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Motion to Strike Plaintiff's Affidavit of Debt - How to File a Motion to Strike in Court

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How to File a Motion to Strike the Plaintiff's Affidavit of Debt

Last Updated: April 2, 2014

If you are in the middle of a lawsuit, hopefully you have already read our articles explaining [how to answer a summons and complaint](#) and [how a lawsuit works](#). Having digested all of that information, you are

now ready to move on to the next phase of your lawsuit, filing a Motion to Strike because part of what you received along with your Summons and Complaint is an Affidavit of Debt from the Plaintiff.

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What is an Affidavit of Debt?

Let's start at the beginning so you fully understand what you are reading as you flip through all the legal pages contained in that lovely lawsuit a [process server](#) just handed you. It is bad enough he just spoiled your day, but now you have to read all of this mumbo-jumbo and make some sense of it all.

An "affidavit" is a sworn statement in writing, so therefore, an "affidavit of debt" is a sworn statement from an employee of the Plaintiff (i.e. Collection Agency) stating they are intimately familiar and/or aware of the methods of record keeping at the original creditor concerning the debt in question, and they can certify the information in the complaint is true. They also usually state that they've examined the sale or assignment records that establish the relationship between the original creditor selling/assigning to the collection agency or junk debt buyer.

Note: These affidavits are sometimes notarized, but their validity is unchanged whether or not this is the case.

If you, the Defendant, do not object to this affidavit, the court will assume the debt is valid and the debt collector will have the right to sue you, and the suit is proper. You will lose if this happens. Fortunately, most of the time these affidavits are fraudulent or contain false evidence, but you must file a "motion to strike" so that this evidence can get thrown out of court.

Here is an example of an Affidavit of Debt:

Plaintiff's Affidavit of Indebtedness and Ownership of Account

I am an authorized representative for ACME Collection Agency (hereafter the "Plaintiff") and hereby certify as follows:

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1. I have personal knowledge regarding Plaintiff's creation and maintenance of its normal business records including computer records of accounts receivables. This information was regularly and contemporaneously maintained during the course of the Plaintiff's business. I am authorized to execute this affidavit on behalf of Plaintiff and the information below is true and correct to the best of my knowledge, information and belief based on business records maintained with respect to the account.
2. The records provided to Plaintiff have been represented to include information provided by the original creditor. Such information includes the debtors name, social security number, account balance, and identity of the original creditor and account number.
3. Based on the business records maintained on account XXXXXXXXXXXX (hereafter "account"), which are a compilation of the information provided upon acquisition and information obtained since acquisition, the account is the result of the extension of credit to "name" by original creditor, on or about (date of the origination). Said business records further indicate the account was then owned by ACME Huge Bank. Acme Huge Bank later sold and/or assigned portfolio 8044 to Plaintiff's assignor which included the defendant's account on (date of assignment). Thereafter, all ownership rights were assigned to, transferred to, and became vested in Plaintiff, including the right to collect the purchased balance owing \$1487.64 plus any additional accrued interest.
4. To the best of my knowledge and belief, the Defendant is not a minor or mentally incompetent.
5. Based on business records maintained in regard to the account, the above stated amounts are justly and duly owed by the Defendant to the Plaintiff and that all just and lawful offsets, payments, and credits to the account have been allowed. Demand for payment was made more than 30 days ago.

Signed,

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Clueless Employee

ACME Collection Agency

Sound scary? Don't worry - we will show you how this affidavit is nonsense and complete hearsay.

Court Cases Where Affidavits Were Determined to be False or Fraudulent

Debt buyers regularly submit affidavits that purport to be made on personal knowledge but in fact are based on reading a computer screen. For example:

- Luke v. Unifund CCR Partners, No. 2-06-444-CV, 2007 Tex.App. LEXIS' 7096 (2nd Dist. Ft. Worth Aug. 31, 2007).
- Palisades Collection, LLC a/p/o AT&T Wireless v. Gonzalez, 10 Misc. 3d 1058A; 809 N.Y.S.2d 482 (N.Y.County Civ. Ct. 2005):
- Todd v. Weltman, Weinberg & Reis Co., L.P.A., 434 F.3d 432 (6th Cir. 2006);
- Delawder v. Platinum Financial, 443 F. Supp. 2d 942 (S.D.Ohio March 1,2005);
- Griffith v. Javitch, Block & Rathbone, LLP, 1:04cv238 (S.D.Ohio, July 8, 2004);
- Gionis v. Javitch, Block & Rathbone, 405 F. Supp. 2d 856 (S.D.Ohio. 2005);
- Blevins v. Hudson & Keyse, Inc., 395 F. Supp. 2d 655 (S.D.Ohio 2004), later opinion, 395 F.Supp.2d 662 (S.D.Ohio 2004);
- Stolicker v. Muller, Muller, Richmond, Harms, Meyers & Sgroi, P.C., 1:04cv733 (W.D.Mich., Sept. 8, 2005).

In the ***Palisades Collection, LLC a/p/o AT&T Wireless v. Gonzalez*** case, an affidavit was submitted from a Ms. Bergman who claimed to be

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V.P. of Palisades and familiar with business record keeping practices. Being familiar with records in the course of doing business is one way debt collectors can side-step the hearsay exception:

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sell or
trade your
info, we hate spam too.

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Ms. Bergmann does not claim to be familiar with AT&T's record keeping practices, but only with the method by which Plaintiff maintains the accounts it purchases from others. *The mere fact the Plaintiff obtained the records from AT&T and then retained them is an insufficient basis for their introduction into evidence.* Therefore, the Court cannot rely on the account statements which Ms. Bergmann proffered to establish Defendant's default.

How to Combat False Affidavits Based on Hearsay Rules

Attack the authority of the person writing the affidavit:

1. Subpoena the Affiant (person writing the affidavit) to appear in court for testimony. Usually this person will be "unavailable."
2. File a subpoena for the employment record and resume of the Affiant. There may be some fighting by the Plaintiff's attorney but since they are claiming to be knowledgeable, this is not an unreasonable request.
3. Does the employee look like he or she has knowledge of record keeping? If this person has only been employed to contact debtors on the telephone, obviously there is no experience.
4. If the Affiant's experience looks questionable, pose the question as to how he/she can know the original creditor's methods of keeping records.
5. What if the Affiant is employed by the original issuer of the credit card? Even if he/she is an employee of the original creditor, does he/she have proper experience to be a record keeper?
6. Cite the case law given here showing that affidavits are known to be false and misleading.

7. Stated in your motion filed with the court that "the Affiant's employment resume shows he/she cannot have knowledge of the original creditor's bookkeeping practices, and the fact that she is not available to testify in court - and may not even exist along with the past used of falsified affidavits in other states by this JBD points to this affidavit of being highly suspect and should be stricken."
8. Does the Affiant have the necessary background to be a record keeper? If so, is there a claim they are familiar with the original creditor's record keeping? What is the proof for their statements?
9. Cite cases where affidavits are purported to be made on personal knowledge, but in fact are based on reading a computer screen.
 - Luke v. Unifund CCR Partners, No. 2-06-444-CV, 2007 Tex.App. LEXIS' 7096 (2nd Dist. Ft. Worth Aug. 31, 2007)
 - Palisades Collection, LLC a/p/o AT&T Wireless v. Gonzalez, 10 Misc. 3d 1058A; 809 N.Y.S.2d 482 (N.Y.County Civ. Ct. 2005)
 - Todd v. Weltman, Weinberg & Reis Co., L.P.A., 434 F.3d 432 (6th Cir. 2006)
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 - Stolicker v. Muller, Muller, Richmond, Harms, Meyers & Sgroi, P.C., 1:04cv733 (W.D.Mich., Sept. 8, 2005)
10. File your motion to strike the affidavit of debt with the court.

11. At this point, the affidavit should be stricken, and hopefully the case will be dismissed.

Sample of a Motion to Strike Plaintiff's Affidavit of Debt

PLEASE DO NOT JUST CUT AND PASTE - Every motion is different.

One size DOES NOT fit all. If you merely cut and paste, you WILL LOSE. In addition, you need to review and UNDERSTAND your state/county Rules of Civil Procedures when filing your motion. Improper filing of your motion will cause it to be denied.

IN THE JUSTICE COURT OF (City Name)

County Name, STATE OF

Case Number: XXXXXXX

Collection Agency,
Plaintiff

vs

John Q. Public,
Defendant

MOTION TO STRIKE AFFIDAVIT OF DEBT IN SUPPORT OF PLAINTIFF'S CLAIMS

Comes now, Defendant and respectfully states the following:

1. Plaintiff has submitted into evidence an affidavit claiming that the affiant has personal knowledge of business records related to the aforementioned debt. AFFIDAVIT OF DEBT IN SUPPORT OF PLAINTIFF'S CLAIMS (hereinafter referred to as "EXHIBIT A").
2. The affiant writing the AFFIDAVIT OF DEBT (Exhibit A) does not

explain how the business records came into her possession, only that to the best of her belief they "represent" the actual records from the original creditor, Gigantic Credit Card Company.

3. Affiant of AFFIDAVIT OF DEBT does not claim to have personal knowledge of how business records were kept at the original creditor.

4. Affiant of AFFIDAVIT OF DEBT does not claim to have personal knowledge of the sale or assignment of the debt from the original creditor to ACME Collection Agency.

WHEREFORE, the Defendant prays this Honorable Court that Plaintiff's "Exhibit A" be stricken from evidence in the above action.

I state under penalty of perjury that the foregoing is true and correct.

Defendant Name.

By: _____ Date: _____

Defendant Name, Defendant

Address

Phone

I CERTIFY that I mailed / delivered a copy of this MOTION to: ACME

Collection Attorney

Address

Plaintiff's attorney at the above address or Defendant's attorney

By: _____ Date: _____

Defendant Name, Defendant

If you want more help or examples of how to handle your lawsuit, our [legal discussion forum](#) is an excellent source of information. It's free - visit it today!

Please Note: **WE ARE NOT ATTORNEYS**. If you are being sued, it's **ALWAYS** a good idea to hire an attorney or get some legal assistance. If you cannot afford an attorney, a lot of people have handled their cases pro per or without a lawyer. Our articles are meant to provide basic information on handling litigation.

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