**STATE OF MICHIGAN**

**IN THE 47th DISTRICT OF THE COUNTY OF OAKLAND**

MIDLAND FUNDING, LLC,

As Assignee of CREDIT ONE BANK, N.A.

 Plaintiff/Counter-Defendant,

Case No. 17-

 HON. Marla E. Parker

-vs- **DEFENDANTS RESPONSE TO PLAINTIFF’S MOTION AND BRIEF**

MR. DEBTOR

,

Defendant/Counter-Plaintiff.

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**BRIEF IN SUPPORT OF DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION FOR SUMMARY DISPOSITION AND TO SUPPORT DEFENDANT’S COUNTER CLAIM**

NOW COMES DEFENDANT , by his attorneys, The Law Offices of Brian P. Parker, P.C.**,** and for this Brief in Support of Defendant’s Response to Plaintiff Midland Funding, LLC (“Midland”)’s Motion for Summary Disposition states as follows:

1. **Introduction**

Above, Midland is claiming to be an assignee of Credit One Bank in a suit against Mr. based upon Bill of Sales and Assignments that show no evidence of the specific debt. Midland has filed a breach of contract/account stated claim with an Affidavit from Midland to replace the actual cardholder agreement. The cardholder agreement they now attach is from 2016. As Midland’s field data report shows, Mr. did not sign up for a Credit One account in 2016. With no 2015 agreement and no terms and conditions, Midland seeks $612.36 without any proof. Further, a payment history does not equal an assignment or ownership of the debt.

The Affidavit of Ms. Nicole Hanke at **Exhibit 1 (Plaintiff’s Exhibit B, Defendant’s Exhibit 3)** states that the obligation was sued upon on September 21, 2017 even though the lawsuit was not filed until December 4, 2017. There is no proof that Midland Credit Management has any authority to make the Affidavit. MCM’s affiant presents no proof that the ***specific debt*** of Mr. has transferred along with the thousands of other debts ***from the original creditor,*** *Credit One Bank, N.A.*

Q. All right. So you wouldn't know what debts were passed from Credit One Bank to MHC Receivables; is that correct?

**A. Correct.** -Nicole Hanke, April 23, 2018 (page 158 of her deposition attached)

Q.All right. So you didn't look at -- I already -- you didn't look at any assignment from Credit One to MHC Receivables from MHC Receivables to Sherman Originator III, LLC from Sherman Originator III, LLC to Midland Funding; is that correct?

**A. I did not look at the bill of** **sales, no.** -Nicole Hanke, April 23, 2018 (page 84 attached)

Ms. Hanke has not reviewed any Bill of Sales or Assignments showing Midland owns the specific debt. In that vein, Michigan’s Court of Appeals just ruled on a similar case where the Affiant/Legal Specialist could not prove or show a link in the chain of title ownership.

1. **The *Midland Funding v Michael Bassett* Finds a Missing Link in This Case.**

*Midland Funding, LLC v Michael Bassett*, No. 338404, **April 24, 2018** laid out what a debt buyer like Midland needs to prove a proper chain of title. In *Bassett*, the Defendant had a Bank or America credit card from FIA Card Services. After Mr. Bassett is alleged to have stopped paying on the card, a large pool of charged off debts was sold by FIA to Asset Acceptance. During testimony to establish Midland’s ownership of the debt and a chain of title at trial, Ms. Emily Walker, a Legal Specialist at Midland Credit Management testified that there was *no mention of specific debtors or accounts* included in the sale between FIA and Asset. “The bill of sale and assignment of loans between FIA Card Services, N.A. and Asset Acceptance, LLC contain no specific identifying information regarding individual debtors.” ***Bassett Page 3 at Exhibit 2***.

The pool of charged off debts was sold by Asset Acceptance to Midland Funding, LLC. Walker testified that although defendant’s information is not explicitly listed on the chain of title documents, she was confident that his account was included in the transfer. ***Basset at Page 3***. Walker produced a redacted “field data report” showing the Bassett information to prove ownership of the debt by Midland. “The field data report was created by Midland Funding within 30 days of the debt pool sale. No similar document was produced by Asset Acceptance, LLC when it sold the charged off debt pool to Midland.” ***Bassett at Page 3***.

 The *Bassett* trial court found in favor of Midland believing that defendant had conceded he “probably owes” a debt to either FIA Card Services, N.A. or Asset Acceptance, LLC. Therefore, the only issue in this case was whether plaintiff could prove, through establishing a chain of title, that it was the owner of defendant’s debt. ***Bassett at 4***.

 The Court of Appeals held that Midland had failed to prove by a preponderance of the evidence that Midland owned Basset’s debt and reversed the trial court. “Although the chain of title documents admitted affirmatively show Midland Financial purchased a debt pool from Asset Acceptance, LLC, which was originally owned by FIA Card Services, N.A., the trial court’s ***finding that defendant’s individual debt was included in that debt pool is clearly erroneous***.” ***Bassett at Page 4 with emphasis added***. The Appeals Court held:

 “***However, there was no information identifying any individual debtors in any of the chain of sale documents with respect to the sale between FIA Card Services, N.A. and Asset Acceptance, LLC, and likewise, no field data report, or similar document, was produced with respect to that sale.*** Therefore, there is a break in the chain of title as it relates to the inclusion of defendant’s debt in the charged off debt pool.”

The Court held further that, “Based on the foregoing, we conclude that ***plaintiff failed to affirmatively establish a continuous chain of title to defendant’s debt between FIA Card Services, N.A. and Midland Funding. Instead, plaintiff only established a continuous chain of title to a generic debt pool***… Because Midland Funding failed to prove by a preponderance of the evidence that it owned defendant’s debt, defendant was entitled to judgment in his favor.” **Page 5 of the COA Opinion at Exhibit 2**. (emphasis added)

Here, while a pool of debts might have been sold to Midland, there is no specific assignments or field data reports or similar documents between Credit One, MHC Receivables and Sherman Originators III, LLC that show any connection to Mr. ’s debt. “Therefore, there is a break in the chain of title as it relates to the inclusion of defendant’s debt in the charged off debt pool.” *Bassett at Page 5*.

1. **STANDARD OF REVIEW**

 Defendant would agree with the Standard of Review put forth by Midland. Further, Mr. should also be granted Summary Disposition in its favor under MCR 2.116(I)(2) because the lack of ownership evidence that Midland owns the specific obligation of Mr. . Under MCR 2.116(I)(2), the Court may render a summary disposition judgment to the opposing party if it appears to the Court that that party is entitled to judgment rather than the moving party.

Counter Plaintiff/Defendant bring his Counter Claim for damages and injunctive relief based upon the Counter Defendant/Plaintiff Midland’s violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.* and The Regulation of Collection Practices Act (RCPA), and codified at [MCL 445.251 et seq.](http://www.michiganlegislature.org/mileg.asp?page=getObject&objName=mcl-Act-70-of-1981) and the Michigan Occupation Code ("MOC"), MCL 339.901 et seq;

Midland violates Federal and Michigan law by deceiving Mr. Mr. Debtor into paying a debt or being defaulted in State courts where Midland lacks ownership and/or proof of ownership to sue on a debt through collection lawsuits with material and false representations in filing the lawsuit without the proper chain of title and a false Affidavit.[[1]](#footnote-2)

1. **FURTHER FACTS AND ANALYSIS**
2. **There is a genuine issue as to the material fact that Midland owns the debt as Midland cannot prove it has a right to pursue Mr. Debtor and therefore, Midland’s Motion for Summary should be Denied, and Defendant entitled to Summary Disposition against Midland under and MCR 2.116(I)(2).**

In its Brief here, Midland states as proof it has a good chain of title on Page 8 when it states (cut and paste from the brief by PDF):



Midland’s proof of ownership and charge off date is based upon a field data like in *Bassett*. The “report” has no reference to Credit One or MHC. It sates the debt was created on 3/10/2015 and charged off on 04/17/2016. However, the field data report Plaintiff relies upon was not created Midland as in *Bassett*, but by the third buyer in the chain, Sherman Originators III, LLC on 05/20/2016. Ms. Hanke confirms this too:

Q. And it's called a field data sheet; is that correct?

**A. We refer to it as seller data** **sheet, but.**

Q. Seller data sheet. Why do you refer to it as a seller data sheet?

**A. Because it's data that was sent** **over by the seller regarding the account.**

-Nicole Hanke, April 23, 2018 (page 102 at **Exhibit 1**)

Midland’s data report has no custodian of records or witness supporting its admissablity and is clearly Hearsay without exception. On the bottom of the field data sheet it states:



 With zero proof supplied, Midland states in its Brief that “The Accounts transferred under the terms of the Bill of Sale were each transferred to MHC immediately following charge off, on the charge off date for each applicable Account as shown in the computer file.” However, Ms. Hanke did not know when the original creditor, Credit One Bank charged off the account:

Q. All right. Thank you.

What documents did you look at from Credit One that showed it to be charged off at that date?

**A. I didn't look at documents. I** **looked at the information that was integrated** **into our internal database.**

Q. From?

**A. The seller.**

Q. Which was Sherman Originators?

 **A. Correct.**

Q. So you didn't see anything from Credit One saying when the debt was charged off, you saw it from the third owner of the debt saying when it was charged off; is that correct?

**A. Correct. Hanke** -Nicole Hanke, April 23, 2018 (page 129 of **Exhibit 1**)

Ms. Hanke also testified as to where the information Midland relies upon comes from and *who creates the data sheet*:

THE WITNESS: The seller sends over the compilation of in this case Darrin Mr. Debtor's account. And it is put into what we call a data sheet.

BY MR. PARKER:

Q. Do you know who the seller is?

**A. Sherman.**

Q. Originator?

**A. Originator III, LLC.**

Q All right. And you're saying that they created the sheet and sent it over -- or no, you don't know who created it, but they send information? Yes? No?

**A. Correct.** Nicole Hanke, April 23, 2018 (page 99 at **Exhibit 1**)

MCM’s Affiant did not look at any information from Credit One Bank or MHC Receivables, LLC or any Bill of Sales Midland is relying upon in its Brief.

THE WITNESS: **If you're referring to this affidavit, I did not look at any bill of sales.**

BY MR. PARKER:

Q. All right. So you didn't look at information from Credit One Bank; is that correct?

**A. Correct.** -Nicole Hanke, April 23, 2018 (page 105 of her deposition attached)

Q. Do you look at information from MHC Receivables, LLC and these affidavit of records?

 MR. Tucker: Same objection.

THE WITNESS: **I -- no. I didn't** **look at any bill of sale or any of –**

BY MR. PARKER:

Q. Anything from those entities?

MR. MR. Tucker: Objection.

BY MR. PARKER:

Q. On September 21st?

**A. No.** -Nicole Hanke, April 23, 2018 (page 105-107 at **Exhibit 1**)

No bill of sale and no information from Credit One or MHC. In a nut shell, Midland’s evidence of the assignment of the Mr. Debtor debt are hearsay documents created by the third owner of the debt months after the sale from Credit One to MHC and from MHC to Sherman:

Q. All right. So you wouldn't know what debts were passed from Credit One Bank to MHC Receivables; is that correct?

**A. Correct.**

-Nicole Hanke, April 23, 2018 (page 158 of **Exhibit 1**)

Q. All right. Have you seen anything signed by Midland where they're accepting ownership of this Mr. Debtor debt?

 **A. Not to my knowledge.** -Nicole Hanke, April 23, 2018 (page 148 of **Exhibit 1**)

1. ***Nothing in Midland’s Motion shows Midland is an assignee of Credit One Bank.***

Midland states on Page 8 that “In point of fact, Midland has provided the full chain of title of the assignment of the debt, along with the accompanying sworn affidavits which align as to the dates of assignment, showing that Midland is the current owner of the subject debt.” Midland presents a payment history for Mr. Debtor in its Brief. However, a payment history does not equal ownership. There is no proof that the chain of title of ownership specific to Mr. Debtor exists as required in the ruling of *Midland Funding, LLC v Michael Bassett*, No. 338404.

In *Bassett*, the Court ruled “***However, there was no information identifying any individual debtors in any of the chain of sale documents with respect to the sale between FIA Card Services, N.A. and Asset Acceptance, LLC, and likewise, no field data report, or similar document, was produced with respect to that sale.”*** There is no “field data report or similar document” between Credit One Bank and MHC Receivables and MHC Receivables and Sherman Originator. Midland has failed to provide a full chain of title of the showing the Mr. Debtor debt passing to any entity prior to Sherman. Appropriately their Motion should be Denied, and Mr. Mr. Debtor granted a No-Cause under MCR 2.116(I)(2).

1. **The Bill of Sales Show Four Owners and No Chain of Title**

None of the Bill of Sales or Affidavits between Credit One to MHC to Sherman mention Mr. Mr. Debtor. The Bill of Sale between Credit One Bank and MHC Receivables, LLC above from Midland’s Brief (attached here at **Exhibit 4 Plaintiff Exhibit C**), shows that Credit One supposedly sold every *right, title and interest in the accounts* to MHC Receivables, LLC to a pool of debt on April 30, 2016. Mr. Mr. Debtor’s debt is not mentioned as one of the Accounts.

MHC then sold a pool of debts to Sherman Originators, III, LL on May 12, 2106. **Please see Exhibit 5, Midland Exhibit E**. On July 18, 2017 Ms. Vicki Scott states in the Affidavit of Sale of Accounts at Paragraph 7 that, “***Credit One and MHC have agreed to transfer all such rights, title and interest in and to the Sold Accounts to Sherman.***” **See Affidavit of Scott at Exhibit 5, Midland Exhibit F**. Mr. Mr. Debtor’s debt is not mentioned as one of the Accounts. However, Credit One cannot agree to transfer anything. It sold its interest in the accounts on April 30, 2016 according to **Plaintiff’s Exhibit C (Defendant’s Exhibit 4)**.

 On **May 27, 2016** (**Midland Exhibit H, Defendant’s Exhibit 65**) Mr. Mazzoli swore under oath that prior to the sale to Midland on **May 20, 2016** at Paragraph 5 that, “Sherman Originator III, LLC had previously bought the Accounts on ***May 12, 2016*** from Credit One ***and*** its affiliates.” MHC is not mentioned. That would not be possible if the Bill of Sale and Assignment from Credit One to MHC Receivables is to be believed on **April 30, 2016** in **Exhibit 4**. The Court is asked to review the Bill of Sale and Assignment at **Midland’s Exhibit G at Exhibit 6** and the John Mazzoli Affidavit at **Their Exhibit H (Exhibit 6)** and notice that neither document references ***MHC Receivables*** or ***MHC*** owning anything.

 MHC Receivables, LLC is a separate entity from Credit One Bank. **See attached Exhibit 7**. Only MHC could sell the pool of debt after April 30, 2016, but in Mazzoli’ s Affidavit on May 27, 2016, there is no mention of any ownership interest of MHC passing on to Sherman. Just Credit One and affiliates who had nothing to sell after April 30, 2016.

1. ***Ms. Hanke’s Affidavit does not belong to Midland***

The Affidavit that Midland relies upon was created by a company called Midland

Credit Management (MCM). Midland Funding has nothing to do with the creation of the Affidavit Plaintiff relies upon. Ms. Hanke does not create the Affidavit and can’t explain much of anything about the document she signs.

 Q. Well, let me ask you this: It doesn't say that it's owed to plaintiff.

MR. TUCKER: Objection to the form.

THE WITNESS: It's an MCM affidavit. I guess I thought that -- in my opinion, that's pretty clear that it's -- we are the one that are suing.

BY MR. PARKER: Q. You called it an MCM affidavit; is that correct?

**A. It's a Midland Funding affidavit.**

Q. Okay. Which one is it, a Midland Funding affidavit or an MCM affidavit? MCM created it; is that correct?

**A. Yes.**

Q. Midland had nothing to do with this creation of this; is that correct, Midland Funding?

**A. To my knowledge, yes.**

Q. They didn't have –

**A. Yeah.** -Nicole Hanke, April 23, 2018 (page 126-127 of **Exhibit 1**)

 Ms. Hanke does not create or supply any information to the Affidavit either.

All right. Do you write the affidavits that you sign, validate, or notarize?

**A. I do not.**

Q. You do not write them. Do you add anything to the affidavits that you validate, sign, or notarize?

**A. No.**

Q. Other than your signature?

**A. Yes.**

Q. All right. So the only thing you add to an affidavit as part of your job as a legal specialist is your signature?

**A. And a date stamp.**

Q. And a date stamp?

**A. If it requires a notary, a notary** **stamp.**

Q. All right. So you don't add anything to the information?

**A. No.** -Nicole Hanke, April 23, 2018 (page 24-25 of **Exhibit 1**)

1. ***Ms. Hanke lacks reliable, evidentiary authority to speak for anyone.***

The Court is asked to look at the Midland/Hanke/MCM Affidavit and consider who is authorizing Ms. Hanke to sign off on this Affidavit. Ms. Hanke states she is a Legal Specialist for MCM. She states that she makes the Affidavit on Plaintiff’s behalf. She is the only witness to this authority. She is, in effect testifying that Midland by Hanke has authorized MCM, acting through Hanke as its Legal Specialist to prepare the Affidavit for Midland that she admits she did not prepare-she just signed, and date stamped. With two entities involved, there should have been a person authorizing Ms. Hanke to act on behalf of Midland to lay a proper evidentiary foundation. This alone should be trouble the Court as the basis of the action against Mr. Debtor.

1. ***So, here is what Midland did with the Junior Web Developer***

Midland is now saying on Page10 of it recent Response Brief to Defendant’s Motion to Compel and Motion to Strike that: “As Midland explained under oath, Mr. Debtor’s Account was included in the computer files attached to the bills of sale in each step of the chain of title: from Credit One to MHC, from MHC to Sherman, and then from Sherman to Midland Funding. (Ex. B.,pp.6-9).” Then on Page 15 of the same Response Brief it states “Rather, in the instant case, Midland Funding has signed interrogatories under oath testifying that Mr. Mr. Debtor’s Account was included in the computer file attached to each bill of sale from Credit One to MHC, from MHC to Sherman and from Sherman to Midland Funding. (Ex. B, pp6-9).” **See Exhibit 8**.

Below is the signature from the signed interrogatories Midland now claims shows sworn evidence that the debt passed with each previous owner:**Please See Exhibit 9**.

Mr. Zaytsev is a *Junior Web Developer* who also works for Encore Capital Group. **See his Linkedin Bio he created at Exhibit 10**. Midland is asking the Court to believe Mr. Zaytsev’s quirky and ambivalent statement two years later that “*To the extent* that I have personal knowledge of the information contained therein, the same are true and correct. Insofar as said facts are based on a composite of information from computerized records, *I do not have personal knowledge* concerning all of the information contained in said responses, but I am informed and believe that the information set forth therein for *I lack personal knowledge* is true and correct.” Apparently, this is the best Midland can do with very little.

 Mr. Zaytsev is denying knowledge of the “composite of information from computerized records” Midland states, “Mr. Debtor’s Account was included in the computer file attached to each bill of sale from Credit One to MHC, from MHC to Sherman and from Sherman to Midland Funding.” However, Mr. Zaystev does not have enough personal knowledge for Midland to base its whole case on his signed interrogatories this far down the road. Under MRE 803(6), his statement is not a record made at or near the time by-or from information transmitted by-someone with knowledge.

Given the broken chain of title and absence of ownership proof of the Mr. Debtor debt a genuine issue of fact exits and Midland’s Motion under MCR 2.116(C) (10) should be Denied. Very clearly, Defendant should be granted Summary Disposition under MCR 2.116(I)(2).

1. ***Midland Funding has no basis to file the lawsuit against Mr. Debtor***.

 In Midland’s Affidavit attached to the lawsuit against Mr. Debtor, Ms. Nicole Hanke swears under oath in Minnesota on September 21, 2017 that a debt “obligation [has been] sued upon” and that Mr. Mr. Debtor is a Defendant and Midland a Plaintiff before any lawsuit has been filed in the 47th District Court on that date. Midland and Ms. Hanke’s belief is that the statement “obligation [has been] sued upon” and the fact Mr. Mr. Debtor is a Defendant and Midland is a Plaintiff ***before a lawsuit filed three months later*** becomes true once Mr. Mr. Debtor receives the Affidavit and lawsuit.

Q. We had some discussion on that. Is it your belief it's not a false statement to Mr. Debtor because when he obtains it, it is a true statement that it's been sued upon?

**A. Correct.**

Q. Right?

**A. Correct.**

Q. Is it your belief that it becomes a true statement once Mr. Mr. Debtor receives this?

**A. Yes.** -Nicole Hanke, April 23, 2018 (page 181 at **Exhibit 1**)

 Ms. Hanke swears “I certify under perjury that the foregoing statements are true and correct.” But she has testified that the statements she swears to under oath are false until they become true. But they are not true at the time she swears they are-under oath and Midland (who is aware of this at signing) violates the law and the FDCPA.

1. ***The 6th Circuit has ruled on a similar situation where the debt collector claims there was no misrepresentation until the debtor became aware of it.***

A similar situation as the Mr. Debtor case occurred in the facts of a Court of Appeals decision titled *Tyler v DH Capital Management, Inc*., 736 F.3d 455-Court of Appeals, 6th Circuit 2013. In *Tyler*, the Court was asked to decide something similar as in this case: Did an actionable violation under the FDCPA occur at the time of the filing of the complaint or when the Plaintiff was served with the complaint that violated the FDCPA? The *Tyler* Court held that the violation occurred pre-service of the complaint or before the debtor became aware of the lawsuit.

The FDCPA prohibits, however, an "attempt to collect any debt" not permitted by contract or law and the false representation of the "the character, amount, or ***legal status of any debt***." 15 U.S.C. §§ 1692e(2)(A), 1692f (1).” *Tyler* at 463.Ms. Hanke confirms Midland violated the FDCPA under Tyler *when served on Mr. Mr. Debtor* after filing *the false but true when served Affidavit* with the 47th District Court:

Q. All right.

**A. So by the time the consumer would** **receive this affidavit and the complaint, the** **account will have been sued upon.**

Q. When the consumer receives it?

**A. Correct.**

Q. How about when it's filed with the court, is it sued upon then?

MR. TUCKER: Objection to the form.

BY MR. PARKER:

Q. Is it filed then with the court? I think you said October 16th.

**A. Yes.**

Q. He's not served until -- in this case I think he was served in January. So is the obligation sued upon in October 16th when it's actually filed with the court?

**A.That would be my -- yes.**

Q. All right. So it hasn't been sued upon until it gets -- at least it gets to the court; is that correct?

**A. Correct.** -Nicole Hanke, April 23, 2018 (page 77-78 of **Exhibit 1**)

Ms. Hanke is admitting that the statement in the Affidavit that the obligation has been sued upon if false until it gets to Court. Ms. Hanke testified that she signs the Affidavit before the lawsuit is filed:

Q. All right. And this may sound -- how do you not know?

**A. Because when the affidavits are** **sent, they're sent over by the firm. As for what** **action they're taking whether they filed the** **complaint or not, I'm not aware. I just know** **that they need this affidavit to file suit.**

Q. Okay. To file suit. All right. So that's your job is to set up an affidavit prior to filing suit?

**A. To attach it to their complaint.** -Nicole Hanke, April 23, 2018 (page 137 of **Exhibit 1**)

The *Tyler* court stated that “The FDCPA prohibits various kinds of unfair debt-collection practices, many of which do not involve the legal process. *See, e.g.,* 15 U.S.C. § 1692d (5) (harassing phone calls). These claims are easily dated to the time of the violation. The FDCPA also prohibits, however, an "attempt to collect any debt" not permitted by contract or law and the false representation of the "the character, amount, or legal status of any debt." 15 U.S.C. §§ 1692e(2)(A), 1692f (1).” *Tyler* at 463.

The Court further held that “As the purpose of the FDCPA "is to regulate the actions of debt collectors," [*Naas,* 130 F.3d at 893,](https://scholar.google.com/scholar_case?case=15009443818842446607&q=tyler+v+dh+capital+management+inc&hl=en&as_sdt=80000006) the focus should be on the debt collector's actions, not on the awareness of the debtor.” *Tyler* at 464.

*Tyler* emphasizes that Midland violated the law in the Mr. Debtor case by relying upon the Hanke misrepresentation under oath *on the day she signed the false Affidavit* in Minnesota on September 21, 2017 instead of the December 4, 2017 when Midland filed the lawsuit with the 47th District Court and served it on Mr. Mr. Debtor in January of 2018.

1. **Application of the Michigan Case law on assignments to the fact that there is no ownership interest in the Mr. Debtor debt by Midland Funding, LLC.**

 To constitute a valid assignment there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned. [*Weston v Dowty*, 163 Mich App 238, 242](https://scholar.google.com/scholar_case?case=1834068389497053589&q=Brownbark+II+LP+v.+Bay+Area+Floorcovering+%26+Design+Inc.+et+al,+&hl=en&as_sdt=4,23); 414 NW2d 165 (1987). Further, absent evidence of the different sales documents produced showing the specific assignment from the Original Lender to the Midland, the Plaintiff’s pleading containing Midland’s bare assertion of the assignment is insufficient to establish factual support for plaintiff’s claim that it acquired defendant’s account by assignment. See *Unifund CCR Partners v. Nishawn Riley*, Michigan Court of Appeals Case No. 287599, February 18, 2010.

In, *Brownbark II, LP v. Bay Area Floorcovering & Design Inc. et al*, Michigan Court of Appeals Case No. 296660, May 31, 2011, the Court of Appeals stated that Michigan’s statute of frauds still requires that an assignment of debt be in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise. The Court focused on the authority of various people and entities signing assignments or transfers. The Court was troubled by representatives of other companies or affiliates of the companies signing assignments on each other’s behalf without actual authority to do so. Discussing the facts of Brownbark but illustrating the web of connections here in the Mr. Debtor case, the Brownbark court illuminated,

“In addition, plaintiff's representative conceded that James Hrebenar, the person who purportedly signed the allonge on behalf of National City Bank, was actually an employee of plaintiff's affiliate. Plaintiff presented no evidence, either of an actual signed power of attorney or testimony by Hrebenar or a representative of National City Bank, to support the assertion that Hrebenar had been authorized to act as an attorney-in-fact on National City Bank's behalf.[[4]](https://scholar.google.com/scholar_case?case=2101869393241940904&q=Brownbark+v+Bay&hl=en&as_sdt=80000006" \l "[4]) In light of the foregoing facts, we cannot conclude that the trial court clearly erred in finding that plaintiff had failed to prove the existence of a valid assignment. [*Burkhardt,* 260 Mich App at 653-654](https://scholar.google.com/scholar_case?case=16065675057084706992&q=Brownbark+v+Bay&hl=en&as_sdt=80000006).

 Like in *Brownbark*, in this case, we see Vicki Scott wearing many hats and signing for other entities without any authority or any reference to the Mr. Debtor debt being anywhere near the transactions she signs on. Mr. Mazzoli believes the sale of the debt is between Credit One and Sherman. After Ms. Scott exits the chain, MHC like the Mr. Debtor debt from beginning all the way to Midland is never mentioned again.

Mr. Mr. Debtor’s Affidavit states that he made no payments to Midland and does not owe them a debt. **Please see Exhibit 11**. Midland has not provided the Credit One Cardholder agreement in its complaint or in the new documents with this Motion. Midland’s field data report states the debt was created on 03/10/2015. The agreement supplied by Midland (**Midland Exhibit A last page, Defendant Exhibit 12**) were created in 2016. Why would Midland supply the wrong agreement?



The FDCPA also prohibits, however, an "attempt to collect any debt" ***not permitted by contract*** or law and the false representation of the "the character, amount, or ***legal status*** of any debt." 15 U.S.C. §§ 1692e(2)(A), 1692f (1).” *Tyler* at 463. Given the lack of any proof (Mr. Zaytsev ‘s records were not made at or near the time by -or from the information transmitted by-someone with knowledge under 803(6)) there remains a genuine issue for trial as to the chain of title on Plaintiff’s Motion. Defendant is entitled to a no-cause under MCR 2.116(I)(2) and Midland’s case should be dismissed with prejudice.

1. **COUNTER CLAIM UNDER THE FDCPA AND RCPA**

For the many reasons as stated above, Defendant violated 15 U.S.C. 1692e and e (10) with the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer with their use of false Affidavits and without any proof they owned the debt. They depend upon a 2016 Credit Cardholder agreement on a debt their own Field Report states it was opened in 2015. The Affidavit in the collection complaint was signed under oath but the Affiant admits that it was not true when she signed it. See *Tyler at 363* above.

 Defendant violated 15 U.S.C. 1692e(2)(A) by making false representations about the character, amount and ***legal status*** of the debt and without itemization of the debt. The Cardholder agreement determines what to charge the Defendant. Yet, the agreement supplied to the court is a not signed by Mr. Mr. Debtor in 2016. Defendant violated 15 U.S.C. 1692e (5) by suing on a debt that Plaintiff does not owe Plaintiff and Midland does not have proof or contract to sue upon.

 Defendant violated 15 U.S.C. 1692f (1) by suing for interest costs, damages and fees that it is not authorized by the original contract to collect and without itemization of the debt. Where is the Original Contract from 2015? Given the violations and false documents, Defendant violated 15 U.S.C. 1692e (3) and 15 U.S.C. 1692e (10) by filing a lawsuit without any meaningful attorney review of the file before it was signed and in violation of MCR 2.114. **Exhibit 13 has the statutes violated by Midland Funding, LLC in their lawsuit against Mr. Mr. Debtor**.

The FDCPA is a strict liability statute, which provides for actual or statutory damages upon the showing of one violation. Whether a debt collector’s actions are false, deceptive, or misleading under § 1692(a)-g is based on whether the “least sophisticated consumer” would be misled by a defendant’s actions. *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 329 (6th Cir. 2006).). This standard ensures “that the FDCPA protects all consumers, the gullible as well as the shrewd.” *Kistner v. Law Offices of Michael P. Margelefsky, LLC.*, 518 F.3d 433, 438 (6th Cir).

 The RCPA mirrors the requirements and remedies of the FDCPA with the same 6th Circuit use of the “least sophisticated consumer” standard. *McKeown v. Mary Jane M. Elliott P.C.,*No. 07–12016–BC, 2007 WL 4326825, at \*5 (E.D.Mich. Dec. 10, 2007) (citing *Hubbard v. Nat'l Bond and Collection Assocs., Inc.,*126 B.R. 422, 426 (D.Del.1991)) held that “§ 445.252(e) applies to Defendant, its analysis is similar to that under § 1692e of the FDCPA, both of which bar misleading and deceptive communications… Considering the similarity between 15 U.S.C. § 1692e 15 U.S.C. § 1692g, it appears appropriate to view Plaintiff’s claims under the same “least sophisticated consumer” standard.

Counter-Plaintiff alleges Midland’s acts in attempting to collect this debt against the Mr. Mr. Debtor constitute violations of the Occupational Code, M.C.L. 339.915/ and RCPA M.C.L 445.252 including but not limited to (e) Making an inaccurate, misleading, untrue, or deceptive statement or claim in a communication to collect a debt or concealing or not revealing the purpose of a communication when it is made in connection with collecting a debt,(n) by using a harassing, oppressive, or abusive method to collect a debt, including causing a telephone to ring or engaging a person in telephone conversation repeatedly, continuously, or at unusual times or places which are known to be inconvenient to the debtor, (q) Failing to implement a procedure designed to prevent a violation by an employee.

1. ***A word about Harvey v. Great Seneca Financial Corp., 453 F.3d 324 (6th Cir. 2006).***

Mr. Mr. Debtor is arguing that Midland has no legal right to sue them related to the Credit One debt at issue, and that by extension in doing so (among a multitude of violations) misrepresented the amounts due and/or the legal character and status of the debts at issue when the lawsuit was filed against him.

In *Harvey*, the Plaintiff alleged that the debt collector did not have the means to prove a lawsuit *at the time of filing*. Ms. Harvey lost because she could not show the debt collector was incapable of ever obtaining the proper paperwork throughout the case. Here, Midland filed a collection lawsuit “*without the means of ever being able to obtain sufficient proof of the debt-collection action*.” Midland’s Brief shows they have no proof they own the Mr. Debtor debt. Even after they filed the Summary Motion, their only fall back was on the signature of supplemental responses from Mr. Zaystev and he refuses to show personal knowledge of much of anything. **The *Harvey* analysis would not apply to this case**.

1. **CONCLUSION**

As shown above, Midland Funding, LLC has sued Mr. Mr. Debtor with no proof that it owned the specific debt bought from three different sellers. The *Bassett* case is instructive here in providing the Court the foundation of what a debt collector must do to both file and prove a case: Have the specific assignment or a data sheet or equivalent from each previous owner or there is no chain of title. This does not exist in Mr. Mr. Debtor’s case. While Midland’s actions may be enough to show it purchased a generic pool of debts, it has no proof to show as the caption above states, that it is an “*Assignee of CREDIT ONE BANK, N.A*.” regarding Mr. Mr. Debtor’s specific debt. Both Midland’s own Ms. Hanke and Mr. Zaystev and the dearth of ownership documentation *confirm* there is a break in the chain of title that is irrevocable on the date this lawsuit is filed.

WHEREFORE, this Honorable Court is requested to find that Midland has failed to prove the existence here of a valid chain of title to the assignment of the Mr. Debtor account from Credit One Bank, NA to Midland Funding, LLC under MCR. 2.116(C) (10) as there remains a genuine issue of fact on Plaintiff’s Motion. Clearly, Defendant has shown that under MCR 2.116(I)(2), a no-cause for Mr. Mr. Debtor should be found by this Honorable Court. Thank you.

 Respectfully submitted,

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Dated: May 13, 2018 BRIAN P. PARKER (P48617)

1. https://www.nclc.org/images/pdf/debt\_collection/Debt-Collection-Facts-2016.pdf See, e.g., Mary Spector, “Debts,

Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts,” 6 Va. L. &

Bus. Rev. 257, 288 (2011) (77% default rate in Dallas County); Claudia Wilner and Nasoan Sheftel-Gomes,

Neighborhood Economic Development Advocacy Project, Debt Deception: How Debt Buyers Abuse the Legal

System to Prey on Low Income New Yorkers (2010) (81% default rates in New York City); Federal Trade

Commission, Repairing a Broken System 7 (July 2010) (“panelists from throughout the country estimated that sixty

percent to ninety-five percent of consumer debt collection lawsuits result in defaults, with most panelists indicating

that the rate in their jurisdictions was close to ninety percent”) and 7 n.18 (collecting studies on default rates) [↑](#footnote-ref-2)