IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

MIDLAND FUNDING LLC,

Plaintiff,

vs.

ARISTA WALKER,

Defendant.

Case No. 3AN-14-9283 CI

DECISION RE: MIDLAND FUNDING AND ARISTA WALKER'S CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Midland Funding LLC ("Midland") alleges that it is the current owner of Arista Walker's unpaid credit card debt from a credit card she opened in 2006 with Chase Bank. Memorandum in Support of Motion for Summary Judgment 2–3 [hereinafter Motion]. Walker claims Midland cannot prove it owns her specific debt and counter-claims that bringing suit without adequate proof of ownership violates both the Alaska Unfair Trade Practices and Consumer Protection Act ("UTPCPA") and the consent decree Midland entered into with the Consumer Financial Protection Bureau ("CFPB"). On April 29, 2016, Midland filed a motion for summary judgment as to its initial claim and Walker's counter-claims. *See* Motion; Memorandum in Support of Motion for Summary Judgment as to Defendant's Counterclaims. Walker first responded by filing a motion to strike both affidavits attached to Midland's motion on February 24, 2017. *See* Defendant's Motion to Strike. Shortly thereafter, on March 23, 2017, Walker also filed a

cross motion for summary judgment as to all claims. *See* Defendant's Memorandum in Support of Cross-Motion for Summary Judgment and in Supplemental Opposition to Plaintiff's Motion for Summary Judgment [hereinafter Opposition]. A Sisyphean discovery dispute ensued,[1] but the boulder has finally crested the mountain, Midland's affiant has finally been deposed, and the case is ready for the court to decide the cross-motions for summary judgment.

II. Factual and Procedural Background

Walker opened a credit card with Chase Bank in 2006. Motion at 2. Walker borrowed $1828.34 before eventually leaving an unpaid balance of $1603.34. *Id.* Midland is a debt-buying company[2] who purchased a large portfolio of such unpaid debts from Chase Bank on May 22, 2012. *Id.* Midland alleges that Walker's debt was among those purchased in the portfolio. *Id.*

In support of its motion for summary judgment, Midland attached the affidavits of Emily Walker[3] and Tiffany Woolard. *See* Aff. of Emily Walker, Motion, ex. 1 [hereinafter Walker Aff.]; Aff. of Tiffany Woolard, Motion, ex. 2 [hereinafter Woolard Aff.]. In her affidavit, Emily Walker states that she works at Midland Credit Management ("MCM"), Midland's account servicer, and Midland bought the 5884 account debt from Chase Bank. Walker Aff. at 1–2. Walker attached six exhibits in support of her affidavit titled:

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[1] Said discovery dispute almost assuredly cost far more in attorneys' fees than the $1603.34 at dispute in this suit.

[2] Debt-buying companies, broadly speaking, operate by buying portfolios of unpaid debts from lenders for pennies on the dollar and then attempting to collect on the full underlying debt. *See* FTC, The Structure and Practices of the Debt Buying Industry 11–18 (2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[3] Midland's initial motion for default judgment was filed with the affidavit of Danielle Smith attached, but Midland substituted the affidavit of Emily Walker when filing their motion for summary judgment. The two affidavits are identical in content though.

bill of sale, affidavit of sale of account by original creditor, seller data sheet, monthly statements, 2006 card member agreement, and 2010 card member agreement. *See id.*, exs. A–F. The bill of sale memorializes the sale of a number of accounts from Chase Bank to Midland with the exact account numbers listed in an unattached "Final Data File." Bill of Sale, Walker Aff., ex. A. The affidavit of sale is the affidavit of one Martin Lavergne, an employee of JPMorgan Chase Bank, N.A., affirming that the bill of sale is accurate to the best of his knowledge. Affidavit of Sale of Account by Original Creditor, Walker Aff., ex. B. The seller data sheet is a print-out of an electronic record sent to Midland by Chase Bank as part of the May 2012 sale and states the 5884 account belongs to Arista Walker. Seller Data Sheet, Walker Aff., ex. C. The monthly statements are the monthly statements for the 5884 account from Chase Bank to Arista Walker. Monthly Statements, Walker Aff., ex. D. The 2006 card member agreement is an unsigned, generic card member agreement from Chase Bank. 2006 Card Member Agreement, Walker Aff., Ex. E. The 2010 card member agreement is similarly an unsigned, generic agreement from Chase Bank. 2010 Card Member Agreement, Walker Aff., Ex. F. Finally, in her affidavit, Ms. Woolard states that she is an employee of Chase Bank, the 5884 account is Arista Walker's, and the 5884 account was sold to Midland. Woolard Aff. There are no supporting exhibits attached to the Woolard affidavit. *See id.*

Thus far, the parties have brought three claims in this case: Midland's initial claim for the $1603.34 in unpaid debt on the 5884 account, Walker's counterclaim for violation of the UTPCPA, and Walker's counterclaim that Midland's enforcement action violates its consent decree with the CFPB. *See* Complaint; Answers and Counterclaims. Midland seeks the unpaid balance on the 5884 account, and Walker seeks a statewide

injunction prohibiting Midland from collecting on debts it cannot prove it owns. *See* Complaint; Answer and Counterclaims.

There are currently three motions before the court: Midland's motion for summary judgment as to all claims, Walker's cross-motion for summary judgment as to all claims, and Walker's motion to strike the Walker and Woolard affidavits.

III. LEGAL STANDARD

A. Alaska Rule of Civil Procedure 56(e)

Affidavits submitted in support of a motion for summary judgment "shall be made on personal knowledge, shall set forth such fast as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters state therein." Alaska R. Civ. Proc. 56(e). "Opinion testimony and hearsay statements that would be inadmissible at trial are inadmissible in a motion for summary judgment." *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211, 1215 (Alaska 1991) (citing *Williford v. L.J. Carr Investments, Inc.*, 783 P.2d 235, 238 n. 8 (Alaska 1989)). Further, "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Alaska R. Civ. Proc. 56(e).

B. Alaska Rule of Evidence 803(6)

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and is inadmissible except as provided by the Alaska Rules of Evidence, by rules prescribed the Alaska Supreme Court, or by enactments of the Alaska Legislature. Alaska R. Evid. 801(c), 802. Evidence Rule 803(6) creates a hearsay exception if three conditions are met: "[t]he record . . . was made at or near the time of the occurrence;" "[t]he record was

made by, or was based on information transmitted by, a person with knowledge acquired of a regularly conducted activity of that business entity;" and "[i]t was the regular practice of that business entity to make and keep that kind of record." *Wassillie v. State*, 366 P.3d 549, 552 (Alaska Ct. App. 2016). "[T]hese foundational elements can be established by the testimony of the records custodian or other qualified witness." *Id.* (internal quotations and citations omitted).

C. Summary Judgment

Under Alaska Civil Rule 56, a motion for summary judgment will be granted "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Alaska R. Civ. P. 56(c). "'[A] party seeking summary judgment has the initial burden of proving, through admissible evidence, that there are no [genuine] disputed issues of material fact and that the moving party is entitled to judgment as a matter of law.'" *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 517 (Alaska 2014) (quoting *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 760 n.25 (Alaska 2008)). "Once the moving party has made that showing, the burden shifts to the non-moving party 'to set forth specific facts showing that the party could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of fact exists.'" *Id.* at 517 (quoting *State, Dep't of Highways v. Green*, 586 P.2d 595, 606 n. 32 (Alaska 1978)). In meeting their respective burdens, the parties may use pleadings, affidavits, and any other material that is admissible in evidence. *Miller v. Fairbanks*, 509 P.2d 826, 829 (Alaska 1973).

A fact is material if the resolution of a disputed issue turns on it. *Christensen*, 335 P.3d at 519. Whether a disputed question of material fact exists is a question of law

that is determined according to a reasonableness standard. *Id.* Thus, the non-movant's evidence must not be too incredible for a reasonable mind to believe it, nor may the non-movant rely on mere speculations and unsupported assumptions. *Id.* at 520. A genuine, material factual dispute requires more than a scintilla of contrary evidence. *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005).

In evaluating a motion for summary judgment, the court must draw all reasonable inferences in favor of the non-moving party. *Anderson v. Alyeska Pipeline Service Co.*, 234 P.3d 1282, 1286 (Alaska 2010). "Reasonable inferences are those inferences that a reasonable factfinder could draw from the plaintiff's evidence." *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 449 (Alaska 2002). Summary judgment is appropriate only if any reasonable person would conclude that the non-movant's evidence failed to create a genuine dispute as to any material fact. *Christensen*, 335 P.3d at 520.

D. Alaska Rule of Civil Procedure 17(a)

"Every action shall be prosecuted in the name of the real party in interest." Alaska R. Civ. Proc. 17(a). However, "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." *Id.* Further, "before dismissing an action pursuant to Rule 17(a) the court must first enter an order identifying the real party who must ratify the action or join it within the reasonable time given." *Griffith v. Taylor*, 937 P.2d 297, 309 (Alaska 1997).

E. Alaska Unfair Trade Practices and Consumer Protection Act

The UTPCPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. . . ." AS 45.50.471(a). The UTPCPA provides a lengthy, but not exhaustive, list of proscribed activities including "representing that an agreement confers or involves rights, remedies, or obligations that it does not confer or involve, or that are prohibited by law. . . ." AS 45.50.471(b)(14). "A person who suffers an ascertainable loss of money or property as a result of another person's act or practice declared unlawful by AS 45.50.471 may bring a civil action to recover for each unlawful act or practice three times the actual damages or $500, whichever is greater." AS 45.50.531. Further, "any person who was the victim of the unlawful act, whether or not the person suffered actual damages, may bring an action to obtain an injunction prohibiting a seller or lessor from continuing to engage in an act or practice declared unlawful under AS 45.50.471." AS 45.50.535(a).

IV. Discussion

A. Motion to Strike Walker and Woolard Affidavits

Walker moves to strike the affidavits of Emily Walker and Tiffany Woolard on two grounds. *See* Defendant's Motion to Strike. First, Walker argues Midland has impeded their ability to depose Ms. Walker and Ms. Woolard. *Id.* Second, Walker contends that the two affidavits violate Rule 56(e) as inadmissible hearsay and for failure to attach supporting documents. *Id.* Midland counters that it has no responsibility to aid Walker in her discovery efforts. Plaintiff's Response to Defendant's Motion to Strike. The first argument is moot as, after much delay, Walker has deposed Ms. Woolard. *See* Woolard Depo.

1. Woolard Affidavit

Walker contends the Woolard affidavit violates Rule 56(e) because it is inadmissible hearsay and because Woolard failed to attach any of the supporting documents she relied on to produce the affidavit. *See* Defendant's Motion to Strike. Midland argues the affidavit falls under the business records exception to the rule against hearsay. Plaintiff's Response to Defendant's Supplemental Memorandum Following the Deposition of Tiffany Woolard 2–6.

a. Supporting Documents, or the Lack Thereof, and Rule 56(e)

Alaska Rule of Civil Procedure 56(e) requires that all affidavits submitted in support of a motion for summary judgment be "made on personal knowledge" and "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Alaska R. Civ. Proc. 56(e). Many other state courts have considered the personal knowledge and supporting documents requirements as they relate to debt collection practices. *See, e.g., Cent. Bank v. Colonial Romanelli Assocs.*, 38 Conn. App. 575, 579–80 (1995) (holding affidavit based on affiant's review of computer records submitted without said records inadmissible as it satisfied neither the personal knowledge nor supporting documents requirement); *Cole Taylor Bank v. Corrigan*, 230 Ill. App. 3d 122, 129–30 (1992) (holding affidavit based on affiant's review of bank documents was inadmissible without the documents themselves attached); *Reef v. Asset Acceptance, LLC*, 43 N.E.3d 652, 654 (Ind. App. Ct. 2015) (holding affidavit based on bill of sale inadmissible without the bill of sale attached); *Seth v. Midland Funding, LLC*, 997 N.E.2d 1139, 1142–43 (Ind. App. Ct. 2013) (holding affidavit inadmissible because affiant whose affidavit was based on facts obtained from business records was required to attach the records); *Cach, LLC v. Kulas*, 21 A.3d

1015, 1019 (Me. App. Ct. 2011) (holding affidavit "based on computerized and hard copy books and records of the Bank" inadmissible without the records attached). Although there are permutations within these cases (e.g. whether affiant is associated with the bank or the debt-buyer, or what records were relied on), other states' courts have uniformly found affidavits inadmissible without the underlying records attached when the affiant's personal knowledge was based on a review of records.

The Court of Appeals of Ohio provides a particularly thoughtful analysis of these requirements in *Chase Bank, USA v. Curren*, 191 Ohio App. 3d 507 (2010). The *Curren* court defined personal knowledge as "knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said" or "knowledge of factual truth which does not depend on outside information or hearsay." *Id.* at 516. The court recognized that affidavits are often based on review of documents though and reasoned that in such cases the supporting documents must be attached to the affidavit and the documents must be admissible as evidence.[4] *Id.* In essence, if an affiant's personal knowledge comes by way of document review in preparation for an affidavit, the documents relied on must be both attached to the affidavit and be admissible as evidence.

The court agrees with the other courts that have considered this issue and holds that Ms. Woolard's affidavit violates Rule 56(e) and is thus inadmissible. Ms. Woolard admits in her affidavit and deposition that any personal knowledge she has regarding the 5884 account is based on a review of Chase Bank's records. Woolard Aff.; Woolard

[4] The affidavit at issue in *Curren* had the supporting documents attached, but the court ruled the affidavit was inadmissible because the documents were inadmissible hearsay. *Id.* at 516–17. Despite this difference, the court still finds the discussion of the relationship between personal knowledge and supporting documents a useful heuristic.

Depo. at 11:9–13. However, Ms. Woolard did not attach any of the documents she relied on in her affidavit. Furthermore, those documents would be inadmissible hearsay if submitted by Ms. Woolard as discussed below.

b. Hearsay and the Business Records Exception

Evidence qualifies under the business records exception to the rule against hearsay if "[t]he record . . . was made at or near the time of the occurrence;" "[t]he record was made by . . . a person with knowledge acquired of a regularly conducted activity of that business entity;" and "[i]t was the regular practice of that business entity to make and keep that kind of record." *Wassillie v. State*, 366 P.3d 549, 552 (Alaska Ct. App. 2016). Further, the foundation for admissibility of a business record must be established "by the testimony of the records custodian or other qualified witness." *Id.* (internal quotation and citation omitted). Walker argues that Ms. Woolard is not a qualified witness to lay the foundation necessary for her affidavit to qualify under the business records exception. Defendant's Supplemental Memorandum Following the Deposition of Tiffany Woolard 2–3 ("Ms. Woolard admitted that she has no idea what [the ordinary course of business] might be.") ("Ms. Woolard further conceded that she has no clue who the records custodian might actually be.").

Alaskan courts have had numerous occasions to consider when a testifying witness is qualified to lay the foundation required by Rule 803(6). For example, the Alaska Supreme Court has held that doctors, even doctors not directly responsible for creating medical records, are qualified witnesses to lay the foundation for the admissibility of medical records. *See Loncar v. Gray*, 28 P.3d 928, 934 (Alaska 2001); *Dobos v. Ingersoll*, 9 P.3d 1020, 1027 (Alaska 2000). The Alaska Court of Appeals has

held that the director of a halfway home was a qualified witness to lay the foundation for admission of the halfway home's business records. *Wassillie*, 366 P.3d at 552. The Court of Appeals more thoroughly discusses the requirements for a qualified witness in *Bailey v. City and Borough of Juneau*, No. A–11358, 2013 WL 5972359 (Alaska Ct. App. Nov. 6, 2013).[5] In *Bailey*, a GCI employee, "who was second in command for Southeast Alaska," testified about the contents of automatically generated call and text message records attached to a GCI customer's phone number. *Id.* at *1. The Court of Appeals' discussion highlights that the common thread in these cases is not a position of authority but rather the testifying witness's ability to "express[] a familiarity with both the records and the process for maintaining them." *Id.* at *3.

With this in mind, the court finds that Ms. Woolard is not a qualified witness to lay the necessary foundation for the records she relied on in her affidavit. Ms. Woolard admits in her affidavit that she is unaware of how or who maintains the various databases she relied upon in her affidavit. Wooldard Depo. at 14:8–21, 16:19–23, 17:5–12, 18:2–4. She further admits her averment that all records are maintained "at or near the time of the occurrences" is based on her training from Chase Bank rather than her personal experience. *Id.* at 47:2–7, 48:7–23. Ms. Woolard has failed to show a sufficient familiarity with the process Chase Bank uses to maintain its records to qualify as a foundational witness under Rule 803(6). Accordingly, the Woolard affidavit is inadmissible hearsay, and Walker's motion to strike Ms. Woolard's affidavit for violating Rule 56(e) is granted.

[5] The court is aware unpublished memoranda from the Court of Appeals do not create binding precedent and does not treat them as such here.

2. Walker Affidavit

Walker moves to strike Ms. Walker's affidavit for similar reasons to the Woolard affidavit, namely that it and the documents attached are inadmissible hearsay.

a. Rule 56(e)

As discussed above, Rule 56(e) requires that all affidavits be based on personal knowledge, be admissible evidence, and show the affiant is competent to testify with any sworn or certified copies of any supporting documents attached. Alaska R. Civ. Proc. 56(e). Ms. Walker admits her affidavit is based on her review of various records. Walker aff. at 1. Accordingly, any documents she reviewed must be attached to her affidavit and be admissible as evidence. *See Chase Bank, USA v. Curren*, 191 Ohio App. 3d 507, 516 (2010). As discussed above, Walker attached six exhibits in support of her affidavit: bill of sale, affidavit of sale of account by original creditor, seller data sheet, monthly statements, 2006 card member agreement, and 2010 card member agreement. *See* Walker aff., Exs. A–F. The court must consider each document and determine whether it is admissible evidence, striking any portion of the Walker affidavit which violates Rule 56(e). *See Bliesner v. Commc'n Workers of Am.*, 464 F.3d 910, 915 (upholding the district court's decision to only strike portions of the affidavit violating Federal Rule of Civil Procedure 56(e)).

b. Hearsay and the Business Records Exception 2.0

Alaska Rule of Evidence 803(6) allows some business records which would otherwise be hearsay to be admissible evidence if those records are made at or near the time of a regularly conducted business activity by a person with knowledge of said activity when it is the regular practice of the business to maintain such records. Alaska

R. Evid. 803(6). Rule 803(6) further requires the testimony of a qualified witness as to these foundational requirements. *Id.*

In her affidavit, Ms. Walker attests to being an employee of Midland Credit Management ("MCM"). Walker aff. at 1. A cursory review of MCM's website reveals that Midland and MCM are two distinct entities; Midland is the debt owner, and MCM is the debt servicer. *Frequently Asked Questions*, Midland Credit Mgmt., https://www.midlandcreditonline.com/help-center/faqs/ (last visited Nov. 20, 2017) (answering "What's the difference between Midland Funding and MCM?"). However, none of the exhibits attached to her affidavit are MCM's records. *See* Walker aff., exs. A–F. The bill of sale is from Midland's records, but Ms. Walker works for an entirely different company. Her employment with MCM in no way qualifies her to testify about Midland's record keeping processes. The remaining exhibits attached are documents from Chase Bank and fall victim to the same problem. Ms. Walker's employment with MCM does not qualify her to provide the foundational testimony required by 803(6) for a company she does not work for. Thus, none of the documents attached to the Walker affidavit are admissible, and the affidavit relying upon them is also inadmissible. Therefore, Walker's motion to strike the Walker affidavit is granted.

B. Cross Motions for Summary Judgment as to Midland's Claim

1. Rule 56

The court must grant summary judgment "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Alaska R. Civ. P. 56(c). The only material fact in dispute is whether Midland owns the debt associated with the 5884 account. Midland submitted the Woolard and Walker affidavits

to establish its prima facie case that it owned the 5884 account's debt. Walker did not submit any evidence to rebut the Woolard and Walker affidavits but instead challenged their admissibility as evidence via a motion to strike.

On a motion for summary judgment, the moving party "has the initial burden of proving, through admissible evidence, that there are no [genuine] disputed issues of material fact and that the moving party is entitled to judgment as a matter of law.'" *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 517 (Alaska 2014) (quoting *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 760 n.25 (Alaska 2008)). As discussed above, the court grants Walker's motion to strike the Woolard and Walker affidavits. Midland has thus failed to meet its burden of producing any admissible evidence showing there are no disputed issues of material fact. Accordingly, Midland's motion for summary judgment is denied.

2. Rule 17(a)

Walker filed a cross motion for summary judgment arguing Midland is not the real party in interest as it has failed to prove it owns the 5884 account debt. Rule 17(a) states that "[e]very action shall be prosecuted in the name of the real party in interest." Alaska R. Civ. Proc. 17(a). In the context of the debt-buying industry, the debt-buyer must prove it is the current owner of the debt to have standing to bring suit. *Wirth v. Cach, LLC*, 685 S.E.2d 433, 435 (Ga. App. 2009). As discussed above, Midland has failed to provide any admissible evidence that it owns the debt at issue. Thus, Midland currently lacks standing to bring suit under Rule 17(a).

Nonetheless, "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been

allowed after objection for ratification of commencement of the action by . . . the real party in interest." Alaska R. Civ. Proc. 17(a). The Alaska Supreme Court has interpreted Rule 17(a) as requiring courts to issue an "order identifying the real party who must ratify the action or join it within a reasonable time given" before dismissing a case on Rule 17(a) grounds. *Diksen v. Troxell*, 938 P.2d 1009, 1012 (Alaska 1997); *Griffith v. Taylor II*; 937 P.2d 297, 309 (Alaska 1997). However, in both of these cases, the court knew who the real party in interest was. *Diksen*, 938 P.2d at 1012 (holding that plaintiff was the real party in interest); *Griffith*, 937 P.2d at 309 (holding assignee was the real party in interest thus superior court must issue order identifying assignee as the real party in interest before granting a motion for summary judgment). In this case, neither party has presented any admissible evidence as to who the real party in interest is. The court thus cannot enter an order identifying the real party in interest as the court does not know who the real party in interest is.

It is Midland's burden to prove it is the real party in interest. *See Wirth*, 685 S.E.2d at 435. Midland has failed to carry its burden,[6] and the court reemphasize it cannot enter an order identifying the real party in interest as the court does not know who the real party in interest is. Accordingly, Walker's motion for summary judgment as to Midland's claim is granted.

C. Cross Motions for Summary Judgment as to Walker's UTPCPA Counterclaim

[6] Further, it would be unfair to reward Midland for failing to carry its evidentiary burden by denying a motion a motion for summary judgment, and, in doing so, punish Walker by shifting that burden to her as a prerequisite to granting her relief from a meritless suit.

The UTPCPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. . . ." AS 45.50.471(a). Walker contends that prosecuting a case without admissible evidence is an unfair or deceptive practice in violation of the UTPCPA as she has not suffered an ascertainable loss. Opposition at 14. Midland counters that the UTPCPA does not apply to debt buyers and collectors and that Walker lacks standing to bring suit under the UTPCPA. Plaintiff's Response to Defendant's Cross Motion for Summary Judgment at 5–7.

Midland's arguments are unpersuasive. First, the Alaska Supreme Court has long held that the UTPCPA applies to debt buyers and collectors. *State v. O'Neill Investigations, Inc.*, 609 P.2d 520, 528–30 (Alaska 1980) (holding O'Neill's argument that the UTPCPA does not apply to debt collectors was "without merit"). Second, Walker has suffered an ascertainable loss in attorneys' fees and costs incurred in defending against plaintiff's suit. *Midland Funding, LLC v. Giraldo*, 961 N.Y.S.2d 743, 755 (N.Y. Dist. Ct. 2013) (holding "pecuniary losses such as attorney's fees and costs reasonably incurred in the course of defending against plaintiff's lawsuit . . . are more than adequate to plead a claim for damages. . . ."). Further, AS 45.50.535(a) specifically allows for injunctive relief even if the party seeking relief has not suffered actual damages. AS 45.50.535(a) ("[A]ny person who was the victim of the unlawful act, whether or not the person suffered actual damages, may bring an action to obtain an injunction. . . ."). Midland's motion for summary judgment as to Walker's UTPCPA counterclaim is thus denied.

Walker argues the act of prosecuting a case without access to admissible evidence is an unfair or deceptive practice. Opposition at 14–17. The Alaska Supreme

court has yet to decide this question. However, the Ninth Circuit and other state courts have held that filing a debt collection lawsuit without admissible evidence is an unfair or deceptive practice. *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 950 (holding that bringing suit to collect a debt violates the FDCPA if the debt collector cannot provide admissible evidence by the motion for summary judgment phase of litigation); *Royal Fin. Grp., LLC v. Perkins*, 414 S.W.3d 501, 506 (Mo. Ct. App. 2013) (holding that a debt collector bringing suit it could not fully prosecute violated the FDCPA); *Giraldo*, 961 N.Y.S.2d at 755–56 (holding that a debt buyer should not commence an action "unless it can readily obtain admissible proof that would make out a prima facie case"). The purpose of the UTPCPA is to protect consumers from abusive practices, and the court agrees that an "empty threat to . . . prosecute" a collection suit is thus an unfair or deceptive practice under AS 45.50.371. *Perkins*, 414 S.W.3d at 506. Accordingly, Walker's motion for summary judgment as to her UTPCPA counterclaim is granted.

D. Cross Motions for Summary Judgment as to Walker's CFPB Counterclaim

Midland entered into a consent decree with the CFPB with an effective date of September 9, 2015. Memorandum in Support of Motion for Summary Judgment as to Defendant's Counterclaims at 5. In the consent decree, Midland agreed to forego certain collection actions including collecting debts without a reasonable basis and filing collection suits without an intent to prove the debt.[7] Defendant's Memorandum in

[7] These sections of the consent decree only refer to Encore. However, section I of the consent decree states that the consent decree applies to both Encore and Midland, among other entities, all of which are collectively referred to as Encore through the rest of the consent decree. CFPB Consent Decree at 1.

Opposition to Motion for Protective Order and Defendant's Cross Motion to Continue Trial, ex. 2 at 36–45 [hereinafter CFPB Consent Decree]. Midland also agreed to pay redress to certain consumers the CFPB deemed harmed by Midland's collection activities prior to the effective date of the consent decree. *Id.* at 50–53. Walker argues that Midland has violated the consent decree by prosecuting this case. Answer and Counterclaims at 2. Midland responds that prosecuting this case could not violate the consent decree's forward-looking proscriptions because the consent decree took effect on September 9, 2015, over three years after Midland allegedly purchased Walker's debt and a year after Midlands had filed its complaint in this case. Memorandum in Support of Motion for Summary Judgment as to Defendant's Counterclaims at 5. Midland is correct that prosecuting this case could not violate the prohibitions going forward in the consent decree because Midland allegedly purchased the debt and began prosecuting this case before the effective date of the consent decree. Finally, the CFPB rather than this court is the correct party to enforce the consent decree. CFPB Consent Decree at 62–63 ("The provisions of this Consent Order will be enforceable by the Bureau."). Accordingly, Midland's motion for summary judgment as to Walker's CFPB counterclaim is granted, and Walker's cross motion for summary judgment as to the same claim is denied.

V. Conclusion

After a protracted discovery dispute which likely cost more in attorneys' fees than the underlying debt in this suit, this case finally approaches resolution. For the reasons discussed above, Walker's motion to strike is granted. Midland's motion for summary judgment as to Midland's claim is denied, and Walker's cross motion for summary

judgment as to the same claim is granted. Midland's motion for summary judgment as to Walker's counterclaim for violation of the UTPCPA is denied while Walker's cross motion for summary judgment as to the UTPCPA claim is granted. Midland is hereby enjoined from any further collection efforts as to Walker's debt and any other practice declared unlawful under the UTPCPA in accordance with AS 45.50.535(a). Walker has not provided any documentation of what actual damages she suffered and is instead awarded $500 in statutory damages in accordance with AS 45.50.531. Finally, Midland's motion for summary judgment as to Walker's counterclaim for violating the CFPB consent decree is granted, and Walker's cross motion for summary judgment as to the CFPB counterclaim is denied. Walker's counsel shall submit a final judgment in a form in accordance with the Alaska Code of Civil Procedure.

IT IS SO ORDERED.

DATED at Anchorage, Alaska, this 6th day of December, 2017.

Mark Rindner

MARK RINDNER
Superior Court Judge

I certify that on 12/6/17 a true
and correct copy of this order was sent to:

Filer/Davis

Administrative Assistant CWY