

**COLLECTION PROCESSES AND LAWSUITS:
WHAT EVERY CREDIT PROFESSIONAL
SHOULD KNOW**

**NACM WESTERN CREDIT CONFERENCE
AND CFDD NATIONAL CONFERENCE**

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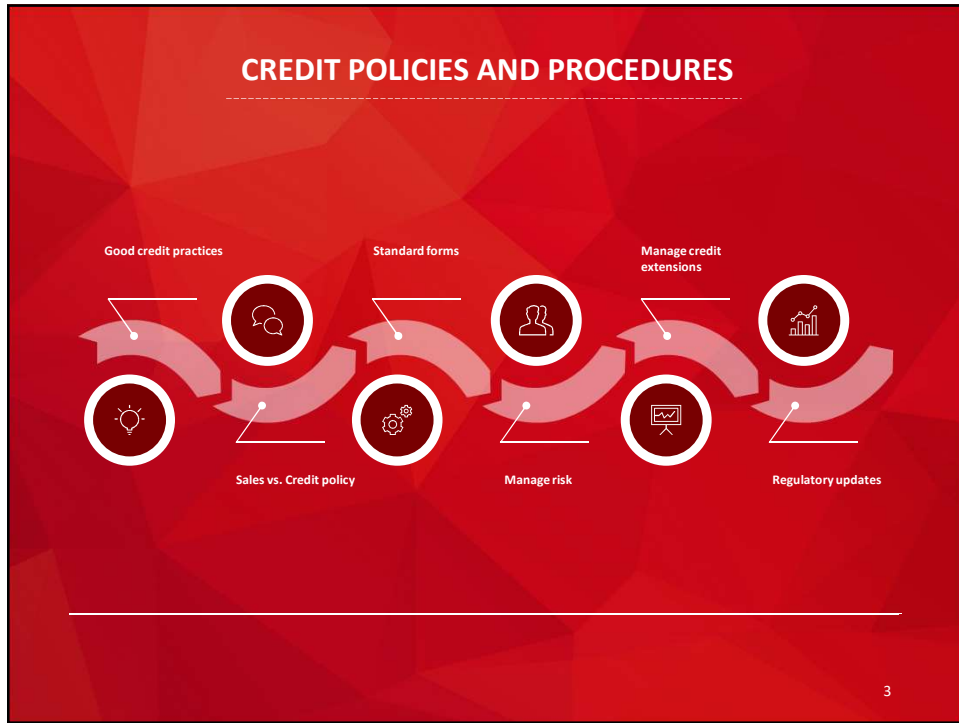
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**CREDIT POLICIES AND
PROCEDURES
FIRST LINE OF DEFENSE**

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CONTRACT FORMALITIES AID IN COLLECTION

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CONTRACTS

- ▶ **A Signed Credit Application can be a legitimate contract provided**
 - All information is accurate and sufficient to identify the parties
 - Terms and Conditions are explicitly stated thereon or clearly referenced elsewhere (e.g. separate page, website)
 - Legal remedies
 - Interest, collection costs, attorneys' fees,
 - Jurisdiction and venue

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CONTRACTS

- ▶ **Actual written and signed contract**
- ▶ **Other documents which together create and aid in the enforcement of a contract**
 - Purchase Order
 - Confirmation
 - Delivery Receipt/bill of lading
 - Invoice
 - Communication about disputes, discrepancies, etc.
 - Documentation evidencing the resolution of disputes, etc.

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A PROPER GUARANTY CAN GET YOU PAID

- ▶ **Why have a personal guaranty?**
- ▶ **Who should sign it?**
- ▶ **Does it really help in collections?**
- ▶ **When does it get signed?**
- ▶ **Is there certain language to form a guaranty?**
- ▶ **What if she/he signs as President (or some other qualification)?**

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ESSENTIAL ELEMENTS OF A GUARANTY

- **Party information**
- **Consideration for guaranty**
- **Signature as individual (not titled)**
- **Dated**
- **Witness/Notarization**

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UNACCEPTABLE GUARANTY

Guaranty of Collection - BAD

All collection efforts must be exhausted first before the credit grantor can seek recovery from the guarantor

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ACCEPTABLE GUARANTY

Guaranty of Payment – GOOD

A requirement to pay immediately upon a default in payment by the primary debtor

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RECOMMENDED LANGUAGE FOR A GUARANTY

The Guarantor acknowledges that this Guarantee is a Guarantee of Payment, and the Guarantor's obligations under this Guarantee are and shall at all times continue to be absolute and unconditional in all respects, and shall at all times be valid and enforceable irrespective of any other agreements or circumstances of any nature whatsoever which might otherwise constitute a defense to this Guarantee and the obligations of the Guarantor under this Guarantee or the obligations of any other person or party (including, without limitation, the Customer) relating to this Guarantee or the obligations of the Guarantor hereunder.

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**MAKE SURE YOU HAVE MET
ALL OF YOUR CONTRACTUAL
OBLIGATIONS**

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MAKE SURE YOUR BILLING SYSTEM AND PROCEDURES ARE ADEQUATE

- ▶ **Efficient, Prompt and Accurate billing**
- ▶ **Discrepancy Resolution**
- ▶ **Legitimate Complaints**
 - **Non-conforming goods**
 - **Defective goods**
 - **Goods damaged in transit**
 - **Late deliveries.**

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STEPS TO BE TAKEN WHEN AN ACCOUNT STOPS PAYING

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STEPS TO TAKE WHEN AN ACCOUNT STOPS PAYING

- ▶ **Collection Letter**
 - **Include all necessary information**
 - **Sign the letter personally**
 - **Focus on “you” not on “we”**
 - **Avoid catch phrases as “we insist”, “we remind”, “we want”**

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Is this the collection letter you want to send????

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"Send him our toughest collection letter, threaten him with legal action, and subliminally suggest some type of bodily harm. But put XOXOXO under my signature to show that we still love him as a customer!"

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STEPS TO TAKE WHEN AN ACCOUNT STOPS PAYING

- ▶ **Collection Phone Call and Discussion – what works best**
 - Empathy
 - Respect
 - Cordial Communication
 - Foil the Bluff, deception or misrepresentation
- ▶ **The Art of Negotiation**
 - Promises combined with threats
 - Concession with a demand for reciprocity
 - Give the debtor a chance to be graceful (save face)
 - Plan Ahead

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Good Documentation Essential



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STEPS TO TAKE WHEN AN ACCOUNT STOPS PAYING

▶ Collection in-Person

- Bring all the Documentation necessary to defeat any excuses for non-payment
 - Invoice copies
 - Delivery receipts/bills of lading
 - Correspondence
 - Statement of Account
- Sales personnel as Collectors – Pros and Cons
 - Sales person already has a relationship with the customer
 - BUT – because of that relationship, sales person may not want to “get tough” with customer
 - Salesman might be able to get a prompt response from customer
 - By getting you paid, the salesman can make future sales and commissions

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When and with Whom to Place an Account

- ▶ **Time can be of the Essence**
 - Unless a payment plan is worked out with the customer within a reasonable period of time (90 days at most), the account should be placed with a third party
 - **Collection Agency**
 - Will handle accounts as a “1st Party” – i.e., calling in your name
 - Will handle accounts as a “3rd Party” – i.e. calling in its own name
 - Will handle accounts on a contingency basis
 - Can collect accounts on a national basis
 - Check the legitimacy of the agency
 - Agencies Certified by the CLLA/IACC must pass muster to keep their certification
 - Better Business Bureau – compliments or complaints?
 - **Attorney**
 - The only entity that can start a lawsuit against your customer
 - May handle accounts on a contingency basis
 - May handle larger accounts on an hourly basis

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LITIGATION HOLD

- **Defined as “Communication that suspends normal disposition or processing of Records because of current or reasonably anticipated litigation”**
- **Requirements**
 - **Identifying and Preserving Relevant Information**
 - **Issuing written notice to individuals most likely to have relevant information to lawsuit**
 - **Monitoring compliance**

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LITIGATION HOLD

XYZ Company has just begun or is about to commence a lawsuit against ABC Company to collect moneys due and owing for goods sold and delivered and/or work, labor and services rendered for which it has not been paid. As this lawsuit proceeds, you must preserve all paper and electronic documents, materials, and data pertaining or relating to business dealings with or involving ABC Company, including any tape recordings of telephone conversations.

This Litigation Hold applies to all forms of information including, without limitation, all Communications, e-mails, voicemail messages, paper documents, electronic documents, *.pdf files, presentations, spreadsheets, and any other hard or electronic data relating to information regarding business dealings with this entity or anyone connected with that entity regardless of how or where any such data is recorded or stored. This Litigation Hold also relates to reports, correspondence, handwritten notes, draft documents, calendar entries, and recordings, whether stored in your office, at home, on a Blackberry (or "smartphone"), PDA or elsewhere. This Litigation Hold supersedes all other document retention policies, applies to documents that you create in the future, and will remain in effect until the dispute is resolved.

DO NOT DESTROY, DELETE OR ALTER ANY DOCUMENT, DATA OR INFORMATION IDENTIFIED BY THIS MEMO. IF YOU HAVE ANY DOUBT WHETHER ANY DOCUMENT, DATA, OR INFORMATION IS IDENTIFIED BY THIS MEMO, YOU MUST PRESERVE IT.

To protect electronic data from automatic or inadvertent deletion, the IT Department has been asked to provide access to your e-mail account to the Legal Department so we can conduct a search for any messages concerning ABC Company.

Please respond via e-mail message acknowledging that you have received this notice, that you understand your obligations to preserve data and that you agree to comply with this notice.

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CRITICAL ASPECTS OF TRIAL

- ▶ **DOCUMENTS**
- ▶ **WITNESSES**
- ▶ **PREPARATION**

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DOCUMENTS

- **Good Documentation can win your case**
- **Bad Documentation can destroy it!**
 - **Parties not the same**
 - **Sloppy Documents**

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DOCUMENTS ESSENTIAL FOR LITIGATION

- **Statement of Account**
 - **Different courts have different requirements for an acceptable Statement of Account**
 - **Computer Generated**
 - **On Proper Letterhead/Stock**
 - **If computer regenerated make sure letterhead and logo matches**
 - **Actually sent to customer**

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DOCUMENTATION FOR LITIGATION

- ▶ **Scanned Documentation**
 - **Documents must be scanned exactly as they appear**
 - **Document must be precisely scanned, not just the data**
 - **“Best Evidence Rule”**
 - **Policy and Procedure must be proven**

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DOCUMENTS

- **Other Documents Can Make a Contract**
 - **Purchase Orders**
 - **Insertion Orders**
 - **Oral agreement between Businessmen**
 - **Credit Application can be a contract**

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WITNESSES

- **Actual/Personal Knowledge of facts**
- **Credibility**
- **Expert**
- **Person in possession and control of documents**

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WITNESSES

- **Actual/Personal Knowledge of facts**
 - **Salesman**
 - **Customer Service Representatives**
 - **Independent Agent**
 - **Credit Manager**

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WITNESSES

- **Credibility**
 - **Length of time in job**
 - **Background**
 - **Knowledge of industry**

- **In other words “WHO IS THE JUDGE MOST LIKELY TO BELIEVE”?**

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WITNESSES

- **Expert**
 - **Generally NOT necessary in a business trial**
 - **Necessary to prove**
 - **Signature**
 - **Custom and usage in the industry**
 - **Other ordinary industry conditions**

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WITNESSES

- **Person in possession and control of documents**
 - **Who really controls all of your company's documents?**
 - **Does credit executive have ALL documents related to a particular customer**

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WITNESSES

- **Credit Executive as Witness**
 - **Must actually have all documents**
 - **Must actually know all facts**
 - **Must actually control all activity**
 - **Not just credit**
 - **Also sales**

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WITNESSES

- **Credit Executive as Witness**
 - **Length of time with company**
 - **Length of time in industry**
 - **Educational background**

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WITNESSES

- **Credit Executive as Witness**
 - **Sitting on the Witness Stand can be nerve-wracking**
 - **Even the most poised can lose their cool**
 - **Nervousness can be misinterpreted as lying**

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HEARSAY

- **What is it**
 - **Examples**
- **Exception to Hearsay**
 - **Excited Utterance**
 - **Business Record Exception**

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BUSINESS RECORD EXCEPTION TO HEARSAY

- **Credit Executive responsible for all credit activities**
- **Credit Executive taking over a position**
- **Credit Executive reviewing all credit files**

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BUSINESS RECORD EXCEPTION TO HEARSAY

- **All Files maintained under supervision and control of credit executive**
 - **Supervision**
 - **Control**

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BUSINESS RECORD EXCEPTION TO HEARSAY

- **Credit Executive familiar with particular document**
 - **Identify it**
 - **Say what it is**
 - **Say how you know it is what it is**
 - **State when you first became familiar with it**

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BUSINESS RECORD EXCEPTION TO HEARSAY

- **Credit Executive's job responsibility is to be familiar with all documents**
 - **Credit Executive at company when original transaction took place**
 - **Credit Executive hired after transaction took place**

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BUSINESS RECORD EXCEPTION TO HEARSAY

- **Credit Executive at company when original transaction took place**
 - **Credit Executive had actual knowledge at time of original transaction**
 - **Sales people answerable to credit executive at time of original transaction**

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SPOLIATION OF EVIDENCE

FAILURE TO PROPERLY PRESERVE ALL OF THIS DATA, RECORDS, ETC. WILL BE REGARDED BY THE COURT AS “SPOLIATION OF EVIDENCE”

- **Loss of your lawsuit because you cannot prove your case**
- **Dismissal of the lawsuit because the court will punish you for not preserving necessary evidence**
 - **The court may presume you destroyed evidence because it would be harmful to your case**
- **Punitive damages to punish you for destroying or not preserving evidence**
- **Attorneys fees awarded to the other side to be paid by you**
- **Sanctions against your attorney for not causing you to preserve the data**

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SPOLIATION OF EVIDENCE

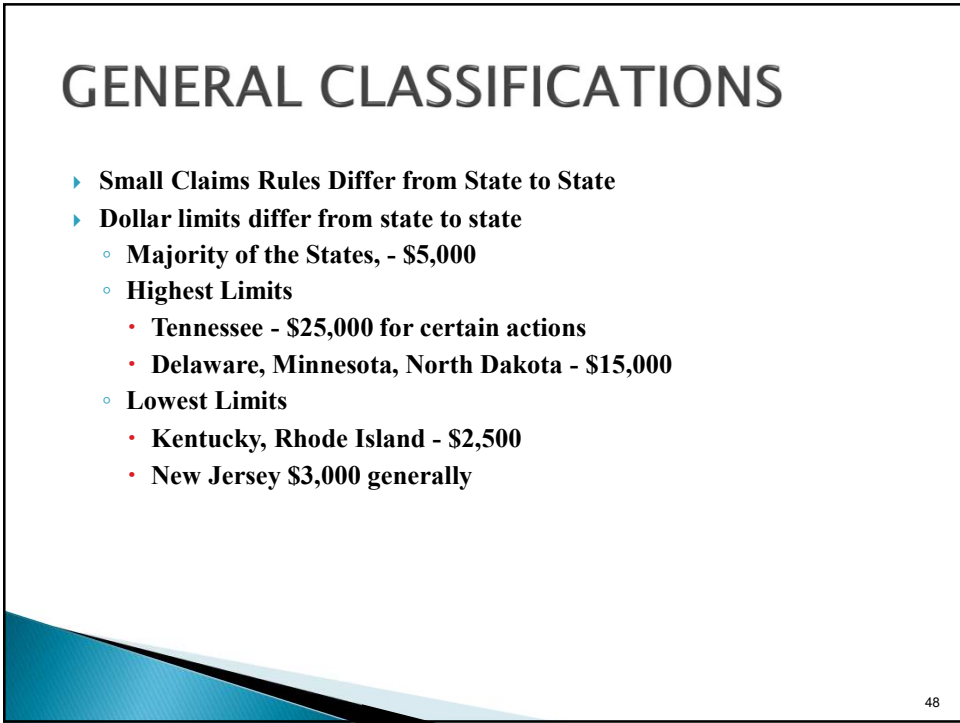
Records (including email and other documents stored electronically) or other Company property pertaining to any matter which is the subject of on-going or threatened litigation or a government investigation must not be destroyed or altered without the prior approval of a Company Attorney. Such “spoliation” of evidence can subject the Company to onerous sanctions and undermine its ability to defend or assert its position in such litigation or investigation. Employees must comply with instructions from a Company Attorney regarding the handling of any records relating to a matter subject to pending or threatened litigation or investigation.

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Corporations have Unique Treatment

- ▶ **General Rule with respect to Court Appearances – Corporations must be represented by an attorney**
- ▶ **THE FOLLOWING IS A GENERAL STATEMENT AND MAY NOT BE TRUE IN EVERY STATE**
- ▶ **In Small Claims Court, Corporations may defend a small claim without an attorney**
- ▶ **In SOME states, Corporations are permitted to bring a small claim without an attorney**
- ▶ **Some States – e.g. California – do NOT permit an attorney to appears in court at all though a party may consult with an attorney**

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Texas Small Claims Rules

- ▶ **Any party (individual or corporation) may appear with or without the representation by an attorney**
- ▶ **Trials are tried before a judge – no jury**
- ▶ **\$10,000 limit, excluding statutory interest and court costs but including attorney fees, if any**
- ▶ **Either party may appeal**

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California Small Claims Rules

- ▶ **A corporation may sue for up to \$5,000.**
 - Only 2 cases for more than \$2,500 may be brought in any one year
 - There is no limit to how many cases under \$2,500 may be brought in any one unyear
 - A guarantor may only be sued in small claims court up to \$4,000
- ▶ **There are no attorneys in small claims courts**
- ▶ **Trials are tried before a judge – no jury**
- ▶ **\$10,000 limit, excluding statutory interest and court costs**

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New York Small Claims Rules

- ▶ **A corporation must be represented by an attorney in order to bring a lawsuit in small claims court**
- ▶ **A corporation who is sued in small claims' court may be represented by an authorized agent**
- ▶ **Trials are tried before a judge – no jury**
- ▶ **\$5,000 limit, excluding statutory interest and court costs**

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**JUDGMENTS
ARE NOT THE ONLY ANSWER**

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A judgment doesn't win you the war ...
... it only wins you the battle.



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MEDIATION

- ▶ **Mediation is a process used by parties in litigation to settle disputes**
 - Not to be confused with arbitration
- ▶ **Often Court Ordered but can be voluntary**
- ▶ **Confidential**
- ▶ **Whether a witness is required varies by jurisdiction**

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MEDIATION

- ▶ **Some Factors to consider when deciding to mediate!**
 - Complexity
 - Level of Detail
 - Strength of Case
 - Obstinance of the other side
 - Amount of Damages
 - Informal discovery
 - Cost of proceeding to trial

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SETTLEMENTS AND FORMS

- ▶ **Why use them?**

- ▶ **Key Terms**
 - **Account or Invoice Specific**
 - **Admission – Valid and Existing**
 - **Date of First Payment**
 - **Release**
 - **Default and Late Notice Provisions**
 - **Stipulation vs. Consent Judgments/Agreed to Judgments/Confessions of Judgments**

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SETTLEMENT FORMS

- ▶ **Waiver Example**

No amendment or modification of this Agreement, and no waiver, discharge or termination of any one or more of the provisions in this Agreement shall be effective unless in writing and signed by all of the parties. Nothing herein requires the Creditor to accept late payments; however, should the Creditor accept any late payments, any acceptance of late payment will not excuse the Customer's default or mean that the Customer can keep making payments after they are due. Furthermore, should the Creditor accept late payments, the parties agree that the Customer will continue to be in default and that Creditor may enforce this Agreement at any time regardless of the number of late payments accepted and require that the full amount owed under this Agreement be paid to Creditor.

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SETTLEMENT FORMS

▶ Stipulation Example

In the event Customer fails to pay as agreed, Customer agrees that the full amount owed of \$8,393.32 is due and owing in addition to prejudgment interest and attorney's fees less any amounts paid under this agreement.

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RECEIVERSHIPS

- ▶ **Not available in every state**
- ▶ **A receivership is a tool in which a receiver is appointed by the Court.**
- ▶ **The purpose of a receiver may be:**
 - **to capture any assets owned by a debtor and to liquidate them for our benefit.**
 - **To operate the business of a debtor until it can be sold or reorganized**

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WANDA BORGES

WANDA BORGES, the principal member of Borges & Associates, LLC., has been specializing in commercial insolvency practice, commercial litigation and transactional matters, representing corporate clients throughout the United States for an excess of thirty-nine years.

She is admitted to practice before the courts of the State of New York and the United States District Court for the Southern, Eastern, Northern and Western Districts of New York, the United States District Court for the District of Connecticut, the United States District Court for the Eastern District of Michigan, the Second Circuit Court of Appeals and the Supreme Court of the United States. She is a member of numerous professional associations including the American Bar Association, American Bankruptcy Institute, The Commercial Law League of America and The International Association of Commercial Collectors. As a member of the Commercial Law League of America, she is a Past President of the League, a Past Chair and current advisor to the Executive Council of its Bankruptcy Section, served for six years on the Executive Council of the Eastern Region of the CLLA, is a Past Chair of the Executive Council of the CLLA Creditors' Rights Section and is the Chair of the Board of Associate Editors for its Commercial Law World magazine. She is the President of the CLLA Fund for Public Education. She is a member of the Board of Directors of the International Association of Commercial Collectors.

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WANDA BORGES

She is a regular lecturer for the National Association of Credit Management (NACM) and its various affiliates. She has prepared and continues to update courses on all phases of bankruptcy issues, Antitrust Issues for the Credit Executive, Credit and Collection Issues, Sarbanes-Oxley Act of 2002, Litigation Issues, Social Media and Ethical Concerns for the Credit Department, Cybersecurity, Privacy Issues, Electronic Signatures, and Credit Card Surcharge Issues which have been presented at past NACM Annual Credit Congresses and at trade credit association meetings. Even prior to the passage of the "Red Flags Rule", Ms. Borges worked with the NACM and the FTC to determine the applicability of the Rule to business creditors. Ms. Borges has prepared and presents seminars on compliance issues for the NACM, its various affiliates, corporations, collection agencies, the IACC, the CLLA and various other organizations. Ms. Borges is a faculty member for the NACM's Graduate School of Credit and Financial Management. Ms. Borges has been a faculty member for the National Institute on Credit Management, a program jointly sponsored by the Commercial Law League of America and the National Association of Credit Management.

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She has been a regular lecturer for the American Management Association on the Uniform Commercial Code and Fundamentals of Business Law for the Non-Lawyer, and for both the American Management Association, the Media Financial Management Association (formerly the Broadcast Cable Financial Management Association) and the Broadcast Cable Credit Association on Creditor's Rights in Commercial Litigation and Bankruptcy Matters.

Additionally, she has and continues to present seminars and webinars for the National Conference of Bankruptcy Judges, the American Bankruptcy Institute, The Commercial Law League of America, The International Association of Commercial Collectors, Riemer/Plus Catalupo & Sherman, various local and national Bar Associations, and Thomson West Publishing Company.

Ms. Borges frequently presents live seminars, tele-seminars and webinars for various trade credit groups, many of whom are managed by NACM Affiliate Association and other professional associations. Additionally, she has prepared and presented educational programs for the American Automotive Leasing Association, the National Chemical Credit Association, the National Cement Trade Credit Group, the Health Industry Manufacturers Association, the Beauty and Barber Manufacturers Credit Association, the New Hampshire Association of Broadcasters and the Credit Association for Satellite History, The Financial Executives Networking Group and the Canadian Forum of Credit Executives.

WANDA BORGES

She has served as the Managing Editor and still is one of the contributing authors of the Manual of Credit and Collection Laws published by the National Association of Credit Management and is a contributing author to its Principles of Business Credit. She is a member of NACM's Editorial Advisory Committee. She has served as a Contributing Editor for the Commercial Law League of America's Bulletin and Journal and has contributed to the Bankruptcy Section Newsletter. She is the Chair of the Board of Associate Editors for the Commercial Law League of America's CLW magazine and contributes articles to that magazine. Her treatise Hidden Liens: Who is Entitled to What? was published in the Fall, 1998 Edition of the Commercial Law Journal. She has authored Antitrust, Restraint of Trade and Unfair Competition: Myth Versus Reality, published by the NACM and most recently updated in 2017. Ms. Borges is the lead author and Editor-in-Chief of Enforcing Judgments and Collecting Debts in New York published by Thomson West Publishing Company and updated annually. She routinely publishes articles for the National Association of Credit Management "Business Credit" magazine and has published articles for its "Fraud Prevention News". Upon the passage of the BAPCPA in 2005, Ms. Borges prepared and presents educational programs on this new legislation and co-authored The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 - An Overhaul of U.S. Bankruptcy Law, published by the NACM. Her article titled "Uniform Voidable Transactions Act" was published in Insolvency Intelligence, a law journal published by Thomson Reuter's Professional (UK) Limited.

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She has published articles for the Broadcast Cable Credit Association "Creditopic\$" and the "The Financial Manager" on Commercial Creditors' Rights in Bankruptcy, Bankruptcy issues generally, the FTC's Red Flags Rule, the ECOA and Regulation B, Electronic Invoicing, "Dot Com" Businesses, and on Advertiser/Agency Liability; and has prepared the "white paper" on the discontinuance of notarization of broadcast invoices. She is a co-author of the National Association of Broadcasters' book Out of the Red and into the Black, as well as the Broadcast Cable Credit Association's Credit & Collection Handbook. Ms. Borges has appeared as a guest on the Fox News Channel program, "Fox on Consumers", speaking on consumer bankruptcy exemptions. In February, 2010, Ms. Borges prepared and presented a program entitled "Avoiding Bankruptcy Pitfalls: Creditors' Rights and Professional Obligations in Bankruptcy Proceedings" for the Georgia Bar Association and the Institute of Continuing Legal Education in Georgia" which was televised live and telecasted to satellite locations throughout the State of Georgia.

She has conducted "in-house" seminars on credit, collection, secured transactions and insolvency for corporate clients such as Agrium, Inc., Bristol-Myers Squibb, Burlington Industries, Inc., Clyde Companies, Inc., Cosmair, Inc., Doric Enterprises, Ferguson Enterprises, Inc., Ingram Industries Inc., Mars Incorporated, McKesson Corporation, Mobil Chemical Company, Multi-Arc Corp., Novo Building Products, Pfizer Inc., R.J. Reynolds Tobacco Company, Sandvik, Inc., Sharp Electronics Corporation, Simon & Schuster Corp., SONY Corporation, Southeastern Freight Lines, Inc., Stanley Works, Sumitomo Corporation of Americas and SunTrust Bank.

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She is a past Chair of the Board of Trustees of Mercy College and served as a member of that board for nine years. She has served on the board of Regents College (now Excelsior College), and has taught Business Law at Seton College in Westchester County, New York. She is a past Chair of the Broadcast Cable Financial Management Association. Ms. Borges is the East Coast Resource in Legal Affairs for Cutting Edge Business Resource & Solutions.

Ms. Borges actively participates in community events. She is a Leader of Song and has directed the Youth Music Ministry at her parish, Our Lady Star of the Sea. She remains a member of the Fairfield County Chorale for which she has served frequently as a director. She served as its president for the years 1995 through 1997, and its Executive Vice-President during the years 2012 through 2013.

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She received the "Human Valor" Award by Noticias del Mundo, a New York based spanish-language newspaper in 1985, the Mercy College Alumni Association's "Professional Achievement" Award in 1991, honorary membership in Delta Mu Delta - The National Honor Society in Business Administration - in May, 1995 and in October, 1996, was awarded the Mercy College Trustee's Medal for outstanding dedication to her profession and alma mater. She is listed in Who's Who of American Women and has recently accepted an invitation to be listed in Who's Who in America. In September, 2000 she was named one of the "50 Outstanding Alumni" of Mercy College. In February, 2001 she received the "Career Achievement Award" from the Broadcast Cable Credit Association.

In May, 2004, she received the "Strength in Numbers Recognition Certificate" from the National Association of Credit Management. In December 2006, she was named one of "2006 Top25 Most Influential Collection Professionals" by Collection Advisor Magazine. Ms. Borges was recently inducted into Mercy College's Alumni Hall of Fame celebrating its 60th year in existence. In November, 2010, Ms. Borges received the "Robert E. Caine Award for Leadership" from the Commercial Law League of America. In April, 2015, Ms. Borges received a "Woman of Distinction" award from St. Catharine Academy, her high school alma mater celebrating its 125th year in existence. Ms. Borges has been included on the New York Super Lawyers - Metro Edition list (Bankruptcy & Creditor/Debtor Rights) each year since 2009.

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