyer accepted the accounts "as is" and without any warranty about any such contractual terms. Since the debt buyer did not care about possible arbitration provisions or other cardmember terms at the time they acquired the "Accounts"-a defined term that makes no reference to underlying cardmember terms-it's not surprising the debt buyers are having trouble finding and authenticating such items now.
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> [In re Cognate Cases, Nos. 1:13–CV–1338; 1:14–CV–34; 1:14–CV–234, 2014 WL 2933230, at

> *2, 2014 U.S. Dist. LEXIS 89159, at *6-8 (W.D. Mich. June 30, 2014) (citations omitted).]

And as the federal district court in Nebraska noted in another FDCPA case:

> [D]ebt buyers often receive only a computerized summary of the creditor's records when they purchase a portfolio and typically do not have access to the original credit application with the consumer's signature, the specific contract that applied to the consumer's account, copies of original credit statements, or customer service records that could confirm or clarify a fraud claim or a legitimate consumer dispute.
>
> [Hengeller v. Brumbaugh & Quandahl, P.C., 894 F. Supp. 2d 1180, 1188 (D. Neb. 2012) (internal quotations and alterations omitted) (quoting Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change, a Workshop Report at 22, 31 (Feb. 2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf).]

The poor quality of the records that debt buyers receive may in turn explain, at least in part, the deeply discounted prices at which they are able to purchase the corresponding portfolios of debt. See, e.g., Gonzales v. Arrow Fin. Servs., LLC, 660 F.3d 1055, 1059 n.1 (9th Cir. 2011) ("Most debt buyers acquire the debts for a fraction of the balance, but then attempt to collect the entire debt." (citing a 2007 study that found the average price for purchasing an obsolete debt to be $0.045 per dollar)); Press Release, Office of Minnesota Attorney

General, Attorney General Lori Swanson Charges One of Nation's Largest "Debt Buyers" with Defrauding Minnesota Courts and Citizens by Filing "Robo-signed" Affidavits (March 28, 2011), http://www.ag.state.mn.us/consumer/pressrelease/110328debtbuyers.asp (noting that Midland Funding and "its publicly-traded parent corporation, Encore Capital Group, Inc., have paid more than $1.8 billion to obtain 33 million customer accounts with a face value of about $54.7 billion, or an average cost of about three cents on the dollar, according to Encore's 2010 Form 10-K").

But just because there are understandable real-world business reasons that debt buyers like plaintiff lack evidence to substantiate their legal claims, does not make the lack of evidence any more legally acceptable. To the contrary, the high-volume litigation practice in which plaintiff and other debt buyers are engaged, possessing little evidence and with adversaries who are usually unrepresented and unlikely to fight back, poses serious risks of sloppy lawyering at best and fraud at worst. See Midland Funding LLC v. Brent, 644 F. Supp. 2d 961, 966-69 (N.D. Ohio 2009), modified on reconsideration, No. 3:08 CV 1434, 2009 WL 3086560, 2009 U.S. Dist. LEXIS 87266 (N.D. Ohio Sept. 23, 2009) (recounting that one of ten "specialists" in the department at Midland Credit Management that supports law firms testified to signing between 200 and 400 affidavits per day, and

comparing one such affidavit against deposition testimony to find that it was replete with false statements attesting to personal knowledge the affiant did not actually have); Unifund CCR Partners v. Shah, 946 N.E.2d 885, 893 (Ill. App. 2011) ("The possibility that debtors might be sued by a party who does not have a legal interest in their debt is a real danger"); Randolph v. Crown Asset Mgmt., LLC, 254 F.R.D. 513 (N.D. Ill. 2008) (certifying a class of at least 341 potential plaintiffs in a class action lawsuit against a defendant who attempted to collect debts that it allegedly did not own).

The New York City Civil Court for Richmond County provided a summary of the problem, and what we respectfully consider to be the appropriate judicial response, in an opinion denying a debt buyer's petition to confirm an award it had obtained in arbitration, and discussing other such petitions:

> Despite the absence of objections by most of the defaulting respondents, in the interest of justice, this Court chooses to analyze the prima facie showing of each of the petitioners' applications. As a result of such undertaking, the Court often discovers fatal procedural and substantive defects inherent within the petitions.
>
> The Court is aware of how the market for the sale of debt currently works, where large sums of defaulted debt are purchased, by a small number of firms, for between .04 and .06 cents on the dollar. The incentive therefore, for the firm purchasing the debt, is to herd these cases into arbitration and churn out papers seeking their confirmation as quickly as possible. The entire industry

> is a game of odds, and in the end as long as enough awards are confirmed to make up for the initial sale and costs of operation the purchase is deemed a successful business venture. However, during this process mistakes are made, mistakes that may seriously impact consumers and their credit. The petition at bar is a specimen replete with such defects and the Court takes this opportunity to analyze the filing in detail, in hopes to persuade creditors, not simply to take more care in dotting their "i"s and crossing their "t"s in their filings, but to assure a minimum level of due process to the respondents.
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> [MBNA Am. Bank, N.A. v. Nelson, 13777/06, 2007 N.Y. Slip Op. 51200(U), 2007 WL 1704618, at *2, 2007 N.Y. Misc. LEXIS 4317, at *3-4 (N.Y. Civ. Ct. May 24, 2007).]

The solution suggested by the court in MBNA v. Nelson is fair and obviously right: given that there have been widespread abuses documented in the debt buyer industry by corporations such as Midland Funding, courts should not excuse these corporations from normal evidence rules and the like. Only by requiring them to comply with the normal requirements of proof can outrageous abuses of consumers be minimized.

Nor would requiring plaintiff to submit admissible evidence of the purported arbitration agreement at issue be out of step with the requirements imposed by other courts or subject Midland Funding, as a debt buyer, to a more demanding standard of proof than that applied to other parties seeking to enforce arbitration agreements over the objections of their litigation

adversaries. Just the opposite. A plethora of decisions from federal and state courts throughout the country have rejected attempts to compel arbitration, made by debt buyers and other types of businesses alike, when evidence of mutual assent was lacking—often on far more robust evidentiary submissions than what plaintiff here has offered.[9]

[9] See, e.g., Discover Bank v. Shea, 362 N.J. Super. 200, 209-210 (Law Div. 2001), appeal dismissed per settlement, 362 N.J. Super. 90 (App. Div. 2003) (denying Discover's demand to compel arbitration where "bill stuffer" amendment requiring arbitration of contract of adhesion claims is unconscionable and unenforceable); Specht v. Netscape Comm. Corp., 306 F.3d 17, 23, 27-28 (2d Cir. 2002) (affirming denial of motion to compel arbitration where company failed to prove that the plaintiffs agreed to arbitration); Kulig v. Midland Funding, LLC, No. 13 Civ. 4715 (PKC), 2013 WL 6017444, at *7, 2013 U.S. Dist. LEXIS 161960, at *18 (S.D.N.Y. Nov. 13, 2013) (denying motion to compel arbitration where "Midland has failed to come forward with evidence which, if believed, demonstrates that Ms. Kulig manifested her assent to the terms of the March 22, 2009 Cardmember Agreement, including the arbitration provision."); Poulson v. Trans Union LLC, 406 F. Supp. 2d 744 (E.D. Texas 2005) (refusing to compel arbitration where credit card issuer failed to prove that original contract gave issuer right to make arbitration provision binding by sending notice and requiring opt-out); Owen v. MBPXL Corp., 173 F. Supp. 2d 905, 921-25 (N.D. Iowa 2001) (finding no persuasive evidence that document including arbitration provision was mailed to employee and "absolutely no evidence" that he received it, and denying motion to compel arbitration for lack of proof of mutual assent); Alltel Corp. v. Sumner, 203 S.W.3d 77, 81 (Ark. 2005) (cell phone company could not prove consumers had received welcome packet with arbitration agreement based on affidavit stating that the company's policy was to send packet to all new subscribers but without any evidence confirming that the policy was followed for the particular subscribers who were representatives of the putative class); Yates v. CACV of Colo., LLC, 693 S.E.2d 629, 634-35 (Ga. Ct. App. 2010) ("an undated, unauthenticated photocopy of certain 'additional' terms and conditions" not enough to meet the burden of proving the

Courts have taken a similarly dim view of attempts to compel arbitration based on the sorts of fragmentary and nearly illegible documents that plaintiff here has proffered, (Da16-Da17; Da61-Da62), particularly where those documents are not signed by and do not even reference the other party to the alleged arbitration agreement. See, e.g., Dreyfus v. eTelecare Global Solutions, 349 F. App'x 551, 554 (2d Cir. 2009) (denying employer's motion to compel arbitration and commenting that the employer's "suggestion that the Court simply enforce the two-

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existence of an arbitration agreement); FIA Card Servs., N.A. v. Weaver, 62 So. 3d 709, 719 (La. 2011) ("[T]his Court is constrained by the evidence in the record, and from this evidence we are unable to conclude that Weaver ever consented to resolve his credit card disputes via arbitration."); Chase Bank USA, N.A. v. Leggio, 997 So. 2d 887, 890 (La. Ct. App. 2008) (evidence that defendant used credit card was not sufficient to show, by itself, that defendant was on notice of the arbitration provision when all plaintiff submitted was an undated, unsigned exemplar Cardmember Agreement and "the plaintiff failed to demonstrate that defendant ever received or signed a 'Cardmember Agreement' which actually contained the arbitration clause language at issue."); Commonwealth Fin. Sys. v. Smith, 15 A.3d 492, 499-500 (Pa. Super. Ct. 2011) (documents that debt collection company sought to introduce to prove its right to collect, in proceeding to confirm arbitration award it had obtained, were not admissible because employee who attempted to authenticate them "was not in a position to know" if the Citibank records of the original credit card contract were reliable or trustworthy); Flanary v. Carl Gregory Dodge of Johnson City, LLC, No. E2004-00620-COA-R3-CV, 2005 Tenn. App. LEXIS 319 (Tenn. Ct. App. May 31, 2005) (party seeking to compel arbitration was not entitled to summary judgment, where genuine issue of material fact existed as to whether there was mutual agreement); cf. Hoffman v. Supplements Togo Mgmt., LLC, 419 N.J. Super. 596, 612 (App. Div. 2011), certif. granted, 209 N.J. 231 (2012) (forum selection clause on website only visible on "submerged" portion of page was presumptively unenforceable).

page fragment as though it were the full document runs afoul of basic contract principles") (internal quotations omitted); Cach, LLC v. Viscuso, No. 7034/09, 2009 WL 2920863, 2009 N.Y. Misc. LEXIS 5463 (N.Y. Sup. Ct. Aug. 18, 2009) (insufficient prima facie evidence of agreement to arbitrate where debt buyer submitted an unsigned, undated exemplar credit card agreement, "portions of which are illegible or cut off" and which "lacks specific reference to the respondent, or to any other obligor on the credit card account"); NCO Portfolio Mgmt. Inc. v. Gougisha, 985 So. 2d 731, 736-37 (La. App. 2008) (creditors failed to prove binding agreement to arbitrate where the documents submitted were unsigned, difficult to read and sometimes illegible form agreements, and did not contain names of customers or other evidence "to show a relationship between these alleged debtor/defendants and these creditor/plaintiffs").

Moreover, the proponent of arbitration must satisfy a heightened evidentiary burden where, as here, the other party has specifically denied receiving or being aware of an agreement to arbitrate. See, e.g., Stepp v. NCR Corp., 494 F. Supp. 2d 826, 831-32 (S.D. Ohio 2007) (employer could not meet its burden of proving mutual assent, and mailbox rule that mailing presumes delivery was rebutted, where employee stated that he never received arbitration agreement in the mail); Acher v. Fujitsu Network Commc'ns, Inc., 354 F. Supp. 2d 26, 37 (D. Mass. 2005)

(employer could not meet its burden of proving that agreement to arbitrate was reached where employee signed an affidavit saying he never received any such agreement, and employer had no evidence to contradict that statement, such as an acknowledgment signed by the employee or a sign-in sheet with his name at a meeting where the agreement was distributed). Like the plaintiffs in Stepp and Acher, Ms. Bordeaux has submitted a signed certification in this case stating that she never received an arbitration agreement regarding her Dell Preferred Account, (Da171-Da172), and like the defendants in those cases, Midland Funding has produced no competent evidence to rebut her sworn statement. Midland Funding cannot force Ms. Bordeaux to honor an arbitration agreement she never received, to which she did not agree, and of which she was not even aware before this case began.

Many debt buyers, including Midland Funding in other cases, have sought to navigate the evidentiary challenges it faces here by seeking to have the purportedly applicable contracts, and other documents created by their predecessors in interest, admitted under the business records exception to the hearsay rule, which is codified in New Jersey as N.J.R.E. 803(c)(6) but which exists in similar if not identical form in the Federal Rules of Evidence and the evidentiary rules of other states. However, courts have roundly rejected these efforts, pointing to

the debt buyers' lack of personal knowledge of the business practices of the third parties who created the records. See N.J.R.E. 803(c)(6) (requiring statements contained in business records, to be admissible, to be made "by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it"); see also, e.g., Webb v. Midland Credit Mgmt., Inc., No. 11 C 5111, 2012 WL 2022013, at *5, 2012 U.S. Dist. LEXIS 80006, at *15 (N.D. Ill. May 31, 2012) (affiant who sought to introduce billing statements from credit card issuer and bills of sale assigning rights through several different entities was not knowledgeable about the recordkeeping procedures of the entities whose records he sought to introduce, so the business records exception did not apply); Asset Acceptance v. Lodge, 325 S.W.3d 525, 529 (Mo. App. 2010) (HSBC records transferred to Asset Acceptance were not admissible under the business records exception because Asset employee was not qualified to testify about the records her company did not prepare); Unifund CCR Partners v. Bonfigli, No. S1295-08 CnC, 2010 WL 2259136, 2010 Vt. Super. LEXIS 24, at *10-11 (Vt. Super. Ct. May 5, 2010) (employee of debt buyer who sought to introduce records from Chase, with whom the account originated, "did not explain how he was so familiar with Chase's business practices, whether he had

ever worked at Chase, whether he has ever sat down with Chase to watch how they entered the data, whether he had ever checked the reliability of the entries, and so forth. The court does not find his testimony reliable or credible with regard to Chase's business practices."); Palisades Collection LLC v. Kalal, 781 N.W.2d 503, 510 (Wis. App. 2010) (records inadmissible where collection agency employee's affidavit contained no facts showing that the employee was knowledgeable about how Chase's records were prepared or whether they were prepared in the ordinary course of Chase's business); Martinez v. Midland Credit Mgmt., Inc., 250 S.W.3d 481, 485 (Tex. App. 2008) (account statement not admissible under business records exception, and summary judgment against debtor reversed, because affiant did not identify predecessor in interest or indicate in any way that the affiant had knowledge of the predecessor's recordkeeping policies). The logic of these decisions applies with equal force here.

Finally, courts have required comparably rigorous proof of the rights that debt buyers have purportedly gained through assignment before allowing them to enforce those rights in court, another area where Midland Funding has fallen far below the mark here. See, e.g., Buford v. Palisades Collection, LLC, 552 F. Supp. 2d 800, 810 (N.D. Ill. 2008) (because Palisades had not shown that it acquired through assignment all of the rights

that AT&T had against customers under its terms of service, Palisades could not enforce the class action waiver contained in those terms of service); Cach, LLC v. Askew, 358 S.W.3d 58, 65 (Mo. 2012) (holding that where debt buyer had adduced no competent evidence of the chain of assignment of rights under the contract at issue, it had no standing to pursue the action). Midland Funding has not offered any competent evidence of the chain of assignment or the scope of rights covered by any purported assignment in this case either, and has not even named its predecessors in interest consistently where the complaint references WEBBANK and the purported arbitration agreement references CIT Bank. (Da1-Da2; Da16-Da17; Da61-Da62).

On this record, or lack thereof, plaintiff has failed to demonstrate that there was a meeting of the minds between Ms. Bordeaux and any other entity that would establish a binding agreement to arbitrate under principles of New Jersey contract law. Nor has plaintiff established that it has the right to enforce any such arbitration agreement, assuming it exists. The trial court erred in granting Midland Funding's unsupported motion to compel arbitration, and the decision should be reversed.

POINT III

THE TRIAL COURT ERRED IN SENDING THIS CASE TO ARBITRATION, WHERE THE ALLEGED ARBITRATION CLAUSE DID NOT APPLY TO SUITS IN "SMALL CLAIMS COURT OR THE

EQUIVALENT COURT" CONSIDERING THAT THIS IS A SUIT IN THE SPECIAL CIVIL PART FOR AN AMOUNT NOT EXCEEDING $3,000, A SUIT COGNIZABLE IN SMALL CLAIMS COURT.

In evaluating whether a particular claim is subject to arbitration, courts "consider the contractual terms, the surrounding circumstances, and the purpose of the contract." Hirsch v. Amper Fin. Servs., 215 N.J. 174, 188 (2013) (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)). Assuming that an arbitration agreement exists involving Ms. Bordeaux's Dell Preferred Account and that Midland Funding can enforce it, two assumptions defendant emphatically rejects for the reasons discussed in the previous sections, the court's next task is to "evaluate whether the particular claims at issue fall within the [arbitration] clause's scope." Ibid. "A court must look to the language of the arbitration agreement to establish its boundaries" and "may not rewrite a contract to broaden the scope of arbitration." Hirsch, supra, 215 N.J. at 188 (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001)).

Looking to the language of the arbitration agreement that plaintiff introduced and claimed to be applicable to this dispute, it includes a clause that states: "We agree not to invoke our right to arbitrate any claim that you bring in small claims court or an equivalent court so long as the claim is pending only in that court." (Da26). Midland Funding filed this

action in the Special Civil Part for an amount under $3000, and the action remained pending in that court when Ms. Bordeaux filed her counterclaim and when plaintiff moved to compel arbitration. One type of case cognizable in the Special Civil Part is "small claims actions," which are defined as "all actions in contract and tort . . . when the amount in dispute, including penalties, does not exceed . . . the sum of $3000." R. 6:1-2(a)(2). Accordingly, plaintiff's original collection action and Ms. Bordeaux's counterclaim were both filed "in small claims court or an equivalent court" and were "pending only in that court" within the meaning of plaintiff's arbitration clause, (Da26), and by the terms of the arbitration agreement itself, are outside the scope of arbitrable issues.

The New Jersey Court Rules contemplate that a Special Civil Part action may be cognizable in the Small Claims Section even if, like the action filed by Midland Funding here, they were not formally filed or pending there. For example, Rule 6:4-3(f) specifies that "[a]ny action filed in the Special Civil Part that is cognizable but not pending in the Small Claims Section may proceed with discovery, but each party is limited to serving interrogatories consisting of no more than five questions without parts." Judge Rosa actually invoked this rule at the August 22nd hearing (1T5-5 to 10), pointing out that defendant

would be limited to five interrogatories rather than the forty-five she had propounded.

Because this action was cognizable in the Small Claims Section at all times relevant to this litigation,[10] it falls within the "small claims court or equivalent court" exception to the arbitration agreement that plaintiff submits is binding here. The court may not rewrite the contract to broaden the scope of arbitration, Hirsch, supra, 215 N.J. at 188, and Midland Funding may not pick and choose which portions of the arbitration agreement it follows. Actions like this one that are cognizable in small claims court are not subject to arbitration under the terms of the contract, and the trial court erred for that additional reason in granting plaintiff's motion and sending this case to arbitration.

POINT IV

THE TRIAL COURT ERRED BECAUSE THE PHRASE "BREACH OF ANY CONTRACT FOR SALE" IN N.J.S.A. 12A:2-725 INCLUDES THE SALE OF COMPUTER GOODS ON CREDIT VIA A STORE ACCOUNT, HENCE PLAINTIFF'S COMPLAINT, SEEKING TO COLLECT THE UNPAID PRICE OF COMPUTER GOODS, BUT FILED MORE THAN FOUR YEARS AFTER DEFAULT, WAS TIME-BARRED.

New Jersey's six-year statute of limitations "shall not apply to any action for breach of any contract for sale governed

[10] Ms. Bordeaux stated in her certification that if the court did not consider actions filed in the Special Civil Part for more than $3000, as her FDCPA counterclaim was, to fall within the "small claims court or equivalent court" exception in the arbitration agreement, she would limit her actual and statutory damage recovery on the counterclaim to $3000. (Da172).

by section 12A:2-725[.]" N.J.S.A. 2A:14-1. The Uniform Commercial Code, Article 2, Sales, has a four-year statute of limitation for sales of goods:

> An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> [N.J.S.A. 12A:2-725(1).]

Absent ambiguity, Courts are bound to enforce the plain language of the statute which the Legislature enacted. Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009). Under the plain language "breach of any contract for sale," the sale of computer goods on credit is a "contract for sale." Here Dell sold computer goods to Roberta Bordeaux via a revolving store account (Dell Preferred Account) which could only be used to buy Dell computer goods. (Da31-Da33; Da63-Da153; 3T4-20 to 25).

The Supreme Court of New Jersey has already decided that a department store's revolving credit account involves the sale of goods, and thus is not a loan. Sliger v. R.H. Macy & Co. held that store charge cards are *sales* governed by the time-price doctrine, which applies exclusively to sales of goods on credit. 59 N.J. 465, 469 (1971). Had the Macy's account not been a sale, the usury laws for loans would have applied. A sale on credit "is not a loan or forbearance of money." Id. Thus, the New

Jersey Supreme Court in Sliger teaches that to be a loan, a lender must first give the borrower *money*. Id. In contrast, in a credit sale, the seller first gives the buyer *goods*, and the buyer later repays the price of goods, along with a time-price differential.

Sliger analyzed a "revolving charge account" at a retail department store, where the customer and the store entered into an agreement for future purchases of goods. The Macy's store account, which was held to be a "sale" in Sliger, had the following characteristics:

> If the customer does not wish to pay cash for a particular item he presents his charge card and the sale is recorded for billing purposes subject to the prior agreement. The purchase is recorded on the customer's account and a monthly statement is mailed to him . . . . [T]he customer may pay the unpaid balance of his account in full . . . [in order to] avoid a finance charge[] [or] he may pay installments over a longer period . . . . [There is a] minimum monthly payment . . . . In exercising his choice to pay over the longer period the purchaser agrees to pay a "finance charge" . . . .
>
> [59 N.J. at 467-68.]

The Dell Preferred Account has the same characteristics and terms as the Macy's store account in Sliger. Just as in Sliger:

- Ms. Bordeaux entered into an agreement with Dell for current and future purchases of Dell computer goods from Dell. (Da31-Da32; Da63-Da153; 3T4-20 to 25);

- Ms. Bordeaux was permitted to use the Dell Preferred Account to purchase computer goods from Dell, where such sale would be recorded on Ms. Bordeaux's account. (Da31-Da32; Da63-Da153);
- Ms. Bordeaux received monthly statements entitled "DELL Preferred Account." (Da32; Da63-Da151); and
- Ms. Bordeaux could pay the unpaid balance in full in order to avoid a finance charge, or she could make small payments and be subject to a finance charge according to the terms of her purchase. (Da31-Da32; Da63-Da153).

Since there is no appreciable difference between the Macy's account in Sliger and Ms. Bordeaux's Dell Preferred Account, it is unquestionable that Ms. Bordeaux's Dell Preferred Account is not a loan but a contract for the sale of goods. Contracts for sale of goods are subject to the four-year statute of limitations. N.J.S.A. 12A:2-725.

Ms. Bordeaux's counterclaim is based upon the fact that Midland Funding filed a time-barred suit, an act prohibited by the Fair Debt Collection Practices Act. The trial court's unsupported rationale for holding that the four-year statute of limitations is inapplicable was that:

> Dell Financial Services was the financer of that account, and neither Dell, nor Dell Financial Services, provided the financing; rather, the financing itself was from a third party, CIT Bank.

> There were no goods and -- good purchased from CIT Bank; therefore, the defendant's argument that the four-year statute of limitations under the Uniform Commercial Code Section 2-725 is not applicable. Rather, it's -– New Jersey general six-year contract implementation status -- six year's contract of limitations.
>
> [(3T5-7 to 17).]

Thus, although the trial court found that "the purchaser" opened a Dell Preferred Account to "purchas[e] goods from Dell Computer using this agreement" (3T4-20 to 3T5-6), the trial court held the Dell Preferred Account was not a contract for the sale of goods because "the financing itself was from a third party, CIT Bank." (3T5-7 to 17).

The trial court's reasoning (i.e., a contract for the sale of goods is not a contract for the sale of goods if a third-party finances the purchases) renders the sections of the Uniform Commercial Code, such as Article 2–Sales and Article 9–Secured Transactions, inapplicable to modern day sales of goods. For example, if the trial court's reasoning is followed, Article 9 would never apply to automobile financing financed by a third-party financier. If a buyer goes to a bank (e.g., http://www.capitalone.com/auto-financing/) and applies for an "auto loan," then proceeds to the car dealership to choose and purchase a vehicle, Article 9 would not apply when the trial court's reasoning is followed because the buyer did not buy the

car from the bank. Thus, the requirements of Article 9 would never apply to third-party automobile financiers because the financier never sells the vehicle. This reasoning would entirely gut the purposes of Article 2 and Article 9 of the UCC. This reasoning is also contrary to the scope of Article 2, which applies to "transactions in goods" irrespective of the identity of the financier. N.J.S.A. 12A:2-102.

Further, the trial court's rationale conflicts with binding precedent. The Supreme Court of New Jersey has already decided that an "action for that part of the sales price which remains unpaid" must be brought within the four-year limitation of the UCC statute of limitation. Assocs. Disc. Corp. v. Palmer, 47 N.J. 183, 187 (1966) (Construing Pennsylvania UCC law identical to N.J.S.A. 12A:2-725). The Court held that "the obligation of the buyer to pay the full sale price to the seller[] [is] an obligation which is an essential element of all sales . . . ." Id. Since Palmer shows that the four-year statute applies to "all sales," both cars and computer goods, both single sales and multiple sales – "any contract[s] for sale" are subject to N.J.S.A. 12A:2-725. Palmer was reaffirmed by Ford Motor Credit Co. v. Arce, 348 N.J. Super. 198 (App. Div. 2002), another case like this one, in which the trial court failed to explain why Palmer had not already decided the issue. In Arce, the Appellate Division *rejected* the finance company's argument that a suit

about "[the] failure to make payments on the contract" was somehow not a suit for breach of "any contract for sale." 348 N.J. Super. at 201.

It is important to note that the plaintiffs in Palmer and Arce were not the original sellers of goods, but were companies which financed the sales. Palmer and Arce stand for the principle that financing a sale does not transform a sale into a "loan" or something other than a sale. Palmer and Arce thus compel the conclusion that this suit by Midland Funding as alleged assignee, suing for the unpaid price of computer goods purchased on credit via a Dell Preferred Account, was governed by N.J.S.A. 12A:2-725.

In a recent unreported decision, New Century Fin. Servs. v. McNamara, the Appellate Division held that a Levitz Furniture store card account, which cannot be used anywhere else but at Levitz stores to buy furniture, was a contract for the sale of goods; thus the collection suit was time-barred by the four-year statute of limitations. No. A-2556-12, 2014 WL 1057076, 2014 N.J. Super. Unpub. LEXIS 602, at *3, *11 (App. Div. March 20, 2014).

In another unreported decision, Asset Acceptance LLC v. Scott, the Appellate Division decided that a judgment should be vacated because the consumer had a potentially meritorious defense under N.J.S.A. 12A:2-725. No. A-4021-05, 2007 WL

3145360, 2007 N.J. Super. Unpub. LEXIS 1067 (App. Div. Oct. 30, 2007). Rejecting plaintiff's attorney's assertion that the account was a "credit card" due to the attorney's lack of personal knowledge, the Appellate Division held:

> [T]here was no competent evidence before the judge establishing that the underlying transaction was a credit card debt. The attorney for plaintiff in his Statement of Case said that it was a credit card debt, but the statement was not sworn and the attorney patently has no personal knowledge of the transaction between defendant and WFNNB/Micro Furniture. It is entirely possible that the underlying transaction was a purchase of furniture under an installment sale contract that was assigned by Micro Furniture to WFNNB. If so, the four-year statute of limitations found in N.J.S.A. 12A:2-725 may very well apply, in which event the complaint would be time barred. Ford Motor Credit Co. v. Arce, 348 N.J. Super. 198, 200, 791 A.2d 1041 (App. Div. 2002) (four year statute of limitations for breach of contract for sale of goods).
>
> [Asset Acceptance LLC v. Scott, 2007 N.J. Super. Unpub. LEXIS 1067, at *7-8 (footnote omitted).]

In Asset Acceptance LLC v. Scott, although there were no facts in the record to prove any "credit card" existed, the Appellate Division strongly suggested that furniture store contracts are sales subject to N.J.S.A. 12A:2-725.[11]

[11] The Judiciary's Automated Case Management System shows that on remand the complaint of Asset Acceptance LLC v. Scott was dismissed. We do not have any further information due to the limitations of ACMS.

This case has a complete record, ready for summary judgment, because Roberta Bordeaux *did* supply the trial court with the original documents creating her Dell computer contract. Ms. Bordeaux certified and thereby vouched on personal knowledge, as an original party to the 2005 contract, for the documents following her Certifications in the record. (Da31-Da33; Da63-Da66). After she opened a Dell Preferred Account, Ms. Bordeaux received an introductory Dell Preferred Account® membership letter (Da67). Subject to an annual percentage rate of 29.74%, Ms. Bordeaux could make purchases from Dell and had access to "amazing **discounts for future purchases**." (Da67). The Dell Preferred Account could only be used to purchase computer goods from Dell. (Da31-Da32; Da63-Da64). After the May 10, 2005 purchase of a Dell Inspiron 2200 computer (Da68-Da70), Ms. Bordeaux received more monthly statements and made additional Dell purchases and payments. (Da71-Da152).

The trial court mistakenly believed that, if a third party finances the purchase of goods, it is not a contract for the sale of goods subject to N.J.S.A. 12A:2-725. (3T5-9 to -17). No authority was cited by the trial court for that proposition. Contract statutes of limitations are divided into two groups: one group is "any contract[s] for sale" in N.J.S.A. 12A:2-725, and the other group includes contracts which are not sales. N.J.S.A. 2A:14-1. Since the Dell Preferred Account is not a

"credit card" and since there is no magnetic strip that can be "swiped," the record is clear that the only purpose of the Dell Preferred Account is to purchase computer goods from Dell.

This appeal will *not* decide the statute of limitations for general purpose credit cards such as Visas, MasterCards, Discover or American Express cards because the Dell Preferred Account is not a general purpose credit card. Ms. Bordeaux cannot take the Dell Preferred Account and attempt to use it at a different merchant, e.g., Apple Inc., nor can she attempt to get *cash advances* at a bank (also there is nothing to swipe with).

Further, the Dell Preferred Account cannot be used to get a loan of money. Since the only possible use of the Dell Preferred Account is to buy more Dell computer goods, it is indeed merely a contract to purchase computer goods from Dell.

The trial court mistakenly thought that the existence of a third-party financier of the Dell computer goods was relevant to the issue of whether a sale of computer goods on credit is included in the plain meaning of "any contract for sale." (3T5-7 to 17). Both Palmer and Arce, supra, hold a suit to collect on a transaction for goods is subject to the UCC's four-year statute of limitations. Where the store account is limited to sales of goods on credit, it simply does not matter if a bank is running the Dell Preferred Account credit operation in the background as

the agent for Dell, or as partner with Dell, or as assignee of Dell. Further, subsequent assignees stand in the shoes of Dell, the seller of goods. James Talcott, Inc. v. H. Corenzwit & Co., 76 N.J. 305, 309-10 (1978) (assignee is subject to defenses against assignor). Whoever is running the store credit account, Dell or a bank, every single transaction on the account is a sale of goods by the store (Dell) to the consumer (Ms. Bordeaux); hence N.J.S.A. 12A:2-725 applies.

The facts for summary judgment are not in dispute: Ms. Bordeaux used the Dell Preferred Account only to purchase Dell computer goods for personal, family and household purposes. (Da31-Da32; Da63-Da152; 3T4-20 to 3T5-6; 3T8-4 to 6). The default occurred sometime in 2009.[12] (Da32; Da65; Da153). Midland Funding commenced this action on April 25, 2014 (Da2), long after the four-year period had elapsed. Therefore plaintiff's complaint was time-barred by N.J.S.A. 12A:2-725. The trial court erred as a matter of law by ruling that N.J.S.A. 12A:2-725 did not apply and erred by denying Ms. Bordaux's motion for summary judgment on her FDCPA counterclaim.

By filing a time-barred collection suit against Ms. Bordeaux, Midland, a debt collector subject to obey the FDCPA, violated the FDCPA by using abusive, deceptive, misleading,

[12] Midland Funding reports the "Date of First Delinquency" as "07/2009." (Da155; Da159).

unfair and unconscionable practices to collect a debt.[13] Moreover, the trial court erred by reaching the merits of this

[13] 15 U.S.C.A. § 1692d; 1692e; 1692f; Kimber v. Fed. Fin. Corp., 668 F. Supp. 1480, 1487 (M.D. Ala. 1987) (Filing a time-barred complaint violates sections 1692e and 1692f of the FDCPA); see also Phillips v Asset Acceptance, LLC, 736 F.3d 1076 (7th Cir. 2013) ("The reason for outlawing stale suits to collect consumer debts is well explained in Kimber . . . ."); Hamid v. Stock & Grimes, LLP, CIV A 11-2349, 2011 U.S. Dist. LEXIS 96245 (E.D. Pa. Aug. 26, 2011); Jackson v. Midland Funding, LLC, 754 F. Supp. 2d 711 (D.N.J. 2010), aff'd, 468 F. App'x 123 (3d Cir. 2012) (affirmed summary judgment granted against Midland who violated the FDCPA by filing a suit time-barred under PA law); Herkert v. MRC Receivables Corp., 655 F. Supp. 2d 870, 876 (N.D. Ill. 2009) ("bringing or threatening to bring a lawsuit 'which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate.'); Ramirez v. Palisades Collection LLC, 250 F.R.D. 366 (N.D. Ill. 2008) (filing time-barred suit violates §§ 1692e & 1692f of the FDCPA); Jenkins v. Gen. Collection Co., 538 F. Supp. 2d 1165 (D. Neb. 2008); Ehsanuddin v. Wolpoff & Abramson, CIV A 06-708, 2007 U.S. Dist. LEXIS 11230 (W.D.Pa. Feb. 16, 2007) (filing a time-barred lawsuit violates the FDCPA); Martinez v. Albuquerque Collection Servs., 867 F. Supp. 1495, 1506 (D.N.M. 1994) ("A collection agency's attempts to collect on time-barred accounts violate the FDCPA."); Beattie v. D.M. Collections, Inc., 754 F. Supp. 383, 393 (D. Del. 1991) ("[T]he threatening of a lawsuit which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate."); New Century Fin. Servs. V. McNamara, No. A-2556-12, 2014 N.J. Super. Unpub. LEXIS 602, 2014 WL 1057076 (App. Div. March 20, 2014); see also Federal Trade Commission, "Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration," 23 (July 2010) available at http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf ("Nearly all courts…have concluded that [suing on time-barred debts] violates the FDCPA. . . . The [FTC] agrees with the interpretation that the FDCPA bars actual or threatened suit to collect on time-barred debts."); Press Release, Federal Trade Commission, Under FTC Settlement, Debt Buyer Agrees to Pay $2.5 Million for Alleged Consumer Deception (Jan. 30, 2012),

FDCPA/UCC issue after it had already granted Midland Funding's motion to compel arbitration and no longer had jurisdiction over the case. Its supplemental findings of fact and conclusions of law on this point should therefore be vacated.

CONCLUSION

Plaintiff filed a time-barred debt collection action in court and, now that a counterclaim has been filed against it based on that time bar, it is backpedaling and trying to go to arbitration instead. This gamesmanship, trying to unring the bell of suing in court once it decided it might do better elsewhere, comes too late. Plaintiff has waived its right to seek arbitration by its course of litigation conduct. Moreover, the arbitration provision it seeks to enforce is not one to which Ms. Bordeaux ever agreed, and plaintiff has failed to meet its burden of proving that there was mutual assent to this, or any, arbitration agreement.

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http://www.ftc.gov/opa/2012/01/asset.shtm (For proposed Consent Order, see http://www.ftc.gov/os/caselist/0523133/120130assetconsent.pdf, wherein Asset Acceptance promises to stop filing time-barred suits); cf. Heintz v. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) (lawyers and litigation activity covered by the FDCPA); Allen v. LaSalle Bank, N.A., 629 F.3d 364 (3d Cir. 2011) (debt collectors could be sued under the FDCPA for asserting a claim to amounts which were "not permitted by law"); Freyermuth v. Credit Bureau Servs., Inc., 248 F.3d 767 (8th Cir. 2001) (effort to collect time-barred checks did not violate the FDCPA when it was not accompanied by a threat of suit.); Hodges v. Sasil Corp., 189 N.J. 210 (2007) (complaint filed in Special Civil Part violated FDCPA).

The September 19, 2014 order granting plaintiff's motion to compel arbitration should be reversed. The November 5 supplemental findings of fact and conclusions of law, which improperly reach the merits of defendant's counterclaims, should be vacated. Defendant respectfully requests that the entire matter be remanded to the trial court for further proceedings.

DATED: December 27, 2014

Respectfully submitted,

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