

**THOMAS WRIGHT, Plaintiff, vs. ASSET ACCEPTANCE CORPORATION, et al.,
Defendants.**

Case No. C-3-97-375

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
OHIO, WESTERN DIVISION**

1999 U.S. Dist. LEXIS 20675

**December 30, 1999, Decided
January 3, 2000, Filed**

DISPOSITION: [*1] Plaintiff's Motion for Reconsideration (Doc. # 37) overruled. Plaintiff's Motion to Strike (Doc. # 38) sustained. Defendants' renewed Motion for Summary Judgment (Doc. # 36) overruled.

COUNSEL: For THOMAS NMI WRIGHT, plaintiff:
Jason David Fregeau, Longmeadow, MA.

For ASSET ACCEPTANCE CORPORATION, DANA HADDEN, defendants: Murdoch J Hertzog, St Clair Shores, MI.

JUDGES: WALTER HERBERT RICE, CHIEF JUDGE, UNITED STATES DISTRICT COURT.

OPINION BY: WALTER HERBERT RICE

OPINION:

DECISION AND ENTRY OVERRULING PLAINTIFF'S MOTION FOR RECONSIDERATION (DOC. # 37); PLAINTIFF'S MOTION TO STRIKE (DOC. # 38) SUSTAINED; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. # 36) OVERRULED

This litigation arises under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq., and the Ohio Consumer Sales Practices Act ("OCSPA"), Ohio Rev. Code Chapter 1345. In his Complaint, the Plaintiff alleges that the Defendants violated both Acts by sending him four debt collection letters. n1 More specifically, he alleges that the Defendants: (1) misrepresented the legal title to his debt; (2) failed to inform him of the consequences of acknowledging debts; (3) misrepresented the imminence of [*2] legal action; (4) created a false sense of urgency; and (5) mailed him letters that were calculated to abuse, to harass, and to oppress. n2 He seeks to recover statutory damages, costs, and attorneys'

fees. He also seeks injunctive relief on his claim under the OCSPA.

n1 The Defendants are the Asset Acceptance Corporation ("AAC") and Dana Hadden, an employee of AAC who attempted to collect a debt from the Plaintiff. In his Complaint, the Plaintiff alleges that he incurred a debt to Value City Furniture, and that AAC purchased the debt after he had defaulted on it.

n2 Although the Plaintiff's Complaint does not set forth these theories of recovery, he has asserted them in a prior Motion for Partial Summary Judgment (Doc. # 23).

In a May 10, 1999, Decision and Entry (Doc. # 33), the Court overruled a Motion for Partial Summary Judgment (Doc. # 23), filed by the Plaintiff. n3 In so doing, the Court found that the Plaintiff had failed to establish the Defendants' liability, as a matter of law, under any of his [*3] theories of recovery. In its May 10, 1999, ruling, the Court also sustained in part, and overruled in part, a Motion for Partial Summary Judgment (Doc. # 25), filed by the Defendants. n4 The Court sustained the Defendants' Motion, insofar as it related to the Plaintiff's FDCPA claims alleging: (1) a failure to inform him of the consequences of acknowledging debts; (2) the creation of a false sense of urgency; and (3) engagement in abusive, harassing, and oppressive behavior. The Court overruled the Defendants' Motion, however, insofar as it related to the Plaintiff's FDCPA claims alleging: (1) misrepresentation of legal title; and (2) misrepresentation of the imminence of legal action.

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n3 The Plaintiff's Motion was directed toward the issue of the Defendants' liability under both the FDCPA and the OCSPA.

n4 Although the Defendants styled their Motion as one for summary judgment, they failed to address the Plaintiff's claim under the OCSPA. Consequently, the Court construed their Motion as one for partial summary judgment. (Doc. # 33 at 5).

[*4]

With respect to the misrepresentation of legal title claim, the Plaintiff alleged that the Defendants had violated *15 U.S.C. § 1692e(10)* by falsely representing in their correspondence that they had purchased his debt. n5 In its May 10, 1999, ruling, the Court recognized that a debt collector, in the business of collecting debts that it had purchased, would violate the FDCPA if it attempted to collect a debt that it had not purchased. (Doc. # 33 at 8). Based upon the evidence before it, however, the Court found a genuine issue of material fact as to whether Value City n6 had assigned the Plaintiff's debt to West Capital Financial Services Corporation ("West Capital"), another debt collection agency, from which it was purchased by AAC. Accordingly, the Court overruled both Motions for [Partial] Summary Judgment on that issue.

n5 Section 1692e(10) prohibits the use of any false representation or deceptive means to collect or to attempt to collect any debt.

n6 More specifically, the record reflects that the initial owner of the Plaintiff's debt was General Electric Capital Corporation ("GE Capital"), which is the financing arm for Value City.

[*5]

The Court reached a similar conclusion with respect to the Plaintiff's claim that the Defendants had misrepresented the imminence of legal action, in violation of *15 U.S.C. § 1692e(5)*, which prohibits a debt collector from, inter alia, threatening to take any action "that cannot legally be taken" n7 The Plaintiff argued that the Defendants had violated § 1692e(5) by threatening to initiate a collection action against him. He contended that no collection action was possible, because the Defendants did not own his Value City debt. As noted above, however, the Court found a genuine issue of material fact as to whether the debt had been assigned to West Capital, from which it was purchased by AAC. The

Court also found a genuine issue of material fact as to whether the AAC collection letter at issue constituted a "threat" of legal action. The Court noted that the threat contained in the letter was a contingent one. Specifically, it was contingent upon the Plaintiff working full-time. Given the absence of evidence on the issue of the Plaintiff's full-time employment status, the Court found a genuine issue of material fact regarding whether the letter threatened [*6] legal action. (Doc. # 33 at 14-15).

n7 A claim under § 1692e(5) has two elements: (1) a threat to take legal action; and (2) the inability to take that action lawfully.

After reaching the foregoing conclusions, the Court noted the Defendants' failure to move for summary judgment on the Plaintiff's claims under the OCSPA. Because those state-law claims were co-extensive with the Plaintiff's claims under the FDCPA, the Court reasoned that, if the Defendants had moved for summary judgment on the Plaintiff's claims under the Ohio statute, their motion would have been sustained "to the same extent that they are entitled to such judgment on Plaintiff's claims under the federal statute." (Id. at 19 n.15). The Court also stated: "It occurs to the Court that both of the Plaintiff's remaining claims under the FDCPA share the common factual question of whether AAC had legal title to the Plaintiff's debt (i.e., had Value City transferred that debt to West Capital, prior to the latter transferring that debt to AAC). [*7] " The Court then recognized that the foregoing factual issue was potentially "susceptible to resolution through renewed motions for summary judgment" (Id. at 20).

Now pending before the Court is a renewed Motion for Summary Judgment (Doc. # 36), filed by the Defendants. The Motion is directed toward the Plaintiff's claims under the OCSPA and the issue of AAC's legal title to the Plaintiff's debt. Also pending before the Court is a Motion for Reconsideration (Doc. # 37), filed by the Plaintiff, and a Motion to Strike (Doc. # 38), also filed by the Plaintiff. As a means of analysis, the Court first will resolve the Plaintiff's Motion for Reconsideration. It then will turn to the Plaintiff's Motion to Strike and, finally, to the Defendants' renewed Motion for Summary Judgment.

1. Plaintiff's Motion for Reconsideration (Doc. # 37)

The Plaintiff seeks reconsideration of the Court's May 10, 1999, Decision and Entry in two respects. First, he contends that the Court erred by finding the Defendants entitled to summary judgment on his claim regarding their failure to inform him of the consequences of acknowledging debts. Second, he argues that the Court

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erred by [*8] overruling his Motion for Summary Judgment and finding genuine issues of material fact on his claim that the Defendants misrepresented the imminence of legal action. n8 The Plaintiff insists that he was entitled to summary judgment on this claim.

n8 The Defendants have asked the Court to strike the Plaintiff's Motion for Reconsideration as untimely. (Doc. # 39 at 2-3). In support, they rely upon *Fed.R.Civ.P. 59(e)*, which provides that "any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." In the present case, however, the Court has not entered judgment in favor of the Defendants and against the Plaintiff. The Court's May 10, 1999, Decision and Entry is not final, and Rule 59(e) does not apply. Cf. *Broadway v. Norris*, 193 F.3d 987 (8th Cir. 1999) ("Rule 59(e) motions are motions to alter or amend a judgment, not any nonfinal order.").

The Plaintiff's argument regarding the acknowledgment of a debt concerns the second debt collection letter that [*9] he received from the Defendants. In that letter, the Defendants expressed their regret that he had not responded to an initial debt collection letter. The letter also stated:

If your reason for not responding was present financial problems, please sign below on the line provided, which by doing so acknowledges the outstanding debt but indicates you are presently unable economically to handle the payments, and return to our office.

By supplying this information, we will be in a position to re-evaluate our present course and try to assist you in getting rid of this debt within your economic means.

(Doc. # 33 at 9).

The Plaintiff previously argued that, by asking a debtor to acknowledge a debt, the Defendants could deceive the debtor into relinquishing a statute of limitations defense, thereby reviving a time-barred debt. Upon review, the Court rejected this argument, reasoning:

With respect to [15 U.S.C.] § 1692e, the Court accepts, for present purposes, the Plaintiff's underlying proposition that a debt collector violates the statutory provision, by knowingly attempting to collect a debt that is barred by the statute of limitations. n9 Indeed, courts have held that a debt [*10] collector violates that provision by knowingly attempting to collect a

time-barred debt. See *Stepney v. Outsourcing Solutions, Inc.*, 1997 U.S. Dist. LEXIS 18264, 1997 WL 722972 (N.D. Ill. 1997) (and cases cited therein). This Court will also accept the Plaintiff's further premise that a debt collector could violate § 1692e by attempting to persuade a debtor to acknowledge and, thus, to revive a debt, which the collector knows to be time-barred. However, the Plaintiff has failed to make a connection between that premise and the facts of this litigation. Decidedly missing from the Plaintiff's Complaint and memoranda is any allegation, evidence or argument that his debt was time-barred. Therefore, the Defendants' act of requesting the Plaintiff to acknowledge his debt could not have deceived him into reviving that debt. The mere fact that this debt collection letter could have deceived some hypothetical debtor does not mean it violated the Plaintiff's rights under the FDCPA. The Plaintiff bases his theory that a debt collector violates § 1692e, by attempting to persuade a debtor to acknowledge and, thus, to revive a debt, upon the recognized theory that a debt collector violates that statutory [*11] provision, by knowingly attempting to collect a time-barred debt. Just as a debt collector does not violate § 1692e, by attempting to collect a debt that is not time-barred, such a person does not violate that provision by requesting that the debtor acknowledge a debt that is similarly not so barred, merely because it is possible that under some hypothetical set of facts a request for an acknowledgment might possibly revive a debt that was time-barred. Given the absence of evidence or argument that the Plaintiff's debt was time-barred, the Defendants cannot have knowingly attempted to deceive him into reviving that debt by signing the acknowledgment.

(Doc. # 33 at 10-12).

n9 Section 1692(e) provides, in part:

A debt collector may not use any false, deceptive, or misleading representation or means in connec-

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tion with the collection of any debt.

In opposition to the foregoing conclusion, the Plaintiff argues that the Court's reasoning "is directly contrary to the least sophisticated consumer standard. [*12]" (Doc. # 37 at 3). According to the Plaintiff, the question is not whether he was deceived into reviving a time-barred debt, but whether the least sophisticated consumer could have been so deceived. (Id.). The Plaintiff argues that the Court's May 10, 1999, ruling replaces an objective standard with a subjective one.

Upon review, the Court cannot agree that its ruling contradicts the standard applicable to claims under the FDCPA. "In determining whether a debt collector's practice is deceptive withing the meaning of the Act, courts apply an objective test based on the understanding of the 'least sophisticated consumer.'" *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 400 (6th Cir. 1998). Given that the Plaintiff previously did not allege or argue that his debt is time-barred, even the least sophisticated consumer in his position could not have been deceived into relinquishing a statute of limitations defense. Under the facts of this case, no such defense existed, and the least sophisticated consumer in the Plaintiff's position could not have inadvertently revived a time-barred debt.

In his Motion for Reconsideration, the Plaintiff suggests that an unsophisticated [*13] consumer with a time-barred debt might be deceived by the Defendants' collection letter. He cites nothing, however, to support the proposition that the "least sophisticated consumer" test obligates the Court to modify the facts at hand and apply those hypothetical facts to the least sophisticated consumer. Indeed, under the right set of hypothetical facts, any debt collection letter could violate the FDCPA. The Act requires the Court to view the existing facts from the perspective of the least sophisticated consumer. It does not obligate the Court to invent hypothetical scenarios under which its terms might be violated. Accordingly, the Court finds the Plaintiff's Motion for Reconsideration unpersuasive, insofar as it concerns the Defendants' request for acknowledgment of his debt. n10

n10 In his Motion for Reconsideration, the Plaintiff also suggests, for the first time, that his own debt might be barred by the applicable statute of limitations. (Doc. # 37 at 4). He also speculates that the Defendants may not have provided him with certain requested documents in an effort to "hide" a statute of limitations problem. (Id.). In its May 10, 1999, Decision and Entry, however, the Court noted that "decidedly missing from

Plaintiff's Complaint and memoranda is any allegation, evidence or argument that his debt was time-barred." (Doc. # 33 at 11). The Plaintiff cannot now obtain "reconsideration" of that ruling by raising a new statute of limitations argument based upon speculation that the Defendants are hiding documents. If the Plaintiff believes that the Defendants have not responded to his discovery requests properly, he should have utilized the remedies provided by the Federal Rules of Civil Procedure.

[*14]

In his second argument, the Plaintiff contends that the Court erred by finding genuine issues of material fact on his claim under 15 U.S.C. § 1692e(5), which prohibits a debt collector from threatening to take any action which it cannot legally take. The Plaintiff argues that the Court should have sustained his Motion for Summary Judgment for two reasons. First, he insists that the issue of whether he was employed full-time when he received the Defendants' debt collection letters is irrelevant. Second, he contends that the Defendants legally could not have filed suit against him, because they "did not have the chain of title" (Doc. # 37 at 5-6). Upon review, the Court finds both of the Plaintiff's arguments to be unpersuasive.

In its May 10, 1999, Decision and Entry, the Court noted that a claim under § 1692e(5) requires proof of two elements: (1) a threat to take legal action; and (2) the inability to take that action lawfully. (Doc. # 33 at 14). The Court then noted that the Defendants' correspondence made a contingent threat of legal action. Specifically, the Defendants threatened to initiate a lawsuit against the Plaintiff if they [*15] discovered that he was working full-time. The letter did not threaten legal action against the Plaintiff if he was not employed full-time. (Id. at 15). Given the absence of evidence concerning the Plaintiff's employment status, the Court found a genuine issue of material fact as to whether the letter "threatened" legal action.

In his Motion for Reconsideration, the Plaintiff asserts, without any supporting evidence, that he was working full-time. He insists, however, that the issue is not whether he was employed full-time, but whether the "least sophisticated consumer" who was working full-time would have concluded that the Defendants' correspondence threatened legal action.

Once again, the Court finds the Plaintiff's argument to be unconvincing. The Plaintiff's unsupported assertion that he was working full-time does not satisfy his evidentiary burden under Rule 56. Furthermore, the Court cannot agree that his employment status is irrelevant. If the

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Plaintiff was not employed full-time when he received the Defendants' correspondence, then the letter did not threaten legal action against him. Assuming, *arguendo*, that the Plaintiff was not a full-time employee, even the least [*16] sophisticated consumer in his position would not have construed the Defendants' letter as threatening a lawsuit. On the other hand, if the evidence establishes that the Plaintiff was working full-time when he received the Defendants' correspondence, then the least sophisticated consumer in his position would have construed the letter as threatening legal action. Therefore, the Plaintiff's employment status is relevant to the existence of a "threat" to take legal action.

With respect to the second element of his § 1692e(5) claim, the Plaintiff insists that the Defendants lacked the lawful ability to take legal action against him, because they "did not have the chain of title when they made their threats." (Doc. # 37 at 6). This argument concerns the Defendants' purported purchase of the Plaintiff's debt. Although the Plaintiff contends that the Court failed to address this issue in its May 10, 1999, Decision and Entry, a review of that ruling demonstrates otherwise. The Court specifically found a genuine issue of material fact as to whether the Defendants had validly purchased the Plaintiff's Value City debt. n11 (Doc. # 33 at 8, 14). If the Defendants had validly purchased the debt [*17] at the time of their correspondence, then they were capable of legally filing suit to recover on the debt. On the other hand, if the Defendants had not purchased the debt, then they lacked the lawful ability to take legal action against him. n12 (Id.). The Court previously concluded that the evidence on this issue did not support the entry of summary judgment in favor of either party. Nothing in the Plaintiff's Motion for Reconsideration alters that conclusion. Accordingly, based upon the analysis set forth above, the Plaintiff's Motion for Reconsideration (Doc. # 37) is hereby overruled.

n11 In his Motion for Summary Judgment, the Plaintiff did not dispute that AAC had purchased his debt from West Capital. See Doc. # 23 at 6 ("There is no dispute that Defendants purchased the alleged debt from West Capital."). He argued, however, that AAC could not establish the validity of its "purchase," because it could not "prove that West Capital ever purchased the debt from the original creditor." (Id. at 7). In other words, he argued that AAC lacked legal title to his debt because it could prove only a transfer of that debt from West Capital to AAC, but not a preceding transfer of his debt from the original creditor, GE Capital, to West Capital. As a result, the Plaintiff asserted that West Capital had no legal title to assign to AAC.

[*18]

n12 In his Motion for Reconsideration, the Plaintiff suggests that the Defendants could not have legally filed suit when they sent him their correspondence, because certain paperwork establishing "chain of title" to his debt was not yet physically in their possession. (Doc. # 37 at 6). He cites no authority, however, for the proposition that the legal owner of a debt cannot commence litigation unless all supporting documentation is securely in hand when the Complaint is filed.

II. Plaintiff's Motion to Strike (Doc. # 38)

Also pending before the Court is a Motion to Strike (Doc. # 38), filed by the Plaintiff. In his Motion, the Plaintiff seeks to strike: (1) a purported purchase agreement between GE Capital and West Capital; and (2) an unsigned, unnotarized copy of an "affidavit" from La Vonne Nelson, who appears to be an employee of GE Capital.

The foregoing documents, and others, are attached to the Defendants' renewed Motion for Summary Judgment (Doc. # 36). The Defendants have provided the documents in an effort to establish their ownership of the Plaintiff's Value City debt. With [*19] respect to the purported affidavit, however, it is axiomatic that an "affidavit" which is unsigned and not notarized cannot qualify as proper Rule 56 evidence. Consequently, the Plaintiff's Motion to Strike is sustained with respect to La Vonne Nelson's "affidavit."

The Court also finds the Plaintiff's Motion persuasive, insofar as it relates to the purchase agreement attached to the Defendants' renewed Motion for Summary Judgment. As noted above, the agreement involves GE Capital and West Capital, which are allegedly the two prior owners of the Plaintiff's Value City debt. The agreement bears the caption, "Receivable Purchase Agreement," and it purports to transfer ownership of certain unspecified accounts from GE Capital to West Capital. n13 In an effort to qualify the agreement (and various other documents) as admissible evidence, AAC President N. F. Bradley has provided the Court with an affidavit in which he avers:

The documents provided this Honorable Court and attorney for the plaintiff are direct copies of documents kept in the files under his control and supervision or in the ordinary course of business or received from his

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predecessor in title as part of the original file [*20] maintained in the ordinary course of business."

(Bradley affidavit, attached to Doc. # 38).

n13 The agreement provides for West Capital's purchase of the accounts listed on "a computer-generated master file list on an electronic magnetic tape identifying Receivables from certain Accounts as of the Cut-Off Date which Receivables are being purchased on the Purchase Date by the Buyer . . ." (December 29, 1995, Receivable Purchase Agreement, attached to Doc. # 36 at 2).

Through his affidavit, Bradley apparently intends to establish the purchase agreement and other documents as business records, pursuant to *Fed.R.Evid. 803(6)*. n14 Under that Rule, the custodian of business records may authenticate them by stating that: (1) the records have been made in the course of regularly conducted business activities; (2) they have been kept in the regular course of business; (3) the regular practice of that business is to make the records; and (4) the records have been made by a person with knowledge of the transaction [*21] or from information transmitted by a person with knowledge. *In re Custodian of Records of Variety Distributing, Inc., 927 F.2d 244, 248 (6th Cir. 1991)*. Once they are properly qualified, business records fall under an exception to the hearsay rule. See *Fed.R.Evid. 803(6)*.

n14 Rule 803(6) provides:

Records of regularly conducted activity. A memorandum, report, record, or date compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. . . .

Bradley's affidavit, however, does not establish that the GE [*22] Capital-West Capital purchase agreement qualifies as a business record. He avers, alternatively, that the agreement and other various documents are direct copies which he kept: (1) in the files under his control and supervision; or (2) in the ordinary course of business; or (3) that they were received from his predecessor in title as part of the original file maintained in the ordinary course of business. As noted above, however, in order to establish that the agreement is a business record, Bradley must aver: (1) that the records have been made in the course of regularly conducted business activities; and (2) that they have been kept in the regular course of business; and (3) that the regular practice of that business is to make the records; and (4) that the records have been made by a person with knowledge of the transaction or from information transmitted by a person with knowledge. *In re Custodian of Records of Variety Distributing, Inc., 927 F.2d at 248*. Bradley's affidavit plainly fails to address each of these requirements. Consequently, he has not properly established the admissibility of the purported purchase agreement. n15 Accordingly, the Plaintiff's Motion [*23] to Strike (Doc. # 38) is hereby sustained.

n15 For reasons to be set forth, *infra*, in its analysis of the Defendants' renewed Motion for Summary Judgment, the Court notes that the GE Capital-West Capital purchase agreement fails to establish AAC's ownership of the Plaintiff's debt, even assuming, *arguendo*, that Bradley's affidavit could establish the admissibility of the agreement.

III. Defendants' Renewed Motion for Summary Judgment (Doc. # 36)

The Defendants have filed a renewed Motion for Summary Judgment (Doc. # 36), directed toward the issues identified in the Court's May 10, 1999, Decision and Entry, to wit: (1) the Plaintiff's state law claims under the OCSA; and (2) the Plaintiff's theories that the Defendants violated the FDCPA by misrepresenting their ownership of his debt and by threatening to take imminent legal action without the lawful ability to do so.

With respect to the former issue, the Court noted in its prior ruling that "if the Defendants had moved for summary judgment on the [*24] Plaintiff's claims under the Ohio statute, [they would have been] entitled to summary judgment on those claims to the same extent

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that they are entitled to such judgment on Plaintiff's claims under the federal statute." (Doc. # 33 at 19). The Court reached this conclusion because the Plaintiff had alleged that the Defendants' violations of the Ohio statute were coextensive with their violations of the FDCPA. (Id.).

In light of the Court's prior ruling on the Plaintiff's FDCPA claims, the Defendants' renewed Motion for Summary Judgment is sustained, insofar as it relates to the following alleged violations of the OCSA: (1) the failure to inform the Plaintiff of the consequences of acknowledging a debt; (2) the creation of a false sense of urgency; (3) the sending of correspondence which was calculated to abuse, to harass, and to oppress. In its May 10, 1999, Decision and Entry, the Court sustained the Defendants' Motion for Summary Judgment on these claims under the FDCPA. For the reasons set forth in that ruling, the Court finds the Defendants entitled to summary judgment on the same claims under the OCSA.

The only remaining issue, then, is whether the Defendants are entitled [*25] to summary judgment, under the OCSA and the FDCPA, on the Plaintiff's two other claims. As noted above, those claims allege that the Defendants misrepresented their ownership of the Plaintiff's debt and threatened to take imminent legal action without the lawful ability to do so. In its prior ruling, the Court noted that both claims share a common factual issue, namely whether AAC possessed legal title to the Plaintiff's debt when it corresponded with him. (Doc. # 33 at 20). In their renewed Motion for Summary Judgment, the Defendants have provided the Court with various documents in an effort to establish their ownership of the Plaintiff's debt. After reviewing those documents, however, the Court concludes that they have failed to demonstrate the absence of a genuine issue of material fact on the point.

In order to establish the Defendants' possession of legal title to the Plaintiff's debt, the evidence must show that ownership of the debt was transferred from GE Capital (the original owner of the debt) to West Capital. n16 The Defendants' evidence fails to establish the occurrence of such a transaction. n17 The first document attached to the Defendants' renewed Motion for Summary [*26] Judgment is a copy of the "Plaintiff's Responses to Defendants' Request for Admissions." The Defendants have provided this document to demonstrate "the complete lack of direct straight forward conduct that one would anticipate receiving from either Plaintiff or Defendants[]" attorneys in matters before the Chief Judge of the present United States District Court." (Doc. # 36 at 3). The Plaintiff's responses have no bearing, however, on the Defendants' ownership of the debt in question. The second document provided by the Defendants is a copy of a letter from their attorney to Plaintiff's attorney.

The letter sets forth the Defendants' belief that they have not violated the FDCPA or the OCSA, but it does nothing to establish the assignment of the Plaintiff's debt from GE Capital to West Capital. The third piece of evidence is a copy of a letter from La Vonne Nelson of GE Capital to the Plaintiff. It informs him that "GE Capital sold your Value Furniture City [sic] account to West Capital Financial Services." This document establishes only that GE Capital told the Plaintiff that his debt had been sold. It does not establish the occurrence of an actual transaction. The fourth [*27] piece of evidence is a lone page bearing the caption "The 45 Largest Retail Card Programs." The page lists a variety of information about GE Capital. Its relevance to the present litigation is not readily apparent. It does nothing to establish a transfer of ownership of the Plaintiff's debt. The fifth document is a copy of the aforementioned GE Capital-West Capital purchase agreement. n18 It provides for West Capital's purchase of certain delinquent accounts. Pursuant to the agreement, the specific accounts at issue were to be identified on "a computer-generated master file list." (Receivable Purchase Agreement, attached to Doc. # 36 at 2). Significantly, nothing in the agreement identifies the Plaintiff's account as one of those transferred from GE Capital to West Capital. The sixth document provided by the Defendants follows the purchase agreement and bears the heading "Accounts Received from GE Capital Purchase." The two-page document lists a number of accounts, including the Plaintiff's. In a "Supplement to Documents in Support of Motion for Summary Disposition" (attached to Doc. # 36), the Defendants contend that the list identifies the specific accounts purchased by West Capital. [*28] Allegations contained in the Defendants' Memorandum, however, are not evidence. The record contains no evidence explaining the significance of the accounts listed on the two pages. As noted above, Bradley's affidavit makes no attempt to explain the contents of any of the Defendants' supporting documentation. He avers only that the documents "are direct copies of documents kept in the files under his control and supervision or in the ordinary course of business or received from his predecessor in title as part of the original file maintained in the ordinary course of business." Absent any proper Rule 56 evidence establishing that the account lists identify the accounts sold by GE Capital to West Capital, they do nothing to establish the Defendants' possession of legal title to the Plaintiff's debt.

n16 As noted, supra, the Plaintiff admitted in his Motion for Summary Judgment that AAC had purchased his debt from West Capital. See Plaintiff's Motion for Summary Judgment, Doc. # 23 at 6 ("There is no dispute that Defendants pur-

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chased the alleged debt from West Capital."). Consequently, the only disputed issue is whether GE Capital, the original creditor, ever assigned the Plaintiff's debt to West Capital.

[*29]

n17 As a threshold matter, the Court notes that none of the various documents attached to the Defendants' renewed Motion for Summary Judgment are authenticated beyond Bradley's insufficient averment that the documents "are direct copies of documents kept in the files under his control and supervision or in the ordinary course of business or received from his predecessor in title as part of the original file maintained in the ordinary course of business." For reasons to be set forth, *infra*, however, the Court finds those documents insufficient to establish the Defendants' entitlement to summary judgment, even if they were proper Rule 56 evidence.

n18 Although the Court has found this document vulnerable to the Plaintiff's Motion to Strike, the Court will address its contents briefly, in order to explain why it fails to establish AAC's ownership of the Plaintiff's debt, even if properly considered as a business record.

The next document provided by the Defendants is a copy of a purchase agreement between West Capital and AAC. The agreement provides for AAC to purchase "certain" of [*30] West Capital's charged-off accounts. The specific accounts purchased by AAC were to be listed on a computer diskette, which was to be made a part of the agreement. (Purchase and Sale Agreement, attached to Doc. # 36, at § 1.2). Nothing in the written agreement identifies the Plaintiff's account as one of those purchased by AAC. Following the agreement, however, is a two-page document which lists a number of accounts, including the Plaintiff's. The document is identical to the two-page document discussed above in connection with the GE Capital-West Capital purchase agreement. In fact, the document bears the same notation, "Accounts Received from GE Capital Purchase." Nothing about the document suggests that it has any relationship to the West Capital-AAC purchase agreement or the accounts that AAC received from West Capital. n19

n19 In any event, the Plaintiff does not dispute that the Defendants "purchased" his debt

from West Capital. He contends only that the transaction had no legal effect, because West Capital did not own his debt. Consequently, the Defendants need not establish the absence of a genuine issue of material fact as to the occurrence of the West Capital-AAC transaction.

[*31]

Finally, the Defendants have provided the Court with a copy of a letter from AAC to the Plaintiff. The letter informs the Plaintiff that AAC has purchased his debt from West Capital. This letter does not constitute evidence establishing a transfer of ownership of the Plaintiff's debt from GE Capital to West Capital. Rather, it establishes only that AAC told the Plaintiff that it owns his debt. This assertion of ownership, which the Plaintiff disputes, forms the basis for one of his claims against the Defendants. Indeed, his theory is that the Defendants misrepresented their ownership of legal title to his Value City debt. (Doc. # 33 at 7). Given the nature of the Plaintiff's claim, a letter from the Defendants asserting ownership of his debt cannot be used to establish the fact of such ownership.

In short, none of the Defendants' evidence establishes, as a matter of law, that the Plaintiff cannot prevail on his remaining claims under the FDCPA and the OCSPA. In its prior ruling, the Court found a genuine issue of material fact as to whether the Plaintiff's original creditor ever assigned his debt to West Capital. (Doc. # 33 at 8). The Court also noted that this factual issue was [*32] common to the Plaintiff's two remaining claims, specifically whether the Defendants violated the FDCPA and the OCSPA by misrepresenting (1) their ownership of legal title to his debt and (2) the imminence of legal action against him. (Id. at 19). For the reasons set forth above, the Court concludes that none of the documents provided by the Defendants in their renewed Motion for Summary Judgment resolve the foregoing factual issue, as a matter of law.

IV. Conclusion

Based upon the reasoning set forth above, the Plaintiff's Motion for Reconsideration (Doc. # 37) is overruled. The Plaintiff's Motion to Strike (Doc. # 38) is sustained. The Defendants' renewed Motion for Summary Judgment (Doc. # 36) is overruled.

December 30, 1999

WALTER HERBERT RICE, CHIEF JUDGE

UNITED STATES DISTRICT COURT