SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

CITIBANK (SOUTH DAKOTA), N.A., Plaintiff, v. JAMES [redacted] Defendant.	Index No.: I2011603564 Hon. Diane Y. Devlin IAS Part 32

DEFENDANT [redacted] MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Matthew A. Parham
Law Offices of Matthew A. Parham
70 Niagara Street, Suite 210
Buffalo, New York 14202
(716) 218-8876

Attorney for Defendant

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Defendant [redacted] ("Mr. [redacted]") respectfully submits this memorandum in opposition to Plaintiff Citibank (South Dakota), N.A.'s motion for summary judgment.

PRELIMINARY STATEMENT

As a threshold matter, Plaintiff's made its motion for summary judgment 141 days after filing the Note of Issue and so well out of time under C.P.L.R. 3212(a), and Plaintiff proffers no excuse for its untimeliness. The motion should be summarily denied on that ground .

In any event, Plaintiff attempts to establish a prima facie case for summary judgment on its breach-of-contract and "account stated" claims with insufficient evidence in a manner that has recently been rejected by a series of decisions of the Fourth Department, including *Unifund CCR Partners* v. *Youngman*, 89 A.D.3d 1377, 932 N.Y.S.2d 609 (4th Dep't Nov. 10. 2011), *lv. denied*, 2012 N.Y. Slip Op. 72420, and *Palisades Collection, LLC* v. *Kedik*, 67 A.D.3d 1329, 1331, 890 N.Y.S.2d 230, 231 (4th Dep't 2009). Plaintiff's reliance on rank hearsay and prohibited secondary evidence in violation of the "Best Evidence" rule presented through a conclusory affidavit of a person with no apparent personal knowledge appears even weaker than the similar effort recently found wanting by the Queens County Supreme Court in *Citibank (S.D.), N.A.* v. *Zaharis*, Index No. 20670/2010, 2011 N.Y. Misc. LEXIS 6024 (Sup. Ct. Queens County Oct. 18, 2011), which denied the same Plaintiff's motion for summary judgment notwithstanding that Plaintiff proffered more extensive and less dubious evidence through a similar records affidavit. And Plaintiff's affiant's single vague and conclusory assertion that account statements were somehow sent to Mr. [redacted] is, as numerous courts have held, patently insufficient to sustain Plaintiff's burden to prove that element of its "account stated" claim.

Moreover, Plaintiff has made no effort to sustain the burden of proof, imposed under the federal Truth in Lending Act (TILA), to establish that Mr [redacted] authorized the interest, fees, and purchase charges that Plaintiff seeks to collect, beyond making a patently

absurd legal argument that the burden has in effect shifted to Defendant due to his failure to avail himself of the consumer protections afforded by the Fair Credit Billing Act (FCBA). But as numerous courts and the federal agency with authoritative interpretive authority concerning the relevant statutes—the Federal Reserve—have all made clear, the FCBA imposes no obligations on consumers and their failure to invoke its billing-dispute rights in no way absolves a credit-card issuer from the obligation to sustain the burden that federal law imposes to prove authorized use. As those courts and the Federal Reserve also make clear, an issuer may not sustain its burden by evidence that a consumer merely remained silent after receiving account statements. Rather, the TILA requires that the issuer prove some affirmative action of the consumer to express authorization, such as signatures on sales receipts or a consistent payment history.

Even had Plaintiff submitted sufficient admissible evidence to sustain its prima facie case—which it has not—the motion must clearly be denied in light of the meritorious defenses that appear both on the face of Plaintiff's own proffered documents and in materials submitted by Mr. [redacted]. Even had Plaintiff submitted admissible evidence of authorized use, Mr. [redacted] has controverted that evidence in the particularized sworn averrals of his affidavit. Mr. [redacted] does not own and did not purchase the items referenced in the statements. Indeed, Plaintiff's account statements appear on their face to contain errors, as they fail to consistently impose late fees; and appear consistent with fraud, as they purport to show numerous purchases and returns of redundant expensive items over a very compressed time frame in the midst of an otherwise generalized lack of activity on the card.

And Plaintiff's own papers also assert that Plaintiff has imposed interest rates in excess of 25% and so clearly establish that Plaintiff has exceeded the maximum rate permitted under South Dakota law—which imposes a maximum rate of 12% where, like here, no written agreement sets forth a higher interest rate. Under the National Bank Act, a national bank that

imposes a rate in excess of that authorized by its home state forfeits the right to collect any interest under the contract. Furthermore, Plaintiff's own publicly disseminated investor materials give every reason to believe that the loans that Plaintiff seeks to collect were not actually made by a national bank but were, in economic substance, loans from a state-law entity that, in effect, rented Plaintiff's national-bank charter for a fee. Numerous courts have held that, notwithstanding that sort of contrivance, such a transaction is fully subject to state usury laws, and thus here to New York's 16% usury limit, violation of which results in forfeiture by Plaintiff of all interest and principal.

Finally, despite representing to Mr. [redacted] and the Court that discovery would be provided, Plaintiff has systematically failed to comply with its obligations to provide discovery that Defendant has sought to determine the source of the two payments reflected in the account statements and the identity of the purchaser of the items therein. In light of these willful discovery violations, the Court should enter a conditional order precluding Plaintiff from offering evidence of authorized use in the event that it does not, within 30 days, produce the requested materials which are material and necessary to Mr [redacted]'s assertion of that defense.

STATEMENT OF FACTS

Plaintiff filed the instant summons and complaint on July 14, 2011, apparently alleging two causes of action for breach of a credit card agreement and "account stated." Defendant timely served a pro se answer on August 10, 2011, denying that he received a copy of a credit agreement, denying that he accepted account statements from Plaintiff without objection, disputing the claimed balance, and demanding discovery including documentation of the charges comprising the claimed balance, any account applications or agreements, and any documents bearing his signature. (Klein Affirm. Ex. C.)

Without providing or responding to any of this requested discovery, Plaintiff filed a Note of Issue more than four months later, on December 27, 2011. Mr [redacted] and an attorney for Plaintiff appeared at a preliminary conference on January 27, 2012, at which time Mr. [redacted] stated that he desired discovery showing the source of the alleged payments and purchases. Plaintiff's counsel stated that the discovery would be provided. ([redacted] Aff. ¶ 23.) No discovery was provided by the time Mr. [redacted] and an attorney for Plaintiff appeared at a compliance conference on March 28, 2012, at which time Mr. [redacted] again stated that he desired the requested discovery and Plaintiff's counsel again stated that it would be provided. ([redacted] Aff. ¶ 24.) Plaintiff has provided no discovery to date. ([redacted] Aff. ¶ 24.)

Apparently, rather than provide the discovery that its counsel represented to Mr. [redacted] and the Court would be provided, Plaintiff opted to submit the instant motion for summary judgment, filed on May 16, 2012, and originally returnable on June 14, 2012. Thus, the motion was made 141 days after the filing of the Note of Issue.

Plaintiff's motion rests upon certain documents attached to a putative records custodian affidavit apparently signed and sworn to on April 19, 2012, by Lisa Blumer. Ms. Blumer, who is apparently employed in Missouri, declines to identify her employer, stating only that she works for "Citibank or an affiliate." (Blumer Aff. ¶ 2.) Ms. Blumer says her job title is "Document Control Officer" and that she is "a custodian of records with respect to accounts owned by Citibank." (*Id.*) But she says nothing specific about what her job duties are, nor does she purport to have any role with respect to the generation, storage, or retrieval of Plaintiff's account records. Nor, if Plaintiff is not her employer, does she explain how her employer got Plaintiff's records or how she would have any personal knowledge of how Plaintiff generated, stored, or retrieved those records.

Ms. Blumer asserts that Plaintiff's records contain "Account Information" that relates to Defendant's account, including "Account Statements" which are attached as Exhibit A to the affidavit. (*Id*. ¶ 3.) Ms. Blumer further states that all the "Account Information," whatever precisely that may include, is "business records reflecting information created and maintained by Citibank or its affiliates, in the course of regularly conducted business activity, and are part of the regular practice of Citibank to create and maintain such information, and also were made at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." (*Id*. ¶ 5.) Yet beyond this conclusory recitation of various legalese, Ms. Blumer says nothing about how, when, or by whom any specific information in the "Account Information," whatever precisely that may include, was generated, stored, or retrieved. Nor does her affidavit say anything about the computer system that "Citibank or an affiliate" uses to store and retrieve this information or its reliability.

The account statements attached as Exhibit A indicate that they relate to a "Sears" card. They reflect a zero balance as of the beginning of October 2010, followed by a brief flurry of purchases and returns of various items, most of which are expensive appliances or electronics. Mr. [redacted] has submitted an affidavit in which he explains that he had opened the account a year or more earlier to make a particular purchase, paid off the balance from that purchase, and then essentially forgot about the card and did not use it again. ([redacted] Aff. ¶¶ 5, 7.) He does not own and did not buy the items referenced in the proffered account statements. ([redacted] Aff. ¶ 10-17.) The statements reflect only two payments, of $30 and $75, and do not indicate how these were paid. Although the $30 payment was under the minimum payment due for the month, no late fee was imposed. A number of purchases appear following the final payment. Mr. [redacted] does not recall receiving the account statements. ([redacted] Aff. ¶ 20.)

Ms. Blumer's affidavit nowhere mentions a Credit Agreement nor is one attached as an exhibit to her affidavit. Plaitniff's counsel attaches as Exhibit D to his affirmation a putative "Credit Agreement" bearing a 2009 copyright date, but which does not refer to Mr. [redacted], an account number, or "Sears" or any other type of account. Counsel affirms that this exhibit is "[a] copy of the account agreement," without explaining how he would possibly know that. (Klein Affirm. ¶ 6.) The putative agreement that is attached does not specify an interest rate for purchases or cash advances, stating that such would be set forth in a "Supplement." There is no such "Supplement" provided among Plaintiff's papers.

The inadmissible documents that Plaintiff has submitted on their face suggest the potential merit of a usury defense, as those documents purport to impose various interest rates, in excess of 25%, which are usurious under both New York, South Dakota, and federal law as the former apply to a contract of the type suggested by Plaintiff's papers. Plaintiff alleges and Defendant has admitted in his answer that Plaintiff is a national bank. (Compl. ¶ 2; Klein Affirm. Ex. C.) Plaintiff submits evidence that its home state, and that of its corporate successor, is South Dakota. (Klein Affirm. Ex. F.)

Judicially noticeable evidence submitted herewith further suggests that, in substance, Defendant's counterparty on his account has always been an entity that is a state-law trust and not an affiliate of Plaintiff, and so not in any event exempt from New York's usury laws. (*See* Parham Affirm. Exs. B, C.) Plaintiff's own publicly filed and disseminated investor materials—which are subject to judicial notice here, *see*, *e.g.*, *Chasalow* v. *Board of Assessors*, 176 A.D.2d 800, 804, 575 N.Y.S.2d 129, 133 (2d Dep't 1991) ("Supreme Court ha[s] broad discretion to take judicial notice, inter alia, of matters of public record . . . .")—tend to show that Plaintiff's credit-card transaction structure has been designed to create a false appearance of usury exemption. As set forth in those materials, Plaintiff securitizes the bulk of its credit card

receivables to a non-affiliated "Master Trust," which is a state-law trust. (Parham Affirm. ¶ 6 & Ex. B, at 105.) As to accounts selected to participate in the securitization, all receivables from the account are assigned to the trust in return for payment from the trust to Plaintiff. (Parham Affirm. ¶ 6 & Ex. B, at 27, 107, Ex. C, § 2.01, at 21.) All receivables (i.e., credit-card charges) associated with the account are owned by the trust from their inception. (*Id*.) Plaintiff acts, pursuant to a written contract, as the "servicer" of these accounts on behalf of the non-exempt trust. (Parham Affirm. ¶ 6 & Ex. B, at 2, 113, Ex. C, at 1, § 1.01, at 18.) Only in the event of a default lasting over 184 days does the trust assign the account back to Plaintiff, which then engages in collection efforts. (Parham Affirm. ¶ 6 & Ex. B, at AI-5, Ex. C, § 1.01, at 15, § 2.10(b), at 35.)

STANDARD ON THIS MOTION

To be entitled to summary judgment, Plaintiff must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. See *Ayotte* v. *Gervasio*, 81 N.Y.2d 1062, 1063, 601 N.Y.S.2d 463, 464, 619 N.E.2d 400, 401 (1993); *Alvarez* v. *Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 926-27, 501 N.E.2d 572, 574 (1986); *Winegrad* v. *N.Y. Univ. Med. Cent.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642 (1985). Only once the Plaintiff bears this burden could any burden to produce evidence shift to Defendant. *See JMD Holding Corp.* v. *Cong. Fin. Corp.*, 4 N.Y.3d 373, 385, 795 N.Y.S.2d 502, 510, 828 N.E.2d 604, 612 (2005); *Zetko* v. *McDonald's Corp.*, 174 A.D.2d 1056, 1056, 522 N.Y.S.2d 219, 220 (4th Dep't 1991).

It has long been well settled that a Plaintiff does not establish its prima facie burden on summary judgment with a conclusory affidavit. *JMD Holding Corp.*, 4 N.Y.3d at 384-85, 795 N.Y.S.2d at 510, 828 N.E.2d at 612 ("A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie

burden."). Where a plaintiff's records affidavit provides insufficient information to enable the Court to infer the basis for the affiant's knowledge or representations concerning the attached documents, therefore, summary judgment cannot be granted. *See, e.g.*, *Palisades Collection, LLC* v. *Gonzalez*, Index No. 58564 CV 2004, 2005 N.Y. Misc. LEXIS 2774, at *3-4 (N.Y.C. Civ. Ct. Dec. 12, 2005).

In contrast, to defeat a motion for summary judgment, it has long been well settled that a non-movant is subject to a less stringent standard, and may rely on hearsay provided that hearsay is suggestive of the existence of admissible evidence and there is reason for the non-movant's inability to provide the evidence in admissible form. *Phillips* v. *Kantor & Co.*, 31 N.Y.2d 307, 311-12, 338 N.Y.S.2d 882, 885, 291 N.E.2d 129, 131 (1972); *Merriam* v. *Integrated Bldg. Controls, Inc.*, 84 A.D.3d 897, 898-99, 922 N.Y.S.2d 562, 563 (2d Dep't 2011).

ARGUMENT

I. PLAINTIFF'S MOTION MUST BE DENIED AS UNTIMELY UNDER C.P.L.R. 3212(a) AND THE COURT'S PART RULES.

C.P.L.R. 3212(a) provides that unless the Court orders a different schedule, no motion for summary judgment may be made more than 120 days after filing of the note of issue, "except with leave of court on good cause shown." This Court's Part Rules provide further for a stricter deadline of 60 days after filing of the note of issue.

The Court of Appeals has held that even meritorious, non-prejudicial motions for summary judgment, if untimely, may not be entertained absent a "satisfactory explanation for the untimeliness" of the motion. *Brill* v. *City of New York*, 2 N.Y.3d 648, 652, 781 N.Y.S.2d 261, 264, 814 N.E.2d 431, 434 (2004). As the Court held in *Brill*, where a motion for summary judgment has been made out of time without proffer of a satisfactory excuse for untimeliness, the

case must remain on the trial calendar, and the movant's remedy is to make a motion for a directed verdict at trial. *Id*. at 653, 781 N.Y.S.2d at 265, 814 N.E.2d at 435.

Here, Plaintiff filed its note of issue on December 27, 2011. Under the Court's Part Rule, any motion for summary judgment was due no later than February 25, 2012. Even under the lengthier default 120-day time limit, any motion for summary judgment was due no later than April 25, 2012. Yet Plaintiff filed and served the instant motion apparently on May 16, 2012—141 days after it filed the note of issue. Plaintiff has provided no explanation or excuse whatsoever in its moving papers for the 21- to 81-day delay in making its motion. Therefore, under *Brill* it is clear that the motion must be denied and the case proceed to trial.

II. PLAINTIFF HAS NOT SUSTAINED ITS BURDEN TO SUBMIT COMPETENT EVIDENCE SUPPORTING ITS MOTION FOR SUMMARY JUDGMENT.

A. Plaintiff's Putative Records Custodian Affidavit Is of No Evidentiary Value and Violates Both the Rule Against Hearsay and the "Best Evidence" Rule.

To rely on the "business records" exception to the rule against hearsay, Plaintiff must establish that (1) the proffered documents were made in the regular course of business; (2) it was in the regular course of business to make the documents; and (3) they were made contemporaneously with, or a reasonable time after, the acts, transactions, occurrences, or events recorded. C.P.L.R. 4518(a); *see Rushmore Recoveries X, LLC* v. *Skolnick,* Index No. 21161/05, 2007 N.Y. Misc. LEXIS 3731, at *6 (Dist. Ct. Nassau County May 24, 2007) (citing cases). Furthermore, if any documents were stored electronically and retrieved from electronic storage, Plaintiff must establish that the proffered exhibit "is a true and accurate representation" of the electronic record, and provide sufficient information to enable the Court to consider "the method or manner by which the electronic record was stored, maintained or retrieved." C.P.L.R. 4518(a).

As the Fourth Department has made clear, to properly authenticate documents as business records, the business records affidavit cannot merely attest in conclusory fashion that the records were made and kept in the regular course of business, but must also show that the affiant is familiar with the plaintiff's business practices or procedures and establish how, when, and by whom the records were made. *Kedik*, 67 A.D.3d at 1331, 890 N.Y.S.2d at 231.

Plaintiff's putative factual affidavit here is no more specific than that which the Fourth Department found insufficient in *Kedik*. The affidavit is so vague on its face as to be of no probative value and patently insufficient to proffer the attached putative documentary evidence. Beyond stating in conclusory fashion that her job duties include being "custodian of records" for some company that may or may not be the Plaintiff herein (Blumer Aff. ¶ 2), the affiant says nothing about what her actual job duties are or whether those duties even involve any familiarity with the manner and method by which the Plaintiff herein has generated or maintained any records. *See also Unifund*, 89 A.D.3d 1377, 932 N.Y.S.2d 609 (affiant failed to show how she could have personal knowledge of a different company's business records).

Indeed, the affidavit on its face contains numerous indicia of the affiant's complete lack of any relevant personal knowledge. The affiant recites that the nonparty companies' records contain various "Account Information," but says nothing about in what form that information is stored and maintained or how it came into existence. (Blumer Aff. ¶ 5.) The affiant says that the "Account Information . . . shows that the Account Statement was sent to the defendant," but does not say how it shows this, nor does she even purport to know how they were supposedly sent, saying that it may have been by either regular or electronic mail. (*Id*. ¶ 8.) Indeed, the statements themselves apparently purport to have been sent from Ohio whereas the affiant is located in Missouri. The affiant nowhere purports to be familiar with any practice of a Citibank office in Ohio with respect to the mailing of account statements.

Nor does Plaintiff's affiant even refer to the supposed "account agreement" associated with the account. This document was attached to and referred to only in Plaintiff's counsel's affirmation. (Klein Affirm. ¶ 6 & Ex. D.) Plaintiff's fact witness nowhere says that any "account agreement" was mailed or provided to the Defendant. Obviously, as numerous courts have held, Plaintiff's attorney cannot authenticate documents as Plaintiff's business records as he lacks the requisite personal knowledge. *See Ciccatello* v. *Tops Friendly Markets, Inc.*, 186 A.D.2d 1091, 1091, 590 N.Y.S.2d 796, 796-97 (4th Dep't 1992) (motion for summary judgment must be denied where supported only by attorney affidavit); *Mullins* v. *DiLorenzo*, 199 A.D.2d 218, 219, 606 N.Y.S.2d 161, 162 (1st Dep't 1993) (attorney affidavit cannot constitute proof of facts supporting liability).

Furthermore, to properly place a copy of the alleged "account agreement," and the account statements, before the Court, Plaintiff must satisfy the requirements of the "Best Evidence" rule. Under C.P.L.R. 4539, to rely on images of these putative documents, Plaintiff must lay a foundation through evidence either of (a) a business practice of making contemporaneous copies at the time the originals were generated, with evidence that the means of doing so creates an accurate reproduction; or (b) use of an electronic image storage system that prevents alterations, with the means by which alterations are prevented being described by Plaintiff's witness.

Here, Plaintiff's affiant provides no explanation at all where the attached account statements came from. Are these electronically stored images, or were the images generated during this litigation from stored database entries? Absent such description, Plaintiff patently has not laid a proper foundation for admissibility of copies under C.P.L.R. 4539. *See Bell Atl. Yellow Pages* v. *Havana Rio Enters. Inc.*, 184 Misc. 2d 863, 710 N.Y.S.2d 751 (N.Y.C. Civ. Ct. 2000) (excluding evidence under C.P.L.R. 4539 and "Best Evidence" rule). Indeed, the latter

option would result in the documents being patently inadmissible under the business records exception, as documents created for the purpose of litigation are not admissible under that exception. *One Step Up, Ltd.* v. *Webster Bus. Credit Corp.*, 87 A.D.3d 1, 11, 925 N.Y.S.2d 61, 67-68 (1st Dep't 2011) ("Documents that are prepared in connection with or in contemplation of litigation are not admissible [as business records]."); *National States Elec. Corp.* v. *LFO Constr. Corp.*, 203 A.D.2d 49, 50, 809 N.Y.S.2d 900, 901-02 (1st Dep't 1994) (damages summary prepared for litigation not admissible under rule against hearsay and "Best Evidence" rule).

Particularly troubling in light of the current "robo-signing" scandals is Plaintiff's failure to provide any information to enable the Court to evaluate the reliability of its method for storing and retrieving electronic records or images. American Banker magazine recently published a series of articles addressing recent disclosures at Chase Bank, where an internal audit revealed numerous inaccuracies in credit-card account records. (Parham Aff. Ex. A.) As set forth in those articles, Chase apparently maintains three separate databases of credit-card account information covering post-charge-off, pre-charge-off and post-default, and pre-default accounts. Upon default and then upon charge-off, the information has to be transmitted from one database to another, and an internal Chase audit revealed numerous errors in the account information that wound up in the post-charge-off database, which was used in formulating affidavits of merit for use in suing debtors. Chase sought to cover up these revelations by firing the person heading the audit, and continued to obtain judgments against cardholders based on the unreliable and often inaccurate account information through the use of "robo-signed" affidavits by individuals who signed stacks of affidavits at a sitting without reviewing any supporting records, falsely claiming personal knowledge when, in fact, they did nothing to personally verify the information.

Although not specific to Citibank, such disclosures suggest that the information relied on by a credit-card issuer in filing a post-default and post-charge-off lawsuit cannot simply

be assumed accurate without some explanation where it came from, and should act as a reminder of the importance of enforcing the usual evidentiary strictures that require a showing of *reliability* before such computer-generated information can be introduced into evidence. Plaintiff's failure to provide such evidence of reliability alone requires that its motion be denied.

B. Even Assuming Plaintiff's Proffered Evidence Was Admissible, Plaintiff Has Submitted No Evidence That the Terms of Any Putative Contract Authorized It to Impose the Claimed Interest and Fees.

A lender has no general right to collect a unilaterally selected rate of interest or to unilaterally impose late fees or other charges on its debtor. Rather, to be valid, interest and fees must be set forth in a contract. *See N.Y. State Thruway Auth.* v. *Hurd*, 25 N.Y.2d 150, 158, 309 N.Y.S.2d 51, 56, 250 N.E.2d 335, 339 (1969) (absent express contractual provision or statute providing for interest or fees, or proof of a prior course of dealing suggesting that the right to charge interest or fees was implied in fact, Plaintiff could have no right to charge such interest or fees).

With a credit-card contract, one expects the applicable interest and charges to be set forth in some cardmember agreement. Where a cardmember agreement is sent to a credit card holder, the originator has made an offer to contract on the terms set forth in the agreement, and use of the card after receipt of the agreement constitutes an acceptance. *Bank of Am.* v. *Jarczyk*, 268 B.R. 17, 25 n.4 (W.D.N.Y. 2001) ("the credit card agreement is merely 'the offer of an act for a promise.' . . . [T]he debtor accepts the offer by using the card."; quoting CORBIN ON CONTRACTS § 3.17 (Rev. Ed.)). Where amendments to the agreement are thereafter mailed, use of the card after receipt constitutes acceptance of the amendments. *Tsadilas* v. *Providian Nat'l Bank*, 13 A.D.3d 190, 190, 786 N.Y.S.2d 478, 480 (1st Dep't 2004). That is why New York courts have held that a creditor seeking to prevail in an action to collect a credit-card debt must proffer in evidence the original cardmember agreement and all amendments thereto—otherwise

there is no evidence what the terms of the agreement are or that they have been accepted by the defendant so as to form part of a contract between the parties. *See Citibank (South Dakota), N.A.* v. *Martin*, 11 Misc. 3d 219, 223, 807 N.Y.S.2d 284, 289 (N.Y.C. Civ. Ct. 2005).[1]

Here, Plaintiff submits no evidence whatsoever that a written contract existed that authorized Plaintiff to impose interest on purchases or cash advances. The putative "terms and conditions" attached to the its outside counsel's affirmation, even if properly authenticated, states on page 1 that to determine the applicable "Purchases and Cash Advance APRs," one should "see Supplement." (Klein Affirm. Ex. D, at 1.) Plaintiff has not submitted any "Supplement."

Although the proffered account statements do indicate what interest rates Plaintiff actually imposed on the account, it would be putting the cart before the horse to permit Plaintiff to argue that because it imposed those rates, therefore they must be authorized by some contract that the Plaintiff has proved incapable of producing. This would also patently violate the Best Evidence Rule. Under that rule, a party that seeks to prove the terms of a contract must submit the original contract or, provided an adequate foundation is set under C.P.L.R. 4539, an image thereof. Plaintiff may only rely on "secondary" evidence to prove the existence or terms of a contract upon a threshold showing that the document has been lost or destroyed through no fault of the Plaintiff. *See Taft* v. *Little*, 178 N.Y. 127, 133, 70 N.E. 211, 211 (1904); *Sirico* v. *Cotto*, 67 Misc. 2d 636, 637-38, 324 N.Y.S.2d 483, 485-86 (N.Y.C. Civ. Ct. 1971).

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[1] Plaintiff apparently suggests that the credit-card contract need not be in writing because it does not fall within the Statute of Frauds. (Klein Affirm. ¶ 13.) This argument is absurd. The Truth in Lending Act expressly requires that a credit-card issuer make extensive written disclosure to the cardholder of the terms and conditions governing the account. 15 U.S.C. § 1637. Violating this provision is a misdemeanor in the State of New York. General Business Law § 515(2). "It is the settled law of this State (and probably of every other State) that a party to an illegal contract cannot ask a court of law to help him carry out his illegal object . . . ." *Stone* v. *Freeman*, 298 N.Y. 268, 82 N.E.2d 571 (1948).

III. PLAINTIFF HAS NOT SUSTAINED ITS BURDEN UNDER THE FEDERAL TRUTH IN LENDING ACT TO PROVE AUTHORIZED USE.

Aside from having made no effort at all to authenticate a written contract and no serious effort to authenticate account statements, Plaintiff has not submitted anything that even purports to carry its burden of proof to establish that Defendant authorized all items that Plaintiff seeks to collect. Plaintiff apparently relies on nothing more than its own account statements to sustain its burden of proof as to this issue. But for the Court to hold that silence upon receipt of account statements on its own evidences authorization would impermissibly shift the burden of proof imposed on credit-card issuers under federal law.

A. The Truth in Lending Act Requires Affirmative Proof of Authorized Use Beyond Mere Silence in the Face of Account Statements.

The federal Truth in Lending Act (TILA) provides that: "In any action by a card issuer to enforce liability for the use of a credit card, the burden of proof is upon the card issuer to show that the use was authorized . . . ." 15 U.S.C. § 1643(b). If the use was not authorized, the cardholder cannot be liable for more than $50, and only then if the issuer proves that it satisfied various conditions. 15 U.S.C. § 1643(a); *accord* 12 C.F.R. § 226.12 ("The liability of a cardholder for unauthorized use of a credit card shall not exceed the lesser of $50 or the amount of money, property, labor, or services obtained by the unauthorized use before notification to the card issuer."). It is clear that this burden must be sustained whether Plaintiff characterizes its claim as one for breach of contract or as for "account stated," so long as the issuer alleges the liability stems from "use" of a credit card. *Bank of New York – Delaware* v. *Santarelli*, 128 Misc. 2d 1003, 1004, 491 N.Y.S.2d 980, 981-82 (County Ct. Greene County 1985).

As courts in this State and elsewhere have held, this burden requires that the issuer show more than a consumer's mere silence after receiving account statements. *Santarelli*, 128 Misc. 2d at 1004, 491 N.Y.S.2d at 981-82; *see, e.g.*, *Crestar Bank* v. *Cheevers*, 744 A.2d

1043 (D.C. App. 2000) (no presumption of authorization can follow from cardholder's failure to object to account statements, because this would impermissibly shift burden of proof under Section 1643); *see also DBI Architects, P.C.* v. *Am. Express Travel-Related Services Co.*, 388 F.3d 886, 891-93 (D.C. Cir. 2004) (citing and following *Crestar Bank*, holding that Section 1643 prohibits issuer from recovering credit-card debt based solely on party's negligent failure to examine account statements, but finding history of paying account in full was evidence of authorization); *Danner* v. *Discover Bank*, 257 S.W.3d 113, 114-15 (Ark. Ct. App. 2007) (following *Crestar Bank*); *Mich. Nat'l Bank* v. *Olson*, 723 P.2d 438, 441-42 (Wash. Ct. App. 1986) (following *Santarelli*).[2]

The *Santarelli* court held that to meet its burden of proof under the Truth in Lending Act, a Plaintiff must introduce not only itemizations of alleged transactions, but also "evidence of the underlying transactions, including names and addresses of vendors and signatories, as well as receipts signed by defendant or her agent." *Id*. Other courts have found that a history of consistently making substantial payments after receiving account statements may suffice to show authorization. *DBI Architects*, 388 F.3d at 891-93. Here, Plaintiff's account statements do not reflect consistent payments, and Plaintiff has not come forward with any other evidence that could come anywhere near sustaining its burden to prove authorization of the transactions referenced in the statements.

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[2] As the *Santarelli* court noted, New York State law also prohibits treating silence in the face of account statements as assent to their contents and provides that to do so would violate public policy. Under General Business Law § 517: "No agreement between the issuer and the holder shall contain any provision that a statement sent by the issuer to the holder shall be deemed correct unless objected to within a specified period of time. Any such provision is against public policy and shall be of no force or effect." *See Santarelli*, 128 Misc. 2d at 1004, 491 N.Y.S.2d at 982 (relying on this provision as well as the TILA in holding consumer's silence alone insufficient to establish assent requirement for "account stated").

B. Plaintiff's Assertion That Because Defendant Did Not Invoke His Rights under the Fair Credit Billing Act, Plaintiff is Absolved from the Obligation Imposed Separately by the TILA to Prove Authorized Use Is Absurd and Contrary to the Express Language of the TILA and the Authoritative Opinion of the Federal Reserve Interpreting It.

Citing the provisions of the Fair Credit Billing Act (FCBA), 15 U.S.C. § 1666, et seq. (which is Chapter 4 of the TILA), and regulations thereunder, 12 C.F.R. 226.13, Plaintiff argues effectively that Defendant waived his right to defend this case by not submitting a written dispute in accord with the provisions of the FCBA. (Klein Affirm. ¶¶ 21-23.) Plaintiff's argument is absurd, and accordingly, has been rejected by numerous courts and by the official Federal Reserve Staff Commentary on the Truth in Lending Act.

These authorities all make clear that the FCBA imposes no obligation on a consumer to dispute a bill and imposes no punishment on a consumer who fails to do so. The FCBA is entirely concerned with defining an issuer's obligations on receiving a billing dispute. An issuer can be held liable under the FCBA for failing to properly respond to a consumer dispute by investigating and/or removing the disputed charges from the account. The D.C. Circuit explained well the relationship between the FCBA's billing dispute provisions and the liability protection provided under Section 1643:

> The plain language of § 1643 does not require a cardholder to inspect monthly billing statements in order to invoke its protections. The text sets no preconditions to its protections, such as an exhaustion requirement, and makes no reference to other remedies, such as those under the Fair Credit Billing Act . . . which permits—but does not require—a cardholder to seek correction of billing errors by reporting them to the card issuer. . . . Congress intended for the card issuer to protect the cardholder from fraud, not the other way around.

DBI Architects, 388 F.3d at 891-92 (holding consumer does not authorize use through "mere silence"); *see also, e.g.*, *Crestar Bank*, 744 A.2d at 1043 (no presumption of authorization follows from cardholder's failure to object to account statements, because to do so would

impermissibly shift burden of proof under Section 1643); *Danner*, 257 S.W.3d at 114-15 (same, following *Crestar Bank*).

Furthermore, as the Supreme Court pointed out in *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980), the Federal Reserve's interpretation of the TILA and Regulation Z thereunder are entitled to particular deference, and "should be dispositive" unless "demonstrably irrational." The Federal Reserve's Official Staff Commentary provides that "the liability protections afforded to cardholders in § 226.12 [the regulation implementing Section 1643] do not depend upon the cardholder's following the error resolution procedures [of the FCBA, implemented by 12 C.F.R. § 226.13]." Federal Reserve Official Staff Commentary on 12 C.F.R. § 226.12(b)(3), 12 C.F.R. Part 226, Supp. 1, ¶ 12(b)(3)-3, at 684 (2012).

The sole case cited by Plaintiff on this point, unsurprisingly, did not address this issue at all as it did not involve a collection action but, rather, concerned a claim brought affirmatively by a consumer against a bank, and found the bank not liable to the consumer where the consumer failed to follow the FCBA procedure. *Plutchok* v. *European Am. Bank*, 143 Misc. 2d 149, 151, 540 N.Y.S.2d 136, 136-37 (Dist. Ct. Nassau County 1989). Although Plaintiff cites this case for the proposition that it is "Defendant's burden to show compliance with the statute" (Klein Affirm. ¶ 23), the case held no such thing, but rather, merely required the plaintiff in that case, which was the cardholder, to sustain his burden to prove his case, which was a case for damages under the FCBA. Similarly, here, it is the plaintiff's burden to prove its case, which is a collection case, and thus to sustain its burden to prove authorization.

IV. PLAINTIFF HAS NOT SUBMITTED SUFFICIENT EVIDENCE TO MAKE A PRIMA FACIE CASE FOR "ACCOUNT STATED."

In addition to the general deficiencies in Plaintiff's motion noted above, Plaintiff has also failed to submit evidence sufficient to establish the elements of an "account stated"

claim, in particular, the mailing and acceptance elements, and may not in any event prevail on this claim as the statements themselves are erroneous.

A. Plaintiff Has Not Submitted Admissible Evidence to Sustain Its Burden to Prove the Element of Mailing.

The mailing of account statements is an essential element of the cause of action for "account stated." Plaintiff's failure to submit any proof of this element is fatal to its claim. *See M & A Constr. Corp.* v. *McTague*, 21 A.D.3d 610, 611-12, 800 N.Y.S.2d 235, 237-38 (3d Dep't 2005) (where no account presented, or accuracy is disputed, account stated claim fails); *see also Direct Merchants Credit Card Bank* v. *Lazareva*, Index No. 2005-369KC, 2005 N.Y. Misc. LEXIS 2623 (App. Term 2d Dep't Nov. 21, 2005) (denying summary judgment on account stated cause of action where no evidence of mailing submitted); *Discover Bank* v. *Williamson*, Index No. 2006-1007SC, 2007 N.Y. Misc. LEXIS 337, at *2 (App. Term 2d Dep't Feb. 2, 2007) (same).

Plaintiff here has submitted no admissible evidence that its proffered account statements were mailed to the Defendant, an essential element of this claim. Plaintiff's affiant improperly avers that Plaintiff's "Account Information shows" that Plaintiff mailed account statements to Defendant. (Blumer Aff. ¶ 5.) But Plaintiff's affiant does not actually proffer any supposed "Account Information" that reflects this alleged fact. Under the "Best Evidence" rule, Plaintiff may not prove the contents of its books and records, such as an alleged record of mailing, through the rank hearsay testimony of its affiant. Neither does Plaintiff's affiant attempt to prove mailing indirectly, by describing a policy or procedure of Plaintiff's related to mailing, nor does she provide any information to suggest she would be familiar with such a policy or procedure if one existed. *See Nassau Ins. Co.* v. *Murray*, 46 N.Y.2d 828, 414 N.Y.S.2d 117, 386 N.E.2d 1085 (1978) ("office practice must be geared so as to ensure the likelihood that a notice

. . . is always properly addressed and mailed"); *Residential Holding Corp.* v. *Scottsdale Ins. Co.*, 286 A.D.2d 679, 729 N.Y.S.2d 776 (2d Dep't 2001) (mailing may be proved directly, or through proof of "standard office practice or procedure designed to ensure that items are properly addressed and mailed"). Indeed, Plaintiff's affiant works in Missouri and not at the location in Ohio from which such statements were apparently mailed.

Indeed, this case is on all fours with the recent Queens County Supreme Court case *Citibank (S.D.), N.A.* v. *Zaharis*, Index No. 20670/2010, 2011 N.Y. Misc. LEXIS 6024 (Sup. Ct. Queens County Oct. 18, 2011), which held that a similar affidavit submitted by the same plaintiff was insufficient to make out a prima facie case for summary judgment on either a breach-of-contract or an account-stated theory. In particular, the Queens County Supreme Court held that such an affidavit failed to establish the existence of a contract by failing to aver that the cardmember agreement was provided to the Defendant, and failed to establish the mailing element of an account-stated claim. 2011 N.Y. Misc. LEXIS, at *7-8. The same is true here.

B. An "Account Stated" Claim Does Not Lie Where, as Here, Defendant Raises Particularized Disputes Concerning the Accuracy of any Proffered Statement of Account.

As noted in the *McTague* case, an "account stated" claim simply does not lie if the Defendant raises a particularized dispute concerning the claimed account balance. 21 A.D.3d at 611-12, 800 N.Y.S.2d at 237-38. Indeed, it has long been well settled that even where there has been an assent—through silence or otherwise—to a statement of account, that assent is not conclusive where it was grounded in mistake or should otherwise be excused for equitable reasons. *See Chisholm-Ryder Co., Inc.* v. *Sommer & Sommer*, 70 A.D.2d 429, 421 N.Y.S.2d 455 (4th Dep't 1979); *Paul, Weiss, Rifkind, Wharton & Garrison* v. *Koons*, 4 Misc. 3d 447, 780 N.Y.S.2d 710 (Sup. Ct. New York County 2004); *see also James Talcott, Inc.* v. *United States Tel. Co.*, 52 A.D.2d 197, 383 N.Y.S.2d 39 (1st Dep't 1976).

Here, because Plaintiff's account statements seek interest to which Plaintiff is not entitled under the terms of any written contract, and because Defendant disputes all purchases shown in the account statements as not having been authorized by him, Defendant does dispute the accuracy of those statements and asserts that they are erroneous. Certainly public policy and equity require that the Court refrain from enforcing a mistaken assent through silence to an erroneous statement of account that includes contractually unauthorized interest charges and unauthorized purchases.

V. DEFENDANT HAS SEVERAL MERITORIOUS DEFENSES.

A. Defendant Has a Meritorious Affirmative Defense of Usury.[3]

1. Plaintiff Has Charged More Than the Maximum Rate of Interest Permitted Under South Dakota Law and so Is in Violation of the Anti-Usury Provision of the National Bank Act.

Plaintiff alleges that it is a national bank and submits evidence that its home state is South Dakota. (Compl. ¶ 2; Klein Affirm. Ex. F.) Under the National Bank Act, 12 U.S.C. § 85, a national bank may impose on its customers the highest interest-rate permitted by its home state even where that rate exceeds the rates permissible in the customer's state.

Thus, the rates of 25% and higher imposed by Plaintiff here could only be permissible if permitted under South Dakota law. 12 U.S.C. § 85 further provides that if the national bank's home state does not specify a maximum interest rate, then the maximum interest

[3] Although Mr. [redacted] did not specifically assert usury as a defense in his *pro se* answer, it is well settled that he may raise, and the Court may consider, unpleaded defenses on a motion for summary judgment. *Rogoff* v. *San Juan Racing Ass'n*, 54 N.Y.2d 883, 885, 444 N.Y.S.2d 911, 912, 429 N.E.2d 418, 418 (1981); *Feliciano-Delgado* v. *N.Y. Hotel Trades Council*, 281 A.D.2d 312, 316, 722 N.Y.S.2d 498, 501 (1st Dep't 2001) ("This Court, in examining the pleadings on a motion for summary judgment, may take into account an unpleaded defense."). Mr. [redacted] requests permission to amend his complaint to assert this defense, on motion if necessary.

rate is 7% (or more precisely, the maximum of 7% or 1% plus the discount rate at the local Federal Reserve Bank, which here would be far lower than 7%).

South Dakota law provides that "there is no maximum interest rate or charge, or usury rate restriction between or among persons, corporations . . . *if they establish the interest rate or charge by written agreement.*" S.D.C.L. § 54-3-1.1

Here, Plaintiff has not produced any written agreement authorizing the imposition of any particular interest rate as to purchases or cash advances. Plaintiff has provided a copy of a 2009 putative cardmember agreement, but has made no attempt to authenticate that document. But the cardmember agreement itself does not, in any event, contain any interest rate. Yet Plaintiff provides account statements reflecting the imposition of rates of over 25% that are not authorized by any writing. Thus, Plaintiff's rate is *not* authorized by the South Dakota "no maximum interest rate" law applicable to rates agreed to in writing—and as noted, even if it was the National Bank Act would then impose a 7% limit. *See Citibank (South Dakota), N.A.* v. *Mahmoud*, Index No. 3657/07, 2008 N.Y. Misc. LEXIS 3194 (N.Y.C. Civ. Ct. May 28, 2008) (construing South Dakota statutes, finding federal 7% usury limit applies to Citibank contract).

As applicable here, South Dakota law, S.D.C.L. § 54-3-4, provides that where no writing establishes the interest rate under a contract, the maximum rate is the "Schedule C rate of interest established by section 54-3-16," which in turn provides for a rate of 12%.[4] *See Tully* v. *Citibank (South Dakota), N.A.*, 173 S.W.3d 212, 219 (Tex. App. 2005) ("The summary judgment evidence lacks any evidence as to the interest rate authorized by the credit card contract. The contract introduced into evidence does not specify the interest rate that was agreed on. . . . When

[4] To the extent Plaintiff may rely on S.D.C.L. § 54-3-13, which exempts "regulated lenders" from interest-rate limitations, this would not help its case. As noted, under 12 U.S.C. § 85, if state law does not impose a maximum interest rate, then the National Bank Act imposes a maximum of 7%—less than the 12% maximum in S.D.C.L. § 54-3-4.

no interest rate is provided in the agreement, South Dakota law limits the maximum interest rate to considerably less than the rates charged by Citibank."; internal footnote omitted).

Under 12 U.S.C. § 86, where a national bank has charged in excess of the permissible interest rate, it forfeits the right to collect all interest on its contract. Plaintiff's own proffered account statements demonstrate that Plaintiff has done so here. The effect of disallowing the collection of interest here would be to substantially reduce Plaintiff's damages.

2. Plaintiff's Own Publicly Disseminated Materials Suggest That Plaintiff Has Engaged in Prohibited Usury Laundering and That Its Accounts Are Properly Subject to and in Violation of New York's Usury Laws.

Under General Obligation Law § 5-501 and Banking Law § 14-a, the maximum rate of interest that may be charged for a "loan or forbearance of any money, goods, or things in action" in New York is 16% annually. General Obligation Law § 5-511(2) then provides that whenever the usurious nature of a contract is proved, the court "shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and cancelled." As the Court of Appeals has long made clear, the lender under a usurious contract forfeits both principal and interest, and may collect nothing. *Seidel* v. *18 E. 17th St. Owners, Inc.*, 79 N.Y.2d 735, 740, 586 N.Y.S.2d 240, 242, 598 N.E.2d 7, 9 (1992); *Szerdahelyi* v. *Harris*, 67 N.Y.2d 42, 48, 499 N.Y.S.2d 650, 654, 490 N.E.2d 517, 521 (1986).

Although as noted above, certain lenders are exempt from the application of New York's usury laws, New York courts have long held that lenders may not structure their way around the usury laws by contriving formally exempt transactions that are in substance non-exempt, usurious loans. In other words, a non-exempt lender may not "launder" its usury by transacting with an exempt entity to create a false appearance that its loan is exempt. *See*, *e.g.*,

Schneider v. *Phelps*, 41 N.Y.2d 238, 391 N.Y.S.2d 568, 359 N.E.2d 1361 (1977); *Nassau Trust Co.* v. *Midland Manor Home for Adults*, 57 A.D.2d 609, 393 N.Y.S.2d 778 (2d Dep't 1977).

Here, Plaintiff itself submits materials in which it purports to have imposed usurious rates of interest. Materials publicly disseminated by Plaintiff to its own investors suggest that Plaintiff has in substance acted as a mere servicer for accounts that were from their inception owned by a state-law trust, the Citibank Master Trust—an entity not exempt from New York's usury laws—and that the Master Trust, acting in economic substance as the lender, has imposed a usurious rate of interest, rendering the contract void under New York law. Plaintiff herein subsequently may have become the true owner of the account by assignment after it went into default, but that in no way un-voids the original contract. In effect these materials suggest that Plaintiff here seeks to collect as assignee of a void obligation.

That New York's usury laws do apply here and are not pre-empted by the federal law is provided further support by federal cases that have addressed another "usury laundering" scenario, that of so-called "rent-a-charters," where payday lenders contract with a national bank to issue payday loans on national bank paper, with the payday lender holding the receivables and the bank in essence receiving a fee for the use of its national bank name and charter. In economic substance, that is exactly what Plaintiff's investor materials suggest may have happened in this case. Federal courts have uniformly held that a debtor may assert that the loan, although documented as a loan from the national bank, was in substance a loan from the payday lender and therefore usurious under state law. *See, e.g.*, *Goleta Nat'l Bank* v. *O'Donnell*, 239 F. Supp. 2d 745 (S.D. Ohio 2002) (collecting cases); *Goleta Nat'l Bank* v. *Lingerfelt*, 211 F. Supp. 2d 711, 717 (E.D.N.C. 2002) (no National Bank Act preemption if non-national bank was "de facto lender"); *Colorado* v. *ACE Cash Express, Inc.*, 188 F. Supp. 2d 1282 (D. Colo. 2002) (National Bank Act does not preempt claim that non-national bank committed usury through

"rent-a-charter" relationship with national bank); *Long* v. *ACE Cash Express, Inc.*, Case No. 3:00-CV-1306-J-25TJC, 2001 U.S. Dist. LEXIS 24617, at *3-4 (M.D. Fla. June 18, 2001) (same); *Brown* v. *ACE Cash Express, Inc.*, Civ. A. No. S-01-2674, 2001 U.S. Dist. LEXIS 25847 (D. Md. Nov. 14, 2001) (same).[5]

B. Defendant Has Provided Sufficient Evidence of "Unauthorized Use" In His Affidavit To Create A Triable Issue Of Fact Precluding Summary Judgment.

Assuming Plaintiff had sustained its initial burden on summary judgment—which it has not—Mr. [redacted] s burden would be to "present facts having probative value sufficient to demonstrate an unresolved material issue which can be determined only at a plenary trial." 7-R3212 N.Y. CIV. PRAC.: CPLR ¶ 3212.12 (David L. Ferstendig ed., Bender 2012) (citing cases, including *Forrest* v. *Jewish Guild for the Blind*, 3 N.Y.3d 295, 312, 786 N.Y.S.2d 382, 395-396, 819 N.E.2d 998, 1011-1012 (2004); *Guzman* v. *Strab Constr. Corp.*, 228 A.D.2d 645, 645 N.Y.S.2d 318 (2d Dep't 1996)). Mr. [redacted] may rely on an affidavit to place such facts before the Court, provided it "contain[s] detailed, clear, unambiguous, and particularized statements based upon personal knowledge" as opposed to "merely set[ting] forth conclusions or repeat[ing] the allegations contained in the pleading." *Id*. (citing cases).

Here, Mr [redacted] has more than sustained his burden to come forward with evidence in opposition to a motion for summary judgment. His affidavit states not merely that he disputes Plaintiff's claimed balance, but gives precise, particularized reasons why he believes

[5] Although Defendant at this stage is able only to submit hearsay materials obtained from Plaintiff's website in support of his usury argument, it is clear that Defendant may defeat summary judgment by providing such hearsay materials so long as they suggest that evidence may be available in admissible form to establish the defense. *Phillips*, 31 N.Y.2d at 311-12, 338 N.Y.S.2d at 885, 291 N.E.2d at 131; *Merriam*, 84 A.D.3d at 898-99, 922 N.Y.S.2d at 563. Defendant submits that such evidence substantiating the terms of Plaintiff's transaction and whether the subject account was included in it should be obtainable through notices to admit, document demands, and/or a trial subpoena to Plaintiff.

the charges therein were not authorized. The account statements submitted by Plaintiff reflects a handful of purchases, over a compressed timeframe, of expensive items, most of which were returned the same day of the purchase or shortly thereafter. The items purchased are all ones that Mr. [redacted] does not own, did not buy, and, in some cases, would have no use for. ([redacted] Aff. ¶¶ 10-17.) For example, the statements indicate that a washer and two dryers were purchased. Mr. [redacted] has had the same washer/dryer for over 10 years, did not purchase a new washer/dryer in 2010, and would not need two dryers. ([redacted] Aff. ¶ 10, 16.) The statements indicate purchases of a number of other items that Mr. [redacted] did not purchase. ([redacted] Aff. ¶¶ 10-14, 16-17.) Furthermore, all purchases, returns, and refunds happened over a compressed timeframe in the midst of general inactivity, at a time when Mr. [redacted] had not used the card in a long time and had essentially forgotten about it. ([redacted] Aff. ¶¶ 7-8, 19.) Nor do the statements reflect any activity of Mr. [redacted] to ratify these transactions. They reflect only two payments of $30 and $75, without reflecting who made the payments or how, and with a number of purchases occurring after the last payment.

VI. PLAINTIFF CANNOT BE PERMITTED TO SUSTAIN ITS BURDEN OF PROOF ON THIS MOTION THROUGH EVIDENCE SUBMITTED FOR THE FIRST TIME ON REPLY.

Plaintiff cannot properly be permitted to sustain its prima facie burden on this motion by submitting necessary evidence for the first time on reply. The function of reply is to respond to the arguments in the opposition. It is not to introduce new evidence. Because Plaintiff's moving papers are insufficient to establish entitlement to judgment as a matter of law, the burden of production has not shifted to Defendant to raise an issue of fact, and therefore the motion simply must be denied, regardless what Plaintiff submits with its reply papers. *Seefeldt* v. *Johnson*, 13 A.D.3d 1203, 787 N.Y.S.2d 594 (4th Dep't 2004). That is because Defendant is not obligated or permitted to respond to a reply, and so it would be improper to consider

evidence submitted for the first time on reply to which Defendant has not had the opportunity to respond. *Azzopardi* v. *American Blower Corp.*, 192 A.D.2d 453, 596 N.Y.S.2d 404 (1st Dep't 1993).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion for summary judgment and strike the Blumer affidavit from the record, together with such other and further relief the Court may find appropriate.

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Respectfully submitted,

Matthew A. Parham
Law Offices of Matthew A. Parham
70 Niagara Street, Suite 210
Buffalo, New York 14202
(716) 218-8876
matthew@matthewparhamlaw.com

Attorney for Defendant [redacted]