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NEW CENTURY FINANCIAL SERVICES, INC., Plaintiff, vs. ORFA I. SANCHEZ, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - MORRIS COUNTY SPECIAL CIVIL PART DOCKET NO. DC-2747-98 Civil Action OPINION

Decided: April 12, 2002

Gerard J. Felt submitted the applications for Plaintiff New Century Financial Services, Inc. (Pressler and Pressler)

The opinion of the court was delivered by

MINIMAN, J.S.C.

Plaintiff New Century Financial Services, Inc. ("New Century"), applies for entry of judgment by default in 148 cases consolidated by the court in an order entered April 12, 2002, under the above caption. In each case, the complaint alleges that New Century has a principal place of business at 8 Bunker Road, East Hanover, Morris County, New Jersey. According to the Dun & Brad-

street website "Small Business Solutions," of which the court takes judicial notice, New Century is located at 8 Bunker Road, East Hanover, New Jersey, where it has 15 employees and annual "sales" of almost $5,000,000. However, the court was informed by a fellow judge that 8 Bunker Road was close to his own home and that it was a small, single-family house in a residential neighborhood.[1]

When questioned about New Century's principal place of business, plaintiff's counsel admitted that 8 Bunker Road was the residence of Eric Sombers, the employee of Pressler and Pressler who is in charge of its computer system.[2] Mr. Sombers is also the vice president of New Century[3] and the person executing most of the certifications of proof on its behalf.[4] Counsel admitted that the business of New Century was actually conducted from the offices of Pressler and Pressler at 64 River Road, East Hanover.

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[1]Taking judicial notice of the East Hanover zoning, Bunker Road is zoned R-20, and business is not permitted in that zone.

[2]The information in this opinion which does not appear in the record was supplied by Gerard J. Felt, Esquire, at two meetings of representatives of The New Jersey Creditors Bar Association with Judges Stanton, and/or Cramp and Miniman in Morris County or was taken from public records.

[3]Other officers of New Century are Lee Pressler, the president, who is a well-known urologist in Morristown and, by admission of counsel, the brother of Sheldon Pressler, the senior partner of Pressler and Pressler. The secretary is Lori Pressler, who the court was informed by counsel is Sheldon Pressler's daughter. They are also the principals in Laurilee Properties, LLC, which owns 8 Bunker Road in East Hanover.

[4]After the meetings with The New Jersey Creditors Bar Association at which the court noted the close relationship of New Century and Pressler and Pressler, Manny Barbosa, as "Senior Agency-Attorney Liaison" or "Senior Collection Liaison," for New Century, began in December of 2001 to sign the certifications of proof.

Ownership of the Accounts

In each case, the certification supporting entry of judgment recites that New Century is "the present owner" of the defendant's open-end credit plan account[5] with a third party credit card company.[6] No other evidence of ownership of the chose in action is offered, despite the requirements of R. 6:6-3(a) which provides that when a claim is founded on a contract a copy shall be attached to the affidavit of proof and which allows the Clerk of Court to demand production of the original. The identity of the entity from which the account was acquired is not disclosed, nor is it clear from the pleadings and evidence whether the account was acquired directly from the original creditor or from some intermediate owner. When questioned about the absence of a document assigning the account, plaintiff's counsel explained that the document of sale was hundreds of pages long and burdensome to submit with each application.

Last Periodic Statements

In the second paragraph of the certifications, Mr. Sombers avers that "I am familiar with the books and business of [New Century]. The account annexed hereto or filed with the com-

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[5]In a proposed amended certification, New Century specifically alleges that the account is an open-end credit plan as defined in 15 U.S.C. § 1602(I) and 12 C.F.R. § 226.2(a)(20).

[6]In 2000, these certifications referred to an "affidavit of sale" but none was attached. When Judge Cramp requested in writing in 2000 that it be supplied, the words "as set forth in the attached affidavit of sale" were deleted from New Century's form certifications of proof.

plaint is [a] true and correct copy of [New Century's] books of original entry."[7] When the court inquired about the absence of the original creditor's "last periodic statement," counsel explained that New Century purchases accounts electronically and the data regarding the accounts is transmitted in that fashion. As a result, plaintiff does not have the former owner's last periodic statement.

The New Jersey Creditors Bar Association informed the court that the business of collecting on credit card accounts has changed over the past five years. They stated that credit card companies no longer wish to sue in their own names, preferring instead to liquidate accounts *en masse* and assign the choses in action to the purchaser.[8] Some of these purchasers are entities which are or appear to be unrelated to the collection firms which represent them.[9] Others are entities in which partners in collection firms are principals.[10] Still others are entities whose

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[7]In 2000, the "account annexed" had the Pressler and Pressler file number at the top, a header reading "Computer Generated Default Records," and below that the name of the debtor, the name of the original creditor, the account number, the name and post office box number for New Century, the total amount due for purchases, cash advances and late charges as of a date certain, and the rate of finance charge. See Ex. A. When Judge Cramp observed in a 2000 letter to Pressler and Pressler that the document was not a book of original entry, the format of the document was changed to create a more formal-looking document. See Ex. B.

[8]It is not clear whether the credit card companies need to liquidate accounts quickly for financial reasons or whether they simply wish to avoid litigation.

[9]See MKM Acquisitions LLC v. Gonzalez, Docket No. DC-8694-01.

[10]For example, Phillip Kahn, Esquire, of the firm of Fein, Such, Kahn & Shepard, is a member of Merchants Commercial Credit, LLC, a company engaged in the business of purchasing credit card

principals are siblings and other relatives of the collection law firms, such as New Century.[11]

In addition, the members of the New Jersey Creditors Bar Association, including attorneys from Pressler and Pressler, informed the court that these credit card companies may not supply the last periodic statement and other account information, such as the credit card application and account history, and may no longer be cooperative with the present account owner.

New Century urges that when the information it receives from the former account owner is entered into its computer system, the computer entry becomes New Century's book of original entry. As a consequence, they claim that the printout of that information contains the information required in the periodic statement required by 15 U.S.C. § 1637(b) and 12 C.F.R. § 266.7 and thus satisfies the requirements of R. 6:6-3(a) for electronically maintain records of open-end credit plans.

In a proposed amended certification, New Century would in the future aver as follows:

> 2. The business records of the original creditor were maintained electronically and at the time of purchase by the plaintiff, the original creditor affirma-

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accounts in default, and represents it in litigation. See Merchants Commercial Credit, LLC, v. Schneider, Docket No. DC-6728-01, in which the plaintiff purchased $1,002,560.51 in accounts for $29,000 from an individual employed by a collection agency.

[11]Andrew Eichenbaum, the brother of the lead named partners in Eichenbaum, Kantrowitz, Leff & Gulko, is the person who signs certifications of proof for RAB Performance Recoveries, L.L.C., a client of the Eichenbaum firm.

tively represented that the account information electronically transferred was due and owing and correct.

3. I am familiar with the business and records of the plaintiff which are maintained electronically and attached hereto is a computer-generated report setting forth the defendant's present financial information.

Nothing suggests that the computer-generated documents attached to the certifications were ever supplied to the defendants.

Statements of Account

The documents annexed to the current certifications and the proposed amended certification always run through the dates of the certifications of proof and thus are clearly documents prepared specifically to secure entry of judgment. The statements of account have the name and address of the defendant in the upper left corner and the name of New Century in the upper right corner, below which are the words "Successor in Interest to" followed in some cases by the former account owner and in other cases by the name of the type of credit card, such as "Discover" rather than the card issuer, for example, Greenwood Trust Company.[12] Immediately below the defendant's name and address is a repetition of the former account owner's name, below that the former owner's account number, and below that the Pressler and Pressler file number.[13]

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[12]For example, see Certification of Proof in New Century Financial Services, Inc., v. Stoops, DC-7017-98.

[13]For example, in New Century Financial Services, Inc., v. Sanchez, Docket No. DC-2747-98, the information below the defendant's name and address on New Century's "original book of entry" is the following: DISCOVER, 6011001132520950, S26898." On pleadings filed by Pressler and Pressler is the notation "P&P File Number S31946."

Rather than supplying information about (1) the total credit line, (2) the cash advance limit, (3) the available credit line, (4) the available cash, (5) purchases and advances, and (6) payments and credits, the typical account annexed to the certification footnotes all of these categories with the notation "The Account is Past Due and charge privileges have been revoked."[14] The date the account was opened is sometimes supplied and sometimes "unknown." Sometimes no charge off date is given but in other cases it is supplied. Sometimes the last payment date and amount will be supplied; while in other cases a last payment date will be stated but the amount may reflect "$0.00" or the payment information is stated to be "unknown."

In another field of information, a "previous balance" is given without supplying the date of the previous balance. Then, finance charges are set forth without providing "a calculation in figures" as required by R. 4:43-2(a), from the date of charge off through the date of the certification of proof.[15] Next, attorney's

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[14]See Certification of Proof and of Non Military Service" in the matter of New Century Financial Services, Inc., v. Sanchez, Docket No. DC-2747-98.

[15]Sometimes the interest is calculated from the charge off date even though the defendant made payments thereafter, presumably to New Century or Pressler and Pressler. In failing to supply the calculation in figures as required by R. 4:43-2(a), New Century makes it impossible for the court to ascertain whether interest was recalculated each time a payment was made or whether it is just calculated on the original "previous balance." See New Century Financial Services, Inc., v. Farin, Docket No. DC-4020-01 (interest calculated from 11/30/97 despite a last payment of 9/12/01). See also plaintiff's claims against Stoops, Docket No. DC-7017-98; Shackelford, Docket No. DC-1956-01; Mincey, Docket No. DC-2844-01; Brayboy, Docket No. DC-2950-01; Rojas, Docket No. DC-5741-01;

fees are calculated on the total amount of the previous balance plus interest through the date of the certification. In a final field of information, the computer-generated summary statement provides a rate summary. The rate is always the same for purchases and advances, the balance subject to finance charge is the "previous balance" and the monthly periodic, nominal annual and annual percentage rates of interest are set forth.

Terms and Conditions of Account

Attached to the certifications of proof are what purport to be the terms and conditions of the credit card company applicable to the account in question. The certifications make no reference to those terms and conditions nor do they aver that they applied to the account in dispute prior to breach, that they were maintained in the ordinary course of the original creditor's business, nor that they are true copies of the originals. Thus, those documents are not before the court in competent evidential form pursuant to N.J.R.E. 803(c)(6) and 901. The mere fact that R. 6:6-3(a) requires the attachment of a copies of documents on which a claim is founded to the certification of proof does not eliminate the Rules of Evidence. Even if plaintiff could somehow have certified that the attached terms and conditions were true copies of the assignor's original contract and were maintained in the ordinary course of business, a large number of the certifications have terms

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Patterson, Docket No. DC-6017-01; Garcia, Docket No. DC-6711-01; Bolanos, Docket No. DC-7012-01; Higgins, Docket No. DC-7742-01; and Pesquera, Docket No. DC-9043-01.

and conditions attached to them which patently are not applicable to the account because they were issued after the breach.[15]

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[15]Those accounts are listed below in docket number order followed by the defendant's last name, the date of the terms and conditions ("T&C") and the date of the last payment or the date of charge off:

DC-2747-98, Sanchez, T&C 9/96, last payment 4/20/95
DC-7017-98, Stoops, T&C 9/96, charge off 2/29/96
DC-5439-00, Bonasco, T&C 9/96, last payment 8/21/95
DC-5777-00, Carrero, T&C 6/99, last payment 11/9/97
DC-5943-00, Montoya, T&C 6/99, last payment 7/28/97
DC-0278-01, Isaac, T&C 9/96, last payment 9/1/94
DC-1956-01, Shackelford, T&C 1996, charge off 2/10/93
DC-2082-01, Fezenko, T&C 11/97, last payment 6/12/97
DC-4020-01, Farin, T&C 9/98, charge off 11/30/97
DC-6293-01, DeCoster, T&C 12/98; last payment 5/1/98
DC-6625-01, Albut, T&C 5/00, last payment 2/22/00
DC-6626-01, Alger, T&C 5/00, last payment 3/8/00
DC-6627-01, Alam, T&C 5/00, last payment 1/20/00
DC-6628-01, Ahmed, T&C 5/00, last payment 8/18/99
DC-6629-01, Antunez, T&C 5/00, last payment 6/25/99
DC-6631-01, Wallace, T&C 1/00, last payment 1/16/96
DC-6666-01, Hammett, T&C 5/00, last payment 6/21/99
DC-7013-01, Coll, T&C 5/00, last payment 2/22/00
DC-7014-01, Campbell, T&C 5/00, last payment 2/16/00
DC-7018-01, Kagan, T&C 5/00, last payment 12/3/99
DC-7021-01, Marini, T&C 5/00, last payment 8/31/99
DC-7022-01, Rudolph, T&C 9/98, last payment 6/3/96
DC-7078-01, Botero, T&C 9/98, charge off 11/30/97
DC-7097-01, Bergman, T&C 5/00, last payment unknown
DC-7217-01, Kelly, T&C 5/00, last payment 10/28/99
DC-7462-01, Staley, T&C 5/00, last payment unknown
DC-7464-01, Sparrow, T&C 5/00, last payment unknown
DC-7496-01, Betancourth-va, T&C 5/00, last payment 2/7/00
DC-7510-01, Gordon, T&C 5/00, last payment 9/13/99
DC-7517-01, Chaparro, T&C 5/00, last payment 6/7/99
DC-7518-01, Echevery, T&C 5/00, last payment 12/7/99
DC-7648-01, Olcay, T&C 5/00, last payment 8/17/99
DC-7649-01, Saenz, T&C 1996, last payment 12/21/96
DC-7682-01, Cryan, T&C 5/00, last payment 8/11/99
DC-7683-01, Castro, T&C 5/00, last payment 8/27/99
DC-7684-01, Wendlanz, T&C 5/00, last payment 7/19/99
DC-7713-01, Beston, T&C 5/00, last payment 12/17/99
DC-7718-01, Trojanowski, T&C 5/00, last payment unknown
DC-7720-01, Filipppini, T&C 1/00, last payment 10/25/95
DC-7721-01, Wladich, T&C 9/98, charge off 11/30/97
DC-7724-01, Merchant, T&C 9/96, last payment 10/25/95
DC-7726-01, Peterson, T&C 5/00, last payment 8/6/99
DC-7727-01, Hoffman, T&C 5/00, last payment unknown
DC-7730-01, Atijas, T&C 3/00, last payment 1/27/98
DC-7741-01, Draper, T&C 5/00, last payment 9/8/99
DC-7748-01, Castro, T&C 5/00, last payment 8/27/99
DC-7749-01, Dondero, T&C 5/00, last payment unknown
DC-7950-01, Dykhouse, T&C 5/00, last payment 11/29/99
DC-7951-01, Ebersbach, T&C 1/00, last payment 12/15/97
DC-8135-01, Black, T&C 5/00, last payment 3/24/00

For example, in New Century Financial Services, Inc., v. Bonansco, Docket No. DC-5439-00, the account is purportedly a Discover Card Account issued by Greenwood Trust Company. The account was opened on August 1, 1993, a last payment was made on August 21, 1995, and the account was charged off on March 29, 1996. The Discover Card terms and conditions attached to the certification were revised in September of 1996, months after the account was closed. Similarly, in New Century Financial Services, Inc., v. Carrero, Docket No. DC-5777-00, the Hurley State Bank Radio Shack account was opened on November 3, 1995, the last payment was made on November 9, 1997, and the account was charged off on September

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DC-8136-01, O'Brien, T&C 5/00, last payment 8/11/99
DC-8137-01, Beck, T&C 5/00, last payment 6/21/99
DC-8138-01, Carey, T&C 5/00, last payment 12/20/99
DC-8139-01, Clay, T&C 5/00, last payment 12/31/99
DC-8141-01, Campos, T&C 5/00, last payment 1/14/00
DC-8142-01, Columbus, T&C 5/00, last payment 7/15/99
DC-8143-01, Evans, T&C 5/00, last payment 8/19/99
DC-8144-01, Frey, T&C 5/00, last payment 3/20/00
DC-8145-01, Frandano, T&C 5/00, last payment 3/7/00
DC-8146-01, Floriano, T&C 5/00, last payment 1/4/00
DC-8148-01, Monnie, T&C 5/00, last payment 9/7/99
DC-8149-01, Nutakor, T&C 10/98, last payment 4/2/98
DC-8153-01, Nolan, T&C 5/00, last payment 1/18/00
DC-8157-01, Segro, T&C 5/00, last payment 1/18/00
DC-8237-01, Engel, T&C 5/00, last payment 6/14/99
DC-8261-01, Basista, T&C 5/00, last payment 6/24/99
DC-8263-01, McCoy, T&C 5/00, last payment 5/27/99
DC-8264-01, Malpica, T&C 5/00, last payment 8/16/99
DC-8266-01, Murphy, T&C 1996, last payment 12/4/95
DC-8286-01, Gandy, T&C 5/00, last payment 12/9/99
DC-8287-01, Gilmartin, T&C 5/00, last payment unknown
DC-8288-01, Noceras, T&C 5/00, last payment 7/14/99
DC-8289-01, Rolph, T&C 5/00, last payment unknown
DC-8300-01, Cochran, T&C 5/00, last payment 1/5/00
DC-8394-01, Pierson, T&C 9/98, last payment 6/19/96
DC-8411-01, Fortin, T&C 5/00, last payment 2/28/00
DC-8463-01, Kowalski, T&C 5/00, last payment 9/1/99
DC-8559-01, Giraldo, T&C 5/00, last payment 12/7/99
DC-8560-01, Hagler, T&C 5/00, last payment 1/12/00
DC-8563-01, Cardona, T&C 5/00, last payment 2/2/00

30, 1998. However, the terms and conditions attached to the certification of proof were revised in June of 1999.

Other problems also exist. No terms and conditions were supplied at all in New Century Financial Services, Inc., v. Garcia, Docket No. DC-6711-01, New Century Financial Services, Inc., v. Botero, Docket No. DC-7095-01, and New Century Financial Services, Inc., v. Whitely, Docket No. DC-8158-01. Nevertheless, counsel seek an award of attorney's fees without a contract permitting such fees. In addition, some of the terms and conditions are unreadable or virtually unreadable,[16] there are blank application forms,[17] and there are documents which are only partially reproduced.[18] For example, in New Century Financial Services, Inc., v. Wenkelman, Docket No. DC-5151-01, the certification has attached to it an unsigned blank credit card application form which cautions the applicant not to sign the application before reading "the attached agreement." No such agreement is attached to the blank application. Other terms and conditions, such as those from First USA Bank, have mandatory arbitration clauses.[19]

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[16]This is true of attachments from Chevy Chase Bank.

[17]This is true of attachments from Home Depot (really Monogram Credit Card Bank of Georgia), Household Finance, and Mitsubishi.

[18]This is true of attachments from First Select, Hurley State Bank, and in New Century Financial Services, Inc., v. Isaac, Docket No. DC-0278-01.

[19]The court has not enforced these clauses in the face of a default because an arbitral award would in any event have to be reduced to judgment.

Without having the terms and conditions that actually governed the account prior to breach, the court cannot determine whether in fact there is a contractual right to recover attorney's fees. The court also cannot compare the rate of interest claimed in the certification of proof with the rate specified in the contract between the original creditor and the defendant. When the terms and conditions were issued after the breach or the charge off, there simply is no competent evidence before the court as to the agreed rate.

Amount Due

The computer-generated summary statements do not disclose the amount charged off by the original creditor in the space provided for this information on New Century's form. Rather, only the "previous balance" amount is included. The certifications before the court do not indicate that the "previous balance" was the amount due on the date of charge off. The proposed amended certification does recite that "the original creditor affirmatively represented that the account information electronically transferred was due and owing and correct." However, nothing in the certification suggests that the affiant has any personal knowledge of such representation or that the representation was made under oath. There is no indication whether it was oral or written and it is not attached to the New Century certification of proof. As such, the proposed averment is just inadmissible hearsay.

In some cases, the computer-generated summary statement indicates the date and amount of the last payment, sometimes before

and sometimes after the date the account was charged off. However, the last payments are not reflected under the account summary, nor is credit given for them in the paragraph of the certification of proof which summarizes the components of the amount of judgment sought.[20]

Affidavits of Non-Military Service

Finally, the certifications of proof aver that:

> No defendant named herein is in the Armed Forces of the United States at the present time nor has such defendant(s) been ordered to report for induction under the Selective Training and Service Act, its supplements and amendments.

In discussing this form of certification with plaintiff's counsel, he admitted that the persons signing the certifications had no personal knowledge on which to base the representations made with respect to military service.

Standards for Entry of Judgment by Default

New Century relies on the matter of Heimbach v. Mueller, 229 N.J. Super. 17 (App. Div. 1988), for the proposition that:

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[20]See New Century Financial Services, Inc., v. Shackelford, Docket No. DC-1956-01 ($2 last payment not credited); New Century Financial Services, Inc., v. Mincey, Docket No. DC-2844-01 ($150 last payment not credited); New Century Financial Services, Inc., v. Brayboy, Docket No. DC-2950-01 (last payment date after charge off given but amount not indicated or credited); New Century Financial Services, Inc., v. Patterson, Docket No. DC-6017-01 ($2 last payment not credited); New Century Financial Services, Inc., v. Bolanos; Docket No. DC-7012-01 ($150 last payment not credited); New Century Financial Services, Inc., v. Higgins, Docket No. DC-7742-01 ($500 last payment not credited); and New Century Financial Services, Inc., v. Pesquera, Docket No. DC-9043-01 ($100 last payment not credited). Of course, the absence of an account history makes it impossible to determine whether there were interim payments between the date of charge off and the last payment date.

> This decision, binding on this Court, makes clear that the judgment must enter in default situations if what a plaintiff alleges "might ... have been the case." In other words, if the facts alleged in plaintiff's Certification may have happened, judgment must enter, as the defendant's failure to answer constitutes his or her admission of the allegations of the Complaint. (Emphasis added.)

Plaintiff misconstrues this Appellate Division decision.

In the Heimbach case the court acknowledged that "New Jersey's salutary practice [] to allow the trial judge the discretion to require proof of liability at a default hearing" was a minority view. Id. at 20-21. Most jurisdictions upon default will not entertain proof of the allegations of the complaint. Id. With the majority view in mind, the Appellate Division turned to federal law, on which New Jersey's practice was based, for guidance on the scope of inquiry at a proof hearing.

The Heimbach court observed that in Trans World Airlines v. Hughes, 449 F.2d 51, 63 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), the defendant in default appeared at the proof hearing and sought to controvert the allegations in the complaint. The Court of Appeals "approved the trial court's decision that the defendant's default admitted every allegation of fact in the complaint which was susceptible of proof by legitimate evidence" under the rule of Thompson v. Wooster, 114 U.S. 104, 5 S.Ct. 788, 29 L.Ed. 105 (1885) (emphasis added).

The Supreme Court in Thompson held that "'so long as the facts as painted by the complaint 'might ... have been the case,' they may not now be successfully controverted by the defaulted

defendant.'" Heimbach, 229 N.J. Super. at 22. The federal rule, thus, does not relieve the party seeking a default judgment from their obligation to prove their prima facie case. It only provides that a defendant in default may not seek to controvert those proofs unless (1) the allegations were made indefinite or erroneous by other allegations of the complaint, (2) the allegations were contrary to facts of which the court could take judicial notice, or (3) the allegations were contrary to uncontroverted material in the file of the case. Id. at 22-23, citing Trans World Airlines, 449 F.2d at 63.

In sum, the Heimbach court held, and the plaintiff here ignores, that:

> When a trial court exercises its discretion to require proof of liability as a prerequisite to entering judgment against a defendant who has defaulted, what is required under the federal practice is that the plaintiff adduce proofs which show that the facts alleged "might have been the case," ... or, to say the same thing in different words, that they could conceivably be proved at trial, and that, if proved, they would establish the legally required elements of the plaintiff's claim.

Heimbach, 229 N.J. Super. at 23 (emphasis added).

This rule does not require that judgment be entered despite the absence of some necessary element of plaintiff's prima facie case or despite that fact that the claim was barred by some rule of law whose applicability was evident either from the pleadings or from the proofs presented. Id. at 23-24. For example, where the agreement itself disproves the liability claimed, default judgment cannot be entered. Johnson v. Johnson, 92 N.J. Super. 457 (App. Div. 1966).

Furthermore, the evidence required by Heimbach does not modify or abrogate the requirements that each and every element of the prima facie case be proven by competent evidence. Indeed, in Heimbach the Appellate Division found the judge's adverse ruling on damages correct:

> [N]o competent testimony whatsoever was offered to prove damages. The plaintiffs presented an employee of the plaintiffs' insurer. The witness had never inspected the building. He relied upon an appraisal prepared by someone who was no longer employed by the insurance company. The appraisal file prepared by the former employee was not proved or offered as a business record, assuming that it could have been, nor was the witness able to provide an adequate foundation to explain or justify the formula which had apparently been used to estimate the replacement value of the burned building. No attempt whatsoever was made to relate replacement value to fair market value at the time of the loss, nor was any authority offered to the trial judge to establish the measure of damages.
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> Heimbach, 229 N.J. Super. at 26.

Unlike the trial court in Heimbach, this court is not addressing defenses to liability and ruling against the plaintiff on that issue. Rather, like the Heimbach court on the issue of damages, the court is concerned with the admissibility and sufficiency of the evidence presented.

Thus, mere default does not prove liability; the trial court has the power to require the plaintiff to show that it is entitled to the relief demanded by furnishing proofs thereof. Douglas v. Harris, 35 N.J. 270, 176-77 (1961); Edelstein v. Toyota Motors Distributors, 176 N.J. Super. 57, 63 (App. Div. 1980); Johnson v. Johnson, 92 N.J. Super. 457, 464 (App. Div. 1966); Reilly v. Perekinys, 33 N.J. Super. 69, 73 (App. Div. 1954) (the

practice in New Jersey is to leave "to the discretion of the trial court ... whether or not to take proofs as to the plaintiff's right to relief"); Scott v. Scott, 190 N.J. Super. 189, 195 (Ch. Div. 1983); Metric Investment, Inc., v. Patterson, 98 N.J. Super. 130, 133 (Law Div. 1967). "After a default has been entered the trial judge may require proof of liability as well as proof of the amount of damages." Metric Investment, 98 N.J. Super. at 133, citing Douglas v. Harris, 35 N.J. 270, and Perry v. Crunden, 79 N.J. Super. 285 (Cty. Ct. 1963). The trial court also has the discretion to "cho[o]se not to require plaintiff to prove the element of liability, but rather [to] treat[] the default as a concession of liability." Interchemical Corp. v. Uncas Printing and Finishing Co., Inc., 39 N.J. Super. 318, 327 (App. Div. 1956). The plaintiff here does not have a right to insist that the court exercise its discretion to treat the default as a concession of liability.

"[T]he court in a default case may decline to enter judgment against a defendant if liability is not established." In re Estate of Sharp, 151 N.J. Super. 579, 582 (Ch. Div. 1977), citing R. 4:43-2(b) and Douglas v. Harris, 35 N.J. at 276-77.

> It is well established that after default the court may conduct a hearing for the purpose of settling the amount of the final judgment and therein require plaintiff to prove his damages. Douglas v. Harris, 270, 277 (1961). Likewise, the trial judge has the discretionary power to require plaintiff to prove the liability of defendant and to allow cross-examination of plaintiff's witnesses produced for the purpose. Douglas, supra, at pp. 276 and 278.
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> Even though a defendant's answer is stricken for failure to make discovery, the plaintiff may be ..., precluded from recovery where the proof which he offers

in support of his own case reveals a legal defense to his claim. See Douglas, supra, p. 282.

Johnson v. Johnson, 92 N.J. Super. 457, 464-65 (App. Div. 1966).

This court, in the exercise of the discretion accorded it, will require plaintiff to prove each and every element of its prima facie case. As the Appellate Division observed:

> Perhaps too little consideration has been had in legal actions as to the reasons why the law has deposited with the court this discretion as to whether or not to take such proofs. Indeed we may say further--without by any means determining in what situations, if any, the lack of proofs will lead to an avoidance of a default judgment-that there are circumstances which have an especial call upon the court in the exercise of this discretion, as where ... the circumstances stir the court's suspicions.
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> Reilly v. Perehinys, 33 N.J. Super. at 74 (emphasis added).

The circumstances here certainly "stir the court's suspicions." Why have Pressler and Pressler deliberately and knowingly misrepresented the principal place of business of New Century in thousands upon thousands of complaints filed throughout the State of New Jersey? Why is the address of Eric Sombers' residence used as the principal place of New Century's business? Why has New Century avoided producing the contract of assignment in the face of R. 6:6-3(a)? Why does plaintiff not submit a certification from the original creditor that its business records no longer exist? Alternatively, why does New Century not file a certification that the original creditor has refused to cooperate and is beyond the reach of a subpoena? Why would the Pressler and Pressler file number appear on all of New Century's "books of original entry (and

on those of other clients as well)? Is the information contained on the computer-generated summary statement the only information plaintiff has on the accounts? Why does New Century not certify to the terms and conditions? Why does it willy nilly attach terms and conditions to the certifications with no regard to whether they apply to the particular defendant's account? Why does New Century blithely certify to the non-military status of defendants with no factual basis for the certifications? Certainly, the circumstances before the court sound an "especial call" to require New Century to present proof of its claims at a hearing.

Proof of Ownership of the Account

It is long "settled that, where the suit is brought by the assignee in his own name, he must aver and prove that the cause of action was in fact assigned to him." Sullivan v. Visconti, 68 N.J.L. 543, 550 (Sup. Ct. 1902); Cullen v. Woolverton, 63 N.J.L. 644, 646 (E. & A. 1899) (holding that the document of assignment was a writing upon which the action of the plaintiff was founded and without which he could have had no standing in court to prosecute his claim.) In addition, "[i]n order to effect a valid assignment it is fundamental that there must be evidence of an intent to assign or transfer the specific thing or debt and the subject matter of the assignment must be described sufficiently to make it capable of being readily identified." Transcon Lines v. Lipo Chemical, Inc., 193 N.J. Super. 456, 467 (Law Div. 1983).

It is also established that the best evidence of the contents of a document is the document itself. "[P]arol evidence of

the contents of a written instrument is inadmissible where the instrument itself can be produced." In re McCraven, 87 N.J. Eq. 28, 30 (Ch. Div. 1916). Where knowledge of facts is derived from documents, the documents themselves are the best evidence of the facts and parol evidence is inadmissible to prove those facts. Weisbond v. Schultz, 2 N.J. Misc. 1132, 1134 (Sup. Ct. 1940). Secondary evidence of the contents of documents is admissible only where the original itemized statements of account have been lost or destroyed. Corono Kid Co. v. Lightman, 84 N.J.L. 363, 374 (E. & A. 1913).

New Century's mere affirmation that it is the owner of the accounts in question does not comply with the best evidence rule. In order to prove the assignment, New Century must submit the actual contracts of assignment and move them into evidence with the appropriate authenticating testimony and those contracts must specifically identify the accounts at issue here.

Sufficiency of the "Computer Generated Summary Statement"

Preliminarily, this court, having no competent evidence before it, is in no position to react to the changes in the business of collecting on credit card accounts which members of the Creditors Bar Association of New Jersey have explained to the court. It does note, however, that at least some credit card companies are fully aware of the legal necessity of maintaining an evidential trail of account ownership.

In the matter of Providian National Bank v. Martinez, Docket No. DC-14-01, the plaintiff on November 2, 2001, filed an

"Officer's Certificate" to which was attached a copy of the assignment of accounts from First Union Direct Bank, N.A., to Providian. Thirty-nine of the accounts at issue here were formerly owned by Providian. Frankly, it would seem that collection firms and their closely affiliated clients are well aware of the chain of evidence required to prove a chose in action acquired from another. Why could they not impose such requirements on the seller of the account or decline to do business with them? In any event, on the evidential record before it, this court cannot respond to the represented change in the collection business, although that business can certainly present its concerns to the Legislature or to the Supreme Court through the Rules Committee.

Turning to the applications before the court, as a general proposition in an action to recover the balance due on a contract, parol evidence as to an amount of a payment or a charge is not admissible where the document is not in evidence. Fielder v. Friedman, 124 N.J.L. 514, 516-17 (E. & A. 1940). It is clear that the computer-generated summary statement is not a "last periodic statement" as contemplated by R. 6:6-3, 15 U.S.C. § 1637, and 12 C.F.R. § 266. The federal statute provides that a periodic statement must include the following information to the extent applicable:

> (1) The outstanding balance in the account at the beginning of the statement period.
>
> (2) The amount and date of each extension of credit during the period ....

(3) The total amount credited to the account during the period.

(4) The amount of any finance charge added to the account during the period, itemized to show the amounts, if any, due to the application of percentage rates and the amount, if any, imposed as a minimum or fixed charge.

(5) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and ....

(6) Where the total finance charge exceeds 50 cents for a monthly or longer billing cycle, ... the total finance charge expressed as an annual percentage rate ....

(7) The balance on which the finance charge was computed and a statement of how the balance was determined. If the balance is determined without deducting all credits during the period, that fact and the amount of such payments shall also be disclosed.

(8) The outstanding balance in the account at the end of the period.

(9) The date by which or the period (if any) within which payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or the termination of such period.

(10) The address to be used by the creditor for the purpose of receiving billing inquiries from the obligor.

Although R. 6:6-3 permits a computer-generated report that sets forth the information required to be supplied in the periodic statement for the last billing cycle, the "Computer Generated Summary Statements" submitted by New Century do not contain much of the above-required information.

Are the computer-generated summary statements even sufficient under Garden State Bank v. Graef, 341 N.J. Super. 241 (App. Div. 2001)? Plaintiff Summit Bank as the assignee of Garden State

Bank submitted a computer print-out of the loan history from the last renewal date and summary judgment was granted to plaintiff. Defendant appealed, contending that the best evidence rule was violated where a summary, rather than the actual accounting record, is provided. Defendant also contended that Summit could not prove a prima facie case because it had failed to maintain records from the outset of the loan obligation.

The Appellate Division first noted that the computer printouts submitted by Summit appeared to be routine records which were kept by a bank in the regular course of business. That record reflected the balance at the time the loan was last renewed, payments made since then, the balance at the time the Summit Bank took over Garden State Bank, and payments made thereafter. Summit's witness testified that he was familiar with the record system used by the bank and established that it was the regular practice of the bank to make that record. Relying on Mahoney v. Minsky, 39 N.J. 208, 213 (1963), the court held that "[t]he printouts are admissible because they 'appear[] perfectly regular on [their] face and as having been issued in the regular course of business prior to the inception of any controversy between the parties.'" The Appellate Division specifically expressed an understanding of the practicality of bank acquisitions, as a result of which older records may be lost or destroyed, and was satisfied that the records submitted by Summit were inherently trustworthy. Garden State Bank, 341 N.J. Super. at 246.

Here, however, the court does not have an understanding of any practicalities of account acquisitions that may result in the loss or destruction of the original creditor's records and does not find the computer-generated summary statements submitted here to be "inherently trustworthy." In the first place, New Century's computer-generated summary statements are created after default and are not part of the routine business of a successor credit card company. Rather, they are created by an entity purportedly in the business of collecting charged off accounts. Secondly, they clearly appear to have been created on the computer system of Pressler & Pressler, not on that of New Century, which may or may not have any separate existence from Pressler and Pressler at all.

It is apparent from certifications of proof Pressler and Pressler have submitted on behalf of other clients that New Century and Pressler and Pressler may in reality be one entity. On December 14, 2001, Neil Angelicova on behalf of Nationwide Credit Information Services, Inc., signed a certification seeking entry of judgment against Joy and Carlos Hoover under Docket No. DC-8497-01. Therein he averred under oath that he was familiar with the books and business of Nationwide and that the account annexed to the certification or filed with the complaint was a "true and correct copy of the plaintiff's books of original entry." What was attached to the certification was an undated "Computer Generated Summary Statement" identical in format and content to those at issue here and which indeed indicated that the holder of the account was New Century Financial Services, Inc., not Nationwide

Credit Information Services, Inc., the plaintiff in the action against the Hoovers. Also attached was a Nationwide contract signed by the debtors. Pressler and Pressler are Nationwide's attorneys.

On December 15, 2001, Kris Lanning on behalf of Greenwood Trust Company signed a similar certification in Greenwood Trust Company v. Brian Boehs, Docket No. DC-379-01. No Greenwood Trust "book of original entry" was attached despite the sworn statements in the certification. Rather, another New Century Financial Services, Inc., "Computer Generated Summary Statement" was annexed, in content and format identical to those at issue here.

The same thing happened on December 17, 2001, in Forest Lumber & Supply Co. v. Don Bush, Docket No. DC-8617-01. Being a regular customer of Forest Lumber, the court knew personally that the New Century Financial Services, Inc., "Computer Generated Summary Statement" attached to Thomas Eckert's certification is not at all like the documents created by Forest Lumber at the point of sale.

One might reasonably infer from this evidence that Pressler and Pressler are generating and attaching "original books of entry" to the certifications, either before or after execution, not only for New Century but other clients as well. Be that as it may, the court rejects these computer-generated summary statements as inherently untrustworthy.

Terms and Conditions

The discussion supra at pp. 8-12 need not be repeated here. Suffice it to say that when plaintiff next applies for entry of judgment by default on these cases, the terms and conditions must be submitted under oath in accordance with the Rules of Court and the Rules of Evidence. They must also have been the terms and conditions applicable to the specific account in question and in effect prior to the breach.

Requirements for Proof of Non-Military Service

R. 1:5-7 provides that:

> An affidavit of non-military service of each defendant, male or female, when required by law, shall be filed before entry of judgment by default against such defendant. Such affidavit may be included as part of the affidavit of proof.

N.J.S.A. 38:23C-4 requires the plaintiff to:

> file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit, plaintiff shall in lieu thereof file an affidavit setting forth ... that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment or final order shall be entered without first securing an order of court directing such entry .... Unless it appears that the defendant is not in such service the court may require, as a condition before judgment or final order is entered, that the plaintiff file a bond, approved by the court, conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment or final order should the judgment or final order be thereafter set aside in whole or in part.

By filing a certification not based on any facts known to the affiant stating that the defendants are not in the military ser-

vice, the plaintiff may hope to avoid the statutory requirement for posting a bond.

The Supreme Court issued a Notice to the Bar in 1969 discussing the required contents of the affidavit of non-military service pursuant to 50 App. U.S.C.A. § 520 and N.J.S.A. 38:23C-4. The Supreme Court made it clear that such affidavits must be based on personal knowledge:

> Affidavits of non-military service must be based on personal knowledge and state facts rather than a conclusion. It is not appropriate for an attorney to file an affidavit of non-military service unless he has personal knowledge of the facts. An affidavit of non-military service which is knowingly false may subject the deponent to punishment for perjury.
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> Notice to Attorneys, Affidavit of Non-Military Service, 92 N.J.L.J. 793 (1969).

Having had the absence of personal knowledge called to its attention, New Century submitted a proposed amended certification of non-military service. Therein, plaintiff first proposed to aver that:

> The defendant(s) resides in New Jersey, and I have no knowledge that the defendant(s) named herein is in the Armed Forces of the United States at the present time nor has such defendant(s) been ordered to report for induction under the Selective Training and Service Act, its supplements and amendments.

A more elaborate certification was thereafter submitted:

> No defendant named herein has ever informed the plaintiff or any agent of the plaintiff that any defendant named herein is in the active armed forces of the United States of America or otherwise entitled to protection under the Soldiers and Sailors Civil Relief Act of 1979 (N.J.S.A. 38:23C-1 et seq.) ("Protection Service") at the present time; nor has any defendant named hereto informed the plaintiff or any agent of the plaintiff that any defendant herein has been ordered to report for induction

> under the Selective Training and Selective Service Act, its supplements, and addendums. Plaintiff is unaware if any defendant against whom default judgment is sought is in such Protection Service. Based upon some, I certify that no defendant against whom default judgment is sought is in the military.

Although these forms of certification to some extent address the court's concern about the lack of personal knowledge and the absence of factual support for conclusions, they do not meet the requirements of the statute in order to avoid the bonding provision. No matter how many words are used, the import is the same--the plaintiff has no personal information that the defendant is or is not in the military. The court is certainly aware of the delay inherent in obtaining certifications from each branch of the military or other evidence establishing that the defendant is not in the military service. However, relaxation of the Supreme Court's Notice to the Bar cannot be obtained from this court, nor does any case law reviewed by the court suggest that it has the power to ignore its duty to determine whether posting of a bond is or is not appropriate under the circumstances of the case. When the applications for entry of default judgment are resubmitted, counsel must address these concerns. If New Century cannot meet the requirements of the statute and the Supreme Court regarding affidavits of non-military service, it must either post a bond or show good cause for not being required to do so.

Award of Attorney's Fees

The court expressed concern to plaintiff's counsel about the propriety of a counsel fee award in light of the close rela-

tionship between Pressler and Pressler and New Century. In Gruber & Colabella, P.A., v. Erickson, 345 N.J. Super. 248, 252-53 (Law Div. 2001), the trial court in the Special Civil Part held that:

> An award of attorney's fees to a successful litigant is meant to make a party whole. Such an award is unwarranted and inappropriate in a case such as this where the plaintiff did not retain an attorney and has not incurred any financial obligation to pay for legal services.

Of course, here there are two entities, the law firm and plaintiff. However, New Century was conducting business out of the law firm's offices, Pressler and Pressler was falsely stating the plaintiff's principal place of business in the complaints the firm filed with the court, an employee of the law firm was an officer of the plaintiff and others may have been working in a dual capacity, and the principals of New Century are the daughter and the brother of Sheldon H. Pressler, Esquire. N.J.S.A. 17:16C-42 only permits an award of attorney's fees on a retail installment contract when the matter is "referred to an attorney, not a salaried employee of the holder of the contract or account, for collection."

As a result, the court requested a certification establishing that Pressler and Pressler and its individual members were not real parties in interest in New Century Financial Services, Inc., nor did they have a financial interest in the matters in suit. In lieu of a certification, the court received an unsigned letter from Sheldon H. Pressler, Esquire, dated January 8, 2002, in which he stated as follows:

> [P]lease accept this letter as representation from this office that Pressler and Pressler is a partnership made

up of partners, Maurice H. Pressler and Sheldon H. Pressler.

> Pressler and Pressler has been retained as a law firm by New Century Financial Services to collect debts due and owing to New Century Financial Services. Pressler and Pressler is not a salaried employee of New Century Financial Services, Inc. Pressler and Pressler works on a contingent fee basis with court costs advanced by New Century Financial Services, Inc. Maurice H. Pressler, Sheldon H. Pressler, and the partnership of Pressler and Pressler are not stockholders or officers of New Century Financial Services, Inc.

This letter does not completely address the court's concerns because it does not reach the issue of a real party in interest and makes an unsworn representation as to the present only, not as to the recent past.[21]

The evidence of New Century computer-generated summary statements being attached to the certifications of proof of other clients of Pressler and Pressler certainly raises an issue was to whether New Century and Pressler and Pressler are in reality one entity, in which case the law firm might not be entitled to recover attorney's fees. The firm and New Century must address these concerns, both as to the present and historically.

Statute of Limitations

Two of the matters consolidated by order of even date are dismissed with prejudice, New Century Financial Services, Inc., v.

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[21]An attorney at Pressler and Pressler advised the court in or about December 2001 that New Century was in the process of renting separate space next door to Pressler and Pressler (in another building owned by Laurilee Properties, LLC, and at about that time Eric Sombers stopped executing certifications of proof. A reorganization to avoid the constraints on awards of attorney's fees to an employee or real party in interest does not correct the past and may not correct the present if it is form over substance.

Shackelford, Docket No. DC-1956-01, and New Century Financial Services, Inc., v. Wenkelman, Docket No. DC-5151-01. The documents submitted to the court demonstrate that the Shackelford action was filed more than eight years after the breach on February 16, 2001, because the account was charged off on February 10, 1993, and the breach presumably occurred some time before charge off.[22] The Wenkelman action was filed on June 27, 2001, more than seven and one-half years after the breach, because the last payment on this account was made on December 18, 1993, and the account was charged off on June 16, 1994. Heimbach, 229 N.J. Super. at 24, [citing Prickett v. Allard, 126 N.J. Super. 438, 440 (App. Div. 1974), aff'd o.b., 66 N.J. 6 (1974), for the proposition that it is proper to deny a default judgment where the complaint showed on its face that the action was barred by the statute of limitations].

Some of the other actions on which judgment is sought may also be barred by the statute of limitations. For example, New Century Financial Services, Inc., v. Saenz, Docket No. DC-7649-01, alleges a last payment date of December 21, 1995, and the complaint was filed on October 10, 2001, but the actual date of breach is not disclosed.[23] Similarly, New Century Financial Services, Inc., v.

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[22]Parenthetically, service of process has never been effected upon defendant Eugene J. Shackelford as both attempts at service were returned as undeliverable, forwarding order expired.

[23]New Century frequently, if not always, treats the date the account was charged off as the date of breach. However, the date of breach generally is when the defendant fails to pay on the account in accordance with the terms of the agreement, a date which could be substantially earlier than either the date of the last payment or the date of charge off.

Filippini, Docket No. DC-7720-01, was filed on October 12, 2001, and the defendant made the last payment on October 25, 1995, but the date of breach is not supplied. Three other cases suffer from the same problem, New Century Financial Services, Inc., v. Whitely, Docket No. 8158-01; New Century Financial Services, Inc., v. Murphy, Docket No. DC-8266-01; and New Century Financial Services v. Merchant, Docket No. DC-7724-01.

Absence of Service

There are a number of applications for entry of judgment by default in cases where service of process has not been effected[24] or where no proof of service exists, i.e., (1) where the certified envelope was returned without markings,[25] and (2) where both the return receipt, the regular envelope, and the certified envelopes

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[24]Mail was returned as undeliverable in the following cases:
DC-2747-98, Sanchez, undeliverable at three Dover addresses;
DC-278-01, Isaac, attempted not known at two Pine Brook addresses;
DC-2082-01, Fezenko, regular and certified returned unknown;
DC-2950-01, Brayboy, regular and certified returned unknown;
DC-4813-01, Mosseau, forwarding order expired;
DC-5439-00, Bonansco, regular and certified returned unknown three times at same address;
DC-7012-01, Bolanos, attempted not known at Dover address;
DC-7644-01, Holubowski, forwarding order expired;
DC-7673-01, Loyal, forwarding order expired;
DC-7950-01, Dykhouse, forwarding order expired; and
DC-8266-01, Murphy, attempted not known at Ledgewood address.

[25]The certified mail envelopes in the following cases were returned either with no markings at all or a note of a new address but no indication the mail was actually forwarded and notice given:
DC-7949-01, Dondero, no indication forwarded to new address;
DC-8135-01, Black, certified mail returned unmarked;
DC-8143-01, Evans, certified mail returned unmarked;
DC-8146-01, Floriano, certified mail returned unmarked;
DC-8286-01, Gandy, certified mail returned unmarked; and
DC-8301-01, Mann, certified mail returned unmarked;

have not been returned to the court at all.[26] The merits of the applications in those cases have been discussed here in order to prevent a subsequent insufficient application once service is effected.

Conclusion

For all of the foregoing reasons, the applications for entry of judgment are denied without prejudice except as to those cases dismissed with prejudice under the applicable Statute of Limitations. New Century Financial Services, Inc., is to schedule proof hearings in accordance with the order of even date when it is ready to proceed of its proofs. If New Century cannot meet its burden of proof at that time on any particular case consolidated under the caption above noted, that action will be subject to dismissal with prejudice.

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[26]No returned mail or return receipt has been received to date by the court in the following cases: DC-6626-01, Alger; DC-7022-01, Rudolph; DC-7462-01, Staley; DC-7464-01, Sparrow; DC-7724-01, Merchant; DC-8141-01, Campos; DC-8153-01, Nolan; DC-8157-01, Segro; DC-8158-01, Whitely; DC-8261-01, Basista; DC-8264-01, Malpica; DC-8296-01, Cox; DC-8394-01, Pierson; and DC-8404-01, Cise.