In *Unifund CCR Partners v. Cavender,* No. 2007-CC-3040, 14 Fla.L. Weekly Supp. 975b (Orange Cty. July 20, 2007), the court held that a debt buyer "assignment" that does not refer to specific accounts does not establish ownership by the plaintiff, nor is testimony based on a computer screen sufficient:

The Court has reviewed the documents presented by the Plaintiff, Bill of Sale and the Assignment, and finds that they fail to sufficiently identify the accounts that were assigned or sold to the Plaintiff. Neither the Bill of Sale nor the Assignment indicate the account numbers or names of account holders. They do not provide any information that would allow the Court to determine if the alleged account of Defendant was one of the accounts sold or assigned to the Plaintiff.

Without any indicia of ownership that would sufficiently identify the true owner of the account at the time that Plaintiff filed this action, the Plaintiff is unable to prove that it had standing to bring the action. An assignment is the basis of the Plaintiff's standing to invoke the processes of the Court in the first place and is therefore an essential element of proof. Progressive Express Ins. Co. v. McGrath Community Chiropractic, 913 So. 2d 1281, 1285 (Fla. 2nd DCA 2005); Oglesby v. State Farm Mutual Automobile Ins. Co., 781 So. 2d 469 (Fla. 5th DCA 2001). "Only the insured or medical provider 'owns' the cause of action against the insurer at any one time." Id. at 470.

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"Facsimile" records, which are computer-generated, nonimage documents. Such documents represent an attempt to avoid laying a proper foundation for computer records. If the records are generated by computer, a person familiar with the computer system who can testify that the output is an accurate reflection of the input must lay a foundation. *American Express Travel Related Services Co. v. Vinhnee (In re Vinhnee),* 336 B.R. 437 (B.A.P. 9th Cir. 2005). Among pertinent subjects of inquiry are "system control procedures, including control of access to the pertinent databases, control of access to the pertinent programs, recording and logging of changes to the data, backup practices, and audit procedures utilized to assure the continuing integrity of the records." 336 B.R. at 449. In *Vinhnee,* "The trial court concluded that the declaration in the post-trial submission was doubly defective. First, the declaration did not establish that the declarant was 'qualified' to provide the requisite testimony. Second, the declaration did not contain information sufficient to warrant a conclusion that the 'American Express computers are sufficiently accurate in the retention and retrieval of the information contained in the documents.' " 336 B.R. at 448.

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The notion that the terms of a valid offer be communicated to the offeree, regardless of whether the contract is unilateral, bilateral or otherwise, before they can become binding is well settled law. Therefore, absent a definite and certain offer outlining the terms and conditions of credit card use with the user's actual signature, the Petitioner . . . has the burden of establishing the binding nature of the underlying contract, including any allegedly applicable arbitration clauses, which entails proof, at a most basic level, that the debtor was provided with notice of the terms and conditions to which Petitioner now seeks to hold Respondent.

Petitioner must tender the *actual* provisions agreed to, including any and all amendments,[35] and not simply a photocopy of general terms to which the credit issuer may currently demand debtors agree. For example, Petitioner's Exhibit A which is labeled "Credit Card Agreement and Additional Terms and Conditions" lacks Respondent's signature. Neither does it contain a date indicating when these terms were adopted by MBNA nor how the terms were amended or changed, if at all, over the years appear [*sic*] anywhere on the document. Furthermore, the contract does not contain any name, account number or other identifying statements which would connect the proffered agreement with the Respondent in this action. In fact, petitioners appear to have attached the exact same photocopy, which as noted is not specific to any particular consumer, to many of its confirmation petitions. While on its face there is nothing necessarily unusual about a large commercial entity such as MBNA providing a standard form contract that all credit card consumers agree to, the burden nevertheless remains with MBNA to tie the binding nature of its boiler-plate terms to the user at issue in each particular case and to show that those terms are binding on each Respondent it seeks to hold accountable (the Respondent's intent to be bound *after notice of terms is established* can be shown via card use). The fact that MBNA issues a particular agreement with particular terms with the majority of its customers is of little relevance in determining the actual terms of the alleged agreement before this Court, if not linked directly to respondent in some way[,] shape or form. Just because a petitioner provides a photocopy of a document entitled "Additional Terms and Conditions," certainly does not mean those terms are binding on someone who could have theoretically signed a completely different agreement when they were extended credit. Whether the physical card itself or some solicitation agreement with Respondent's signature referenced the terms and conditions, or whether the terms were made readily accessible to Respondent by e-mail or the internet, and Respondent was in fact aware of this, may all be relevant to an inquiry into constructive notice but such notice must still be established. At bar, MBNA Bank has failed to establish that the provided terms and conditions were the actual terms and conditions agreed to by Nelson. As such, applying *Kaplan*, the Court does not find objective intent on the part of the Respondent to be bound to the contractual statements proffered by MBNA requiring the question of arbitrability to be decided by the arbitrator or that arbitration is the required forum for either party to bring claims against the other.

State law often outlines the acceptable procedures for amendments to retail credit agreements, and courts may treat as a nullity any amendment that did not follow proper notification, opt out or other relevant amendment procedures (*see for e.g. Kurz v. Chase Manhattan Bank USA, N.A.*, 319 F. Supp. 2d 457, 465 [2d Cir. 2004]) (under Delaware law

"a credit card issuer seeking unilaterally to add an arbitration clause to the agreement must provide notice and an opt out provision"). However, in order to make such a determination the evolution of the contractual agreement from birth to litigation must be outlined for the court's scrutiny. Without the original agreement provided and its history made available, the court is effectively impinged from exercising its limited review function.

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15 U.S.C. §1643(b) applies to both the original creditor and bad debt buyers and requires them to show that charges were authorized by the account holder.

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<u>False statements in the complaint, affidavits, etc., e.g., that affiant has personal knowledge of records establishing debt, that plaintiff is holder in due course, etc., are violations.</u> A debt collector's misrepresentation in a pleading that it is a subrogee was held to be actionable in Gearing v. Check Brokerage Corp., 233 F.3d 469 (7th Cir. 2000). See also Sayyed v. Wolpoff & Abramson, 485 F.3d 226 (4th Cir. 2007). Filing false affidavits in state court collection litigation is actionable. Todd v. Weltman, Weinberg & Reis Co., L.P.A., 434 F.3d 432 (6th Cir. 2006); Delawder v. Platinum Financial Services Corp., 443 F.Supp.2d 942 (2005), later opinion, No. 1:04-cv-680, 2007 U.S.Dist. LEXIS 31174 (S.D. Ohio, Apr. 27, 2007); Griffith v. Javitch, Block & Rathbone, LLP, 1:04cv238 (S.D. Ohio, July 8, 2004); Hartman v. Asset Acceptance Corp., 467 F.Supp.2d 769 (S.D. Ohio 2004); Gionis v. Javitch, Block & Rathbone, 405 F.Supp.2d 856 (S.D. Ohio 2005); Blevins v. Hudson & Keyse, Inc., 395 F.Supp.2d 655, motion denied, 395 F.Supp.2d 662 (S.D. Ohio 2004); Stolicker v. Muller, Muller, Richmond, Harms, Meyers & Sgroi, P.C., No. 1:04-CV-733, 2005 U.S.Dist. LEXIS 32404 (W.D.Mich., Sept. 8, 2005); Eads v. Wolpoff & Abramson, LLP, 538 F.Supp.2d 981 (W.D.Tex. 2008).