POINT COUNTER POINT

ARGUMENT: The Bill and Sale of Assignments show a chain of title and proof that the Defendant owes debt to Midland Funding, LLC.

COUNTER:

1. The Bill of Sale is a bill of sale for thousands of debts, none of which shows that the specific debt of the Debtor is included in the portfolio.

2. There is no evidence of an Assignment from the Original Creditor to Midland Funding, LLC.

3. There is no copy of the Original Credit Card Agreement showing the signature of the debtor or proof of the interest and charges that must be evident to prove the amount Midland seeks. How did they obtain the number they claim Defendant owes?

4. Commonly, any credit card agreement they provide is rarely complete and has a trademark date that the original creditor printed the agreement -in a year different than the date Midland claims the debtor signed up for the card. Look for something like this at the bottom:

5. 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.

6. The Affidavit that Midland relies upon and any Bill of Sale and Assignment states that the signor or Affiant has reviewed the electronic records but Midland never supplies the electronic records they rely upon-they never will without a fight because they don't exist, or they have some problem that does not show the specific debtor owes the specific debt.

ARGUMENT: The Affidavit from a Legal Specialist in Minnesota shows that Midland owns the debt and is owed the money from Defendant Debtor.

COUNTER: The Midland Affidavit is everything to Midland as it avoids the need to show proof of paperwork showing the original creditor that the debtor signed. In Michigan under MCL 600.2145, the Affidavit is prima facia evidence the debt is owed if the debtor does not supply a counter-affidavit within ten days. So, you need a Counter Affidavit right out of the gate.

1. **Read the Affidavit.** Usually, the Affidavit is from a Midland Credit Management (MCM) representative. The Affiant 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 the Affiant has authorized MCM, acting through the Affiant as its Legal Specialist to prepare the Affidavit for Midland that she will admit in a deposition she did not prepare-she just signed, and date stamped. With two entities involved, there should have been a person authorizing the Affiant 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 a Debtor... Not trustworthy at all and again, no proof the Affiant has the right to talk for anyone but herself.
2. Currently, the template Affidavit they use states that the "obligation was sued upon" on the date it is signed, days, weeks and sometimes months before the lawsuit is filed. They are swearing under oath that the Affidavit statements are true but when they sign the document, there is no lawsuit sued upon and no Plaintiff or Defendant as stated.
3. **The Missing Debt Information**. MCM's affiant presents no proof that the ***specific debt*** of the debtor has transferred along with the thousands of other debts in the pool of debts.
4. There is never anything attached to the Affidavit that the Affiant swears she reviewed. She claims that she reviewed electronic records to come to her "opinion." It is all about the electronic records but there are none attached as proof. Court does not just take the Affiant's word for it.
5. **False under Oath.** As far as the Affiant swearing under oath that the Affidavit states the "obligation was sued upon" months before the lawsuit is filed, Midland defends this by saying the statement becomes true once it is in the hands of the debtor when he is served.

Two things: they admit it is false when the notary signs under oath that it is true (2) there is a 6th Circuit Opinion on point on this issue. A similar situation as the Tucker 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: 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. Fit this into your defense of Midland saying, "it was false until it became true."

6. The Midland Affidavit is created to attach to the Midland complaint and before the lawsuit is written. It is created for the purposes of litigation. That is a major reason it will not pass muster as an exception to hearsay under 803(6). See the Midland Affiant transcript where she admits these three times.

ARGUMENT: Midland has all the assignments show the chain of custody of the debt.

COUNTER: 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; 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. *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.

Unifund is a good case for the second Affidavit they produce when you poke holes in the first one attached to the lawsuit. The goal is to never provide the electronic records the Affiants rely upon. They believe that testimony about the bill of sale and what the Affiant viewed regarding assignments or chain of sale evidence of the SPECIFIC DEBT OF DEFENDANT is enough and will not provided what the Affiants view. But to quote *Unifund*: "Because the assignment occurred through the contract, absent evidence of the contract showing the specific assignment, the affidavit containing plaintiff's employee's bare assertion of the assignment is insufficient to establish factual support for plaintiff's claim that it acquired defendant's account by assignment."

Headline of my Response Briefs say: Where are the Electronic Records Midland depends upon?

ARGUMENT: Midland's Field Data Sheet Shows ownership, the charge off date and the fact that the debtor owes the debt. It is our assignment and a complete chain of title.

COUNTER: 50% of the time Midland will attach a Field Data sheet to the complaint (usually 100% with the Summary Motion) providing information about the debt, the charge of date, date the obligation was opened and specific personal information of the debtor. This is the document Midland focuses upon as the specific chain of title for one reason: it has personal info of the Defendant and "why else would Midland have this unless the owned the debt, your Honor?" But this information shows no chain of title or title transference of the debt from the original creditor to Midland or whomever they bought the debt from. The Judge will latch on to this as proof too, so you must call Midland out on this bs document. You should review both ***Basset*** Opinions and Mr. Basset's personal story on this site before going further here. Usually, the field data report is created by the seller of the debt, so it is not trustworthy for Midland's evidence context.

Midland's proof of ownership and charge off date is based upon a field data like in *Bassett*. However, the report will not normally have reference to the original creditor. Further, the field data report Midland relies upon is created by the seller and not Midland as in *Bassett*. Midland or MCM really don't create anything. Just like in the credit card holder

agreement, look on the bottom of the document for clues that help. On the bottom of the field date reports it will tell you who really created the document. It is never Midland. It will say something like this:

> **Data printed from electronic records provided by Sherman Originator III, LLC pursuant to the Bill of Sale / Assignment of Accounts transferred on or about 05/20/2016 in connection with the sale of accounts from Sherman Originator III, LLC to Midland Funding, LLC.**

Data printed from electronic records provided by a third party in connection with the sale from the third-party. Now to wrap this up with the Affidavit. You will recall from re-viewing the Affidavit that you might have seen this statement from the Midland/MCM Affiant:

> XXXXXXXXXXX (hereinafter "the account"). I have access to and have reviewed the electronic records pertaining to the account maintained by MCM and am authorized to make this affidavit on Plaintiff's behalf. The electronic records reviewed consist of data acquired from the seller when Plaintiff purchased the account, together with records generated by MCM in connection with servicing the account since the date the account was purchased by Plaintiff.

Reliance on Third Party Seller: Recognize what the whole thing is really based upon? That's right, the Affiant and Midland are relying upon electronic information created by a third-party and it is all they have reviewed. They have not created, accumulated, witnessed or written anything that Midland or MCM created. This is your hearsay argument. The 803(6) Exception would not apply. Lawyers and Judges forget that these are *exceptions* to the *general rule* of hearsay and the proof to meet the exception should be "exceptional." When you depose (again see Midland Affiant Deposition on this site) the Affiant she will admit that the Affidavit is created for litigation. I made her say it three times in my deposition so there was no dispute. Documents created for litigation are not trustworthy or independent to qualify for 803(6). Secondly and similarly, they need a custodian of records from the third-

party to bring in the third- party hearsay information. That is why their Summary Motion is so important. Citibank is not flying in a witness on any debt they sold off. The Affiant will admit she has no training with the original creditor, did not witness anything and does nothing other confirm the seller's information is the same as what is printed on the Affiant. The MCM Affiants themselves don't call it a Field Data Report but a Seller's Date Report because they know it is created by the debt seller, not Midland or MCM. I have to know my Hearsay Rules and remember to use these words in Court: "Your honor, Hearsay is the ***General Rule***, not the exception. There is nothing exceptional about the third-party statements Midland is bringing in prove their ownership and assignment of the debt."

ARGUMENT: Midland will take the Court through the Bill of Sale and Assignment documents with redacted computer records showing nothing but will ask the Court to take their word for it and that the Court should believe the whole thing is wrapped up by the Midland/MCM Affidavit.

COUNTER: Here is how I respond to this. "Your honor, it is clear that Midland knows how to buy debts, but it does not know how to sue on a specific debt." Or use "Your honor, the standard of care for selling the debts is quite different than the required due process standards of suing upon the debt." Or just start your Argument with, "your honor,

three words-then pause for effect- *Selling vs Suing.*" Then explain these statements using the above arguments.

THINGS I KNOW BEFORE I LEAVE THE HOUSE TO GO TO COURT;

1. What is my Theme from day one.
2. I know the other side's case better than they do.
3. There are no electronic records that they say they rely upon.
4. There is no chain of title from the original creditor to Midland.
5. Every argument I make is written down with the corresponding Exhibit in my Brief (and where it is in the Plaintiff's Brief) as Judges say they read the Briefs beforehand but that is rare. If I take the Judge through my argument and corresponding Exhibits, she will turn to it and as I am saying it, there it is in writing. That is confirmation.
6. The harder I work, the luckier I get. I am not the smartest, but I will try to outwork you. See #6.
7. **You must point out the errors the attorneys for Midland make**. There is an arrogance on the other side that says, "your client owes a debt and is a deadbeat and should accept the ass kicking for not paying their bills." They get away with this for the most part and are lazy as most cases default. Judges usually have Midland's back so why should the attorney for Midland work? Midland attorneys are not used to people not being pin cushions or victims. Fighting back can really score you points and knock them off their game. Remember that look Apollo Creed has in his eyes in *Rocky I* when he realizes in the early rounds that Rocky doesn't know he's not supposed to win? That is fun to see in the Midland's eyes and it is there pretty quick if you hit them where it hurts. When they start attacking me personally for representing deadbeats I know I have them on the run.

You will see this too. It is really the point of my website. After all, you are not the one making shit up or suing on a debt with no proof. You and me are the good guys.

8. Read everything more than five times. Stuff just pops out that you would swear was never there earlier and there is many a time I have gone to court convinced I am going to win on something I would not have found without repeated reviewing. It is all there. You just have to look a couple of times.
9. Writing a Response Brief is easier than you think. See #8 and after you review, take notes each time. I write questions on the side and it comes together in an outline. Together with my theme from my Answer, I now have 50% of it done. Then, I find other cases that have the same questions or arguments from my notes and add either their support or a Michigan case equivalent. Again, the *Basset Rule* is key here too. Write a rough draft then leave it alone. Go back to clean up and you have fresh eyes and a fresh brain not possible from doing it all in one sitting. Just like in the "five times review" of the Midland's Motion, keep going back to your latest draft. You should take five days to write the Response Brief. There will still be mistakes but it will be cleaner and leaner and more to the point. Judges have a lot of work on their docket so don't make them read unless it is important.
10. **K**eep **I**t **S**imple **S**tupid. Really. Why are you going to win? Say it in the Brief too!
11. The harder I work, the luckier I get. Really, also.