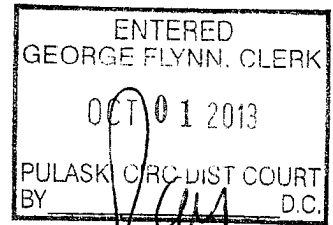


COMMONWEALTH OF KENTUCKY  
PULASKI CIRCUIT COURT  
CASE NO. 12-CI-629



PLAINTIFF

NATIONAL COLLEGIATE LOAN TRUST 2007-3  
C/O FMD LEGAL

VS.

DAVID LAFAVERS A/K/A  
DAVID M. LAFAVERS

DAVID LAFAVERS A/K/A  
DAVID H. LAFAVERS

DEFENDANTS

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ORDER SUSTAINING DEFENDANTS' EVIDENTIARY OBJECTION

AND

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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This matter came before the Court for an evidentiary hearing on September 16, 2013. The Plaintiff was represented by Richard P. Green of Javitch, Block and Rathbone. The Defendants were present and represented by Ms. Rebecca Babarsky of AppalReD Legal Aid.

The only evidence admitted into the record at that time was the oral testimony of the Defendants, David M. Lafavers and David H. Lafavers.

Plaintiff presented no witnesses, but attempted to enter certain documents into evidence under KRE 803 (6) and KRE 901 (11). Defendants' objected to the admission of said documents on multiple grounds. Oral argument was heard on Defendants' objections, and Plaintiff was given the opportunity to respond. Both parties were advised to submit briefs regarding the evidentiary objections within ten (10) days.

## **I. FINDINGS OF FACT**

1. On or about August 17, 2007 Defendants David M. Lafavers and David H. Lafavers signed a “Loan Request/Credit Agreement” with Union Federal Savings Bank. This finding is supported by the testimony of David H. Lafavers and David M. Lafavers.
2. The Court finds that Plaintiff is not the holder of a promissory note executed by the Defendants, as Plaintiff has failed to produce a negotiable promissory note.
3. Additionally, there has been no evidence presented to demonstrate that Union Federal Savings Bank has assigned their agreement with the Defendants to the Plaintiff.

## **II. CONCLUSIONS OF LAW**

1. Plaintiff provided no witnesses at trial. Instead, Plaintiff attempted to offer a stack of documents into evidence under KRE 803 and KRE 902 (11). Mere attachment of a notarized document to records is not sufficient to allow the records to be introduced. Matthews v. Com., 163 S.W.3d 11, 24 (Ky. 2005). In relevant part, KRE 902 (11) provides that business records may be self authenticating in certain cases, “[u]nless the sources of information or other circumstances indicate a lack of trustworthiness . . .” KRE 902(11)(a). Here, the sources of information, as well as other circumstances, indicate a lack of trustworthiness: (1) Plaintiff’s counsel’s assertions at trial, particularly regarding the redaction of documentation in the proposed Exhibit B, conflicted with the affidavit’s statement that “all documents attached are true and correct originals [sic] records or true and correct copies of the original record, being reproduced from the original records;” and (2) The FTC has recently filed a complaint against the employer of the affiant in federal court for, among other things, making made “Unsubstantiated Representations about Owing a Debt” and other “False and Misleading Representations.” The

Court will therefore *sustain* Defendants' first objection to entry of Plaintiff's proposed Exhibits A and B in accordance with KRE 902(11)(a).

2. Plaintiff has plead that it is the "holder of a note," yet it has failed to produce a note endorsed either to Plaintiff or in blank. On July 26, 2012, Plaintiffs were advised by the Court that they could amend their pleading to include a contract claim. Plaintiff chose not to do so.

3. Even if Plaintiff had amended its pleading to include a contract claim, Plaintiff has still failed to provide the Court with any evidence that would serve to substantiate that Plaintiff was an assignee of the contract between Union Federal Savings Bank and the Defendants. As such, Plaintiff has failed to show that it is the real party in interest as required by CR 17.01.

4. In Bruner v. Discover Bank c/o DFS Services, LLC, 360 S.W.3d 774, 778 (Ky. App. 2012), the Court of Appeals set out three showings that a plaintiff must provide in order to succeed on a claim that it is has ownership of a debt when the plaintiff is not the original creditor. These showings are:

- (1) A bill of sale listing the name and account number of the defendant;
- (2) A document specifically detailing how the creditor/plaintiff reached the principal and interest amounts that it is suing for; and
- (3) Documentary evidence that the defendant is in fact the person responsible for the debt.

Defendants admitted that they signed an agreement with Union Federal Savings Bank, so Plaintiff is not required to provide (3) in this case. However, Plaintiff has failed to provide either (1) or (2).

5. As such, the Court finds that neither Defendant is indebted to either Student Loan Trust 2007-3 or FMD Legal.

**IT IS HEREBY ORDERED AND ADJUDGED**

1. That Defendants' objection to entry into evidence of Plaintiff's proposed Exhibits A and B is SUSTAINED;
2. That Judgment be entered in favor of Defendants David M. Lafavers and David H. Lafavers; and
3. That Defendants' counsel shall be awarded reasonable attorney's fees.

This is a final and appealable order.

So Ordered this 30<sup>th</sup> day of sept, 2013

  
HON. DAVID TAPP, JUDGE  
PULASKI COUNTY CIRCUIT COURT

Prepared and submitted by:

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HON. REBECCA BABARSKY  
APPALRED LEGAL AID  
COUNSEL FOR DEFENDANTS  
108 COLLEGE STREET  
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(606)679-7313

**DISTRIBUTION**

It is hereby certified that true and correct copies of the foregoing Order were mailed this 1  
day of October, 2013 to the following:

✓ Hon. Richard Green ✓  
Hon. Robert K. Hogan  
Javitch, Block & Rathbone, LLC  
700 Walnut Street, Suite 300  
Cincinnati, OH 45202  
Counsel for Plaintiff, National Collegiate  
Student Loan Trust.2007-3 C/O FMD Legal

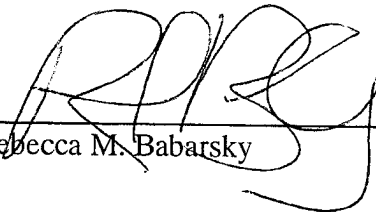
✓ Hon. Rebecca Babarsky ✓  
AppalReD Legal Aid  
108 College Street  
Somerset, KY 42501  
Counsel for Defendants David M. Lafavers  
and David H. Lafavers

George Ayers 10/11/13  
CLERK

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Proposed Findings of Fact and Conclusions of Law was mailed, this 26<sup>th</sup> day of September, 2013, first class, postage pre-paid, to the following parties and/or attorneys:

Hon. Richard Green  
Hon. Robert K. Hogan  
Javitch, Block & Rathbone, LLC  
700 Walnut Street, Suite 300  
Cincinnati, OH 45202  
Counsel for Plaintiff, National Collegiate  
Student Loan Trust 2007-3 C/O FMD Legal

  
Rebecca M. Babarsky