IN THE SUPREME COURT OF THE STATE OF MISSOURI

CACH, LLC,

Plaintiff/Respondent,

v. SC 91780

JON ASKEW,

Defendant/Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri

Associate Division

Honorable Dale Hood, Judge

SUBSTITUTION BRIEF OF APPELLANT JON ASKEW

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TABLE OF CONTENTS

Table of Authorities

JURISDICTIONAL STATEMENT

CACH filed a collection action against Askew seeking damages based on a credit card debt CACH claimed it owned. The trial court issued its amended judgment in favor of CACH on March 25th, 2010. Askew filed a timely notice of appeal to the Missouri Court of Appeals, Eastern District. The Court of Appeals affirmed the trial court's Judgment. Askew subsequently filed an application for transfer to this Court because the questions involved are of general interest and importance, and because the opinion of the Eastern District of the Missouri Court of Appeals is contrary to previous decisions of appellate courts in this state and contrary to a previous decision of this Court. The Court sustained the application for transfer. Because the Court sustained Askew's application for transfer pursuant to Rule 83.04 of the Supreme Court Rules, the Court has jurisdiction over this case pursuant to Art. V, Sec. 9 of the Missouri Constitution.

STATEMENT OF FACTS

Respondent CACH, LLC (hereinafter "CACH"), a debt collector, alleged that it purchased Appellant Jon Askew's (hereinafter "Askew") defaulted credit card account, and sued to collect on it (LF p. 8). CACH alleged Breach of Contract, Account Stated and Suit on Account as alternate theories of recovery (LF p. 8-10). According to CACH, the account originated with Providian Bank (hereinafter "Providian"), and Providian is now the same entity as Washington Mutual Bank (hereinafter "Washington Mutual") (TTr. p. 82). CACH claimed that Washington Mutual then assigned the account to a debt-buying company, Worldwide Asset Purchasing II, LLC (hereinafter "Worldwide"). (TTr. p. 18-21). CACH alleged that Worldwide then assigned the account to CACH (TTr. p. 18). Askew filed an Answer and Defenses, alleging, among other defenses, that CACH lacked standing to sue (LF p. 12-13).

At trial, CACH offered several documents as exhibits. To lay a foundation for these documents as business records, CACH offered the testimony of a sole witness, Diana Eakins (hereinafter "Eakins"), the "keeper of records" for Square Two Financial (TTr. p. 27.), which owns CACH as a subsidiary (TTr. p. 17). CACH has no employees (TTr. p. 18). Eakins testified that she had been an employee of Square Two Financial since September, 2009 and had no business connection with Square Two or CACH prior to that time (TTr. p. 29), that she was not the records custodian of Washington Mutual (TTr. p. 31), and that she never worked for Worldwide (TTr. p. 32-33). Eakins did not testify that she had ever worked at Providian, Washington Mutual, or Worldwide, or that she had any training at any of these businesses. The documents at issue are described as follows:

Exhibit 1 is an application for a credit card (TTr. p. 5-7). The application card contains the following language: "By signing this Membership Card, I agree to be bound by the Account Agreement (which will be mailed to me upon receipt of this card)." The application is undated, but contains the phrase, "LIMITED-TIME OFFER To get your $500 instant credit, mail by: June 18, 1998." (Appendix p. 14).[1]

Exhibit 2 consists of seven non-consecutive monthly billing statements from 2006 and 2007, created by Washington Mutual. (A-15 to A-21). Askew testified that these statements contain his name and address (TTr. 7-9), but he did not know whether he had received the statements (TTr. p. 7-9). There was no testimony concerning whether these documents were created in the ordinary course of business, their mode of preparation, or when they were created (TTr. p. 7-9). **Exhibit 2** was admitted over Askew's hearsay and foundational objections (TTr. p. 8; TTr. p. 84).

Exhibit 7 is a Bill of Sale, created by either Washington Mutual or Worldwide, transferring some accounts from Washington Mutual to Worldwide. (A-22). The Bill of Sale does not mention Askew or his account number. The Bill of Sale makes reference to a list of accounts identified in a separate document called an Account Schedule, attached as Appendix A to a Purchase And Sales Agreement between Washington Mutual and Worldwide. Neither the Account Schedule nor the Purchase and Sales Agreement were offered at trial. Eakins testified that the Bill of Sale was generated in the ordinary course

[1] Hereinafter, references to the Appendix will be made as "A-X" where "X" indicates the page number.

of business (but not CACH's business) (TTr. p. 21), and that it was created at or near the time of the transaction it referenced (TTr. p. 22), but offered no testimony concerning its mode of preparation. Eakins testified that **Exhibit 7** was "transmitted to CACH" (TTr. p. 22). **Exhibit 7** was admitted over Askew's foundational objections (TTr. p. 41).

Exhibit 8 is a bill of sale transferring some accounts pursuant to an Account Sale Agreement between Worldwide and CACH (TTr. p. 22-23; (A- 28). **Exhibit 8** does not mention Askew's name or account number, but instead states that the list of accounts to which **Exhibit 8** pertains is identified in the Account Sale Agreement between Worldwide and CACH (A-28).

Exhibit 9 is a printout of a redacted page from an Excel spreadsheet (Tr. at p. 23-24; A-8). The printout contains one line of information, listing Askew's name and some of his account information, along with CACH's internal account number for Askew's account (A-8). On its face, **Exhibit 9** contains no information identifying what it is, or what entity created it. Eakins testified that **Exhibit 9** is a redacted page from the Account Sale Agreement referenced in **Exhibit 8** (Ttr. p. 38). Eakins testified that this spreadsheet line was generated in the ordinary course of business (but not CACH's business), and was created at or near the time of when the accounts were purchased (TTr. p. 24), but did not testify as to its mode of preparation. Eakins testified that **Exhibit 9** is not CACH's document (TTr. p. 38).

Exhibit 11 is a generic credit card agreement created by Providian (A-30 to A-31). This document does not mention Askew by name or account number and is not signed by

anyone. While a notation in the footer of this document reads "10/98", **Exhibit 11** refers to November 1998 in the past tense, suggesting that it was created after that time. ("…the APR for purchases in the November 1998 billing cycle would have been 19.99%...") (A-30). Eakins testified that this document was "transmitted" to CACH in the ordinary course of business (TTr. p. 44). The trial court sustained Askew's hearsay objection when Eakins attempted to testify as to when **Exhibit 11** was made (TTr. p. 44). Eakins did not testify as to **Exhibit 11's** mode of preparation or that it was "made" in the ordinary course of business. Eakins testified that she had no personal knowledge of the business practices of Providian in 1998 (TTr. p. 48). Eakins testified that she had no knowledge that Askew had received **Exhibit 11** prior to trial (TTr. p. 49). Askew testified that he did not believe that he had ever received a copy of **Exhibit 11** (TTr. p. 93), and further testified that he did not agree to its terms (TTr. p. 93). **Exhibit 11** was admitted into evidence over Askew's hearsay and foundational objections (TTr. p. 46).

Prior to initiating litigation, CACH had retained an attorney named Bramford, located in Texas, to collect the account from Askew. Bramford's phone log, admitted as **Exhibit B** (A-32 to A-35), contains the following relevant notations:

2/13/08 "debtor wife rtrn call sd they do not have any funds sd can not settle the acct I offered her a payment arrag of $1500 down and $200 month sd she does not have the whole $1500 thi month, sd she can pay $500 on the 29th of this month, and $1000 on 3/31/08……"(A-32).

3/24/08 "dtr sp ci sd need to pay mrtge wont have funds, adv mrtge mnts were there

when the arrangment was set up, adv if kill ck bif due no pmts, she sd will juggle some bills and leave ck alone….adv urgency, adv not atty".

Exhibit 5 is a check from Mr. and Mrs. Askew's joint checking account in the amount of $500.00, dated February 29th, 2008, made out to Collect America (A-36). Collect America was the prior name of Square Two Financial. Askew testified that his wife had authorized the check (Ttr. p. 10-11).

Exhibit 6 is a check from Mr. and Mrs. Askew's joint checking account in the amount of $1,000.00, dated March 28th, 2008, made out to Collect America (A-37). Mrs. Askew attempted to stopped payment on this check (TTr. p. 57).

The Askews wrote a letter dated March 28th, 2008 (TTr. p. 70) to Bramford's office, disputing the validity of the account with CACH. (TTr. p. 70). The phone log states that Mrs. Askew also called on March 29th, 2008 to stop payment on the $1,000.00 check, fearing they would loose their house. (A-33). She was informed that she had called "a few hrs to late." (A-33). The dispute letter was received by Bramford's office on April 2nd, 2008.

Askew also wrote a dispute letter to CACH's counsel, which was admitted as **Exhibit D**.

Based upon the bills of sale and Eakins' testimony, the trial court found that CACH had been assigned Askew's account (LF p. 59). The trial court then ruled in favor of

CACH on either its account stated theory or its breach of contract theory.[2] (LF p. 69).

POINTS RELIED ON

First Point Relied On: The trial court erred when it admitted into evidence Exhibits 2, 7, 9 and 11, because these documents did not qualify for the business records exception to the hearsay rule, in that they were not sponsored by qualified witnesses from the entities that actually created the documents, and proper foundations were not laid for them as required by Revised Statutes of Missouri §§490.660-490.690.

State v. Anderson, 413 S.W.2d 161 (Mo., 1967).

Asset Acceptance v. Lodge, 325 S.W.3d 525 (Mo. App., 2010).

Zundel v. Bommarito, 778 S.W.2d 954 (Mo. App., 1989).

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[2] The record is unclear regarding the basis of the trial court's judgment. The original judgment, dated March 23, 2010, contained findings of fact and conclusions of law (LF p. p. 58-69). The Judgment reads: "The Court finds that Defendant Askew owes Plaintiff under Account Stated $5,936.10 plus interest of $450.81, at 9 percent interest from the date of demand of April 23, 2009" (A-12). Directly underneath this paragraph, in the section marked "JUDGMENT AND ORDER", is written: "Plaintiff CACH, LLC have and recover of Defendant John (sic) J. Askew the sum of $5,936.10 for breach of contract and prejudgment interest of $450.81, together with costs of this proceeding." As a result, both theories of recovery will be addressed.

Estate of White, Matter of, 665 S.W.2d 67 (Mo. App. S.D., 1984).

Revised Statutes of Missouri §§490.660-490.690.

Second Point Relied On: The trial court erred in ruling that CACH proved standing to sue, because CACH failed to meet its burden in proving it had been assigned Askew's account, in that CACH did not provide the requisite documentary evidence of assignment of each link in the chain of assignment, and Eakins' testimony regarding assignment was hearsay and in violation of the best evidence rule.

Farmer v. Kinder, 89 S.W.3d 447 (Mo., 2002).

Midwestern Health Management, Inc. v. Walker, 208 S.W.3d 295 (Mo. App., 2006).

Mitchell v. St. Louis Argus Pub. Co., 459 S.W.2d 1 (Mo. App. E.D., 1970).

Mundis v. Kelchner, 176 S.W.2d 565 (Mo. App., 1943).

Third Point Relied On: The trial court erred when it granted judgment to CACH on Account Stated because there was insufficient evidence of the elements of an Account Stated, in that CACH failed to prove that a final and correct balance was agreed to by the parties and failed to prove that Askew promised to pay the balance sought by CACH.

Whelan's, Inc. v. Bob Eldrige Const. Co., Inc., 668 S.W.2d 244 (Mo. App. W.D., 1984).

Chisler v. Staats, 502 S.W.2d 424 (Mo. App., 1973).

Rice's Feed Service, Inc. v. Dodson, 904 S.W.2d 475 (Mo. App. S.D., 1995).

Citibank v. Mincks, 135 S.W.3d 545 (Mo. App. S.D., 2004).

15 U.S.C. §1692c(b).

15 U.S.C. §1692g(c).

Fourth Point Relied On: The trial court erred when it granted judgment to CACH on Breach of Contract because there was insufficient evidence of a breach of contract, in that there was no contract between the parties in evidence, no evidence of a meeting of the minds between the parties, and no evidence of a legally recoverable amount of damages.

Leo Journagan Constr. Co., Inc. v. City Utilities of Springfield, Mo., 116 S.W.3d 711 (Mo. App., 2003).

Pride v. Lewis, 179 S.W.3d 375 (Mo. App., 2005).

Shofler v. Jordan, 284 S.W.2d 612 (Mo. App., 1955).

Tri-State Motor Transit Co. v. Navajo Freight Lines, Inc., 528 S.W.2d 475 (Mo. App., 1975).

ARGUMENT

First Point Relied On: The trial court erred when it admitted into evidence Exhibits 2, 7, 9 and 11, because these documents did not qualify for the business records exception to the hearsay rule, in that they were not sponsored by qualified witnesses from the entities that actually created the documents, and proper foundations were not laid for them as required by Revised Statutes of Missouri §§490.660-490.690.

Standard of Review

The determination of whether a sufficient foundation was laid for admission of the evidence is within the discretion of the trial court. *Estate of West v. Moffatt*, 32 S.W.3d 648, 653 (Mo. App. W.D., 2000). Therefore, there can be no error absent a showing that the court abused its discretion. *C & W Asset Acquisition, LLC v. Somogyi*, 136 S.W.3d 134, 137 (Mo. App. S.D., 2004).

Who Can Lay the Foundation for Business Records

Revised Statute of Missouri §490.680, also know as the Missouri Uniform Business Records as Evidence Act (hereinafter "§490.680") states:

> "[a] record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of

preparation were such as to justify its admission." (A-39).

For forty-four years, Missouri Courts have interpreted the language of §490.680 to mean that the "custodian or other qualified witness" must be a representative of the entity that actually created the business record. In *State v. Anderson*, 413 S.W.2d 161, 165 (Mo., 1967), this Court ruled, "The document obviously was not a record made in the regular course of the [offerer's] business. It was merely found in the [offerer's] files, having been prepared elsewhere. The Uniform Business Records as Evidence Act did not aid its admissibility." See also *Zundel v. Bommarito*, 778 S.W.2d 954, 958 (Mo. App., 1989) holding, "The business records exception to the hearsay rule applies only to documents generated by the business itself.…Where the status of the evidence indicates it was prepared elsewhere and was merely received and held in a file but was not made in the ordinary course of the holder's business it is inadmissible and not within a business record exception to the hearsay rule under § 490.680 RSMo."; *Hamilton Music, Inc. v. York*, 565 S.W.2d 838, 841 (Mo. App., 1978) holding, "…when the status of the record is such that it discloses that an exhibit was not made in the ordinary course of the offerer's business but was instead prepared elsewhere and merely found in the offerer's files, it is inadmissible as a business record under Sec. 490.680."; *C & W Asset Acquisitions, LLC v. Somogyi*, 136 S.W.3d 134, (Mo. App., S.D., 2004) stating, "Allowing a litigant to be the 'custodian' of another entity's records seems to run contrary to the spirit of Section 490.692."; and *State v. Luleff*, 781 S.W.2d 199 (Mo. App., 1989), ruling that a St. Charles County Deputy Sherriff could not lay a foundation for records created by the State Highway Patrol.

State v. Carruth, 166 S.W.3d 580 (Mo. App., 2005) is a limited exception to the otherwise consistent string of Missouri caselaw on this issue. *Carruth* concerned the admissibility of fingerprints in a criminal trial. The *Carruth* Court stated that the rule for laying a foundation for fingerprints in criminal trials is that "[t]he qualifying witness must establish that he or she has knowledge of the standard procedures used by a particular jurisdiction to collect fingerprints from arrestees" before ruling that the witness – an extremely qualified fingerprint technician who testified as to that particular information - had done so. *Carruth*, 166 S.W.3d at 591.

Additonally, the *Carruth* court relied on the decision in *State v. Williams*, 797 S.W.2d 734, 739 (Mo. App. W.D., 1990), for the proposition that "[f]ingerprint cards can be admitted under the business records exception even when the qualifying witness is not the person who took the fingerprints." *Carruth*, 166 S.W.3d at 591. However, while the sponsoring witness in *Williams* was not the fingerprint technician that actually took Williams' fingerprints at the Kansas City, Missouri police department, she was nonetheless a fingerprint technician employed by that same Kansas City, Missouri police department. *Williams,* 797 S.W.2d at 738. So the *Williams* holding was consistent with the *Anderson* line of cases, in that the sponsoring witness in *Williams* was still an employee of the entity that created the document in question. The *Carruth* court expanded *Williams* in a limited and specific criminal context. The *Carruth* ruling has no application to the case at bar and there is no valid precedent which should encourage this Court to expand the law further.

Asset Acceptance v. Lodge, 325 S.W.3d 525 (Mo. App., 2010), the most recent case

to follow *Anderson,* is factually nearly identical to the instant case. In *Lodge,* a debt buying company just like CACH alleged that it was assigned a debt from Household Bank, and sued to attempt to collect on it. At trial, Asset's employee testified that he had worked in the credit industry for twenty years and was familiar with how records were kept in the industry. *Lodge*, 325 S.W.3d at 527. The trial court allowed him to lay a foundation for the original creditor's records, over Lodge's objections. In reversing the trial court, the appellate court ruled:

> "[D]ocuments that are part of a file belonging to a holder's business but were not generated by the holder in the holder's ordinary course of business do not fall under the business records exception. … Asset did not prepare the documents in question, but rather only received the documents from HSBC and held them in their files. [Asset's employee] was not qualified to testify regarding documents not prepared by Asset. Thus, the documents do not fall under the business records exception." *Lodge*, 325 S.W.3d at 529.

The *Lodge* case is so perfectly on point that we need only substitute the names referenced in the quotes to apply it to the case at bar. Here, CACH alleges it was assigned a debt, and has sued to attempt to collect on it. CACH's witness, Eakins, testified, "I can say that I have been to bank training with most of the major banks that we deal with…" (TTr. p. 48). Eakins' testimony concerning her qualifications was even less compelling than that of the witness in *Lodge,* who nonetheless was deemed unqualified to sponsor the records of the original creditor. *Lodge*, 325 S.W.3d at 525. There is no dispute that **Exhibits 2, 7, 9, and 11** were created by entities other than

CACH (TTr. p. 7, 21, 38, and 44). They obviously were not records made in the regular course of CACH's business. They were merely found in CACH's files, having been prepared elsewhere. The Uniform Business Records as Evidence Act did not aid their admissibility.

Keeping in mind that the purpose of §490.680 is to address the issue of hearsay, requiring the "qualified witness" who sponsors a business record to be from the company that actually created the document best promotes the intent of the statute. "When the [aforementioned] enumerated statutory requirements are met, 'the statute invests the record with a presumptive verity, and so excepts them from the hearsay rule.'" *Davolt v. Highland*, 119 S.W.3d 118, 134 (Mo. App., 2003), quoting *Piva v. Gen. Am. Life Ins. Co*., 647 S.W.2d 866, 877 (Mo. App., 1983). A fundamental factor in that presumptive verity is the sponsor's custodial relationship to the record. *C & W Asset Acquisitions, LLC v. Somgyi*, 136 S.W.3d at 139. Logically, the further a sponsoring witness is positioned from that custodial relationship, the less verity we can presume.

It is one thing for a witness to say on behalf of a company, "This is how we (the company) made this document." It is another thing entirely for the witness to say, in effect, "This other company told me that the original creditor told them that this is how they make this kind of document." In the first example, the company is effectively speaking for itself about what it actually did. In the second example, which describes the situation in the case at bar, the witness is too far removed from the source to "invest the record with a presumptive verity." The witness has no custodial relationship to the

document, and her testimony is hearsay not within any exception, beyond the scope of §490.680.

CACH Did Not Lay Proper Foundations for Exhibits 2, 7, 9 and 11

> "In construing § 490.680 it has been observed that simply because a record is in writing and part of a financial transaction, it is not automatically qualified as a business record under the Uniform Business Records as Evidence Law. … Albeit it is said that a trial court possesses wide discretion in determining whether the requirements of [section] 490.680 for admission are met, the trial record should reveal evidence of compliance with each requirement of the law before any deference be accorded the ruling of the court nisi. Ere proper admission of records under [section] 490.680 can be made, it is incumbent upon the party offering them to demonstrate the mode and the times of their preparations and the fact the records were really made in the regular course of business in compliance with the statute." *Estate of White, Matter of*, 665 S.W.2d 67, 69 (Mo. App. S.D., 1984) (internal cites omitted).

CACH did not lay proper foundations for **Exhibits 2, 7, 9 and 11**. **Exhibit 2** consists of seven monthly billing statements created by Washington Mutual. (A-15 to A-21). *None* of the §490.680 foundational requirements were laid for **Exhibit 2**. There was absolutely no testimony concerning the mode of preparation for these billing statements, whether they were created in the ordinary course of business, or when they were created.

Exhibit 7 is the first Bill of Sale, from Washington Mutual to Worldwide, and was

presumably created by either Washington Mutual or Worldwide. Eakins attempted to lay a foundation for this document, yet there was no evidence that Eakins was qualified to lay a foundation for documents created by Washington Mutual or Worldwide. The only testimony Eakins gave about her training regarding other companies was as follows: "I can say that I have been to bank training with most of the major banks that we deal with..." (TTr. p. 48; A-27). Eakins never testified that she had received training specifically at Washington Mutual, never testified that she had received training specifically at Worldwide (which is not even a bank), and never testified that any training she received at any bank pertained to how that bank created or maintained its business records.

In attempting to lay a foundation for **Exhibit 7**, Eakins testified that the Bill of Sale was generated in the ordinary course of business (but not CACH's business) (TTr. p. 21), and that it was created at or near the time of the transaction it referenced (Ttr. p. 22), but offered no testimony whatsoever concerning its mode of preparation, which may account for why there is no evidence of which company even created **Exhibit 7**.

Exhibit 9 is a redacted page from an Excel spreadsheet, containing information about Askew's account. While Eakins testified that CACH did not create **Exhibit 9** (Tr. p. 38), there was no evidence of who actually did create **Exhibit 9**. Eakins testified that **Exhibit 9** is a redacted page from the Account Sale Agreement referenced in **Exhibit 8** (Ttr. p. 38) which would indicate that **Exhibit 9** was given to CACH by Worldwide. But there is no evidence as to whether **Exhibit 9** was created by Worldwide from information it received from Washington Mutual, or whether **Exhibit 9** was created by Washington

Mutual, and then given to Worldwide, who then gave it to CACH. Regardless, Eakins was unqualified to lay a foundation for **Exhibit 9**, which was created by an unidentified entity.

In attempting to lay a foundation for **Exhibit 9**, Eakins testified that it was generated in the ordinary course of business (but not CACH's business) (TTr. p. 24). Eakins also testified that **Exhibit 9** was created at or near the time of when the accounts were *purchased* (TTr. p. 24), not at or near the time of the conditions which are referenced in the document, as required for §490.680 compliance. Likewise, there was no testimony concerning the mode of preparation of **Exhibit 9**.

Exhibit 11 is the generic credit card agreement created by Providian. Here again, there is no evidence that Eakins was familiar with how Providian kept and maintained its records. Eakins never testified that she had received training at Providian, but Eakins did testify that she had no personal knowledge of the business practices of Providian in 1998 (TTr. p. 48), the year that this document was apparently created.

In attempting to lay a foundation for **Exhibit 11**, Eakins testified that this document was "transmitted" to CACH in the ordinary course of business (TTr. p. 44), but did not testify that it was "made" in the ordinary course of business, as §490.680 requires. Eakins attempted to testify as to when **Exhibit 11** was made, but Askew's hearsay objection to this was sustained (TTr. p. 44). There was no attempt to testify as to **Exhibit 11's** mode of preparation. So on the bare assertion that **Exhibit 11** was transmitted to CACH, and nothing more, it was admitted as a business record, in violation of §490.680.

Point One Conclusion

In order to qualify a document for the business records exception to the hearsay rule, the sponsor must be a qualified witness from the business that actually created the document, and must lay the foundation for that document by testifying as to each of the foundational requirements as listed in §490.680. This was not done in this case. Even if a non-employee were allowed to lay foundations for business records that were created by other entities, there was no evidence that Eakins was qualified to lay foundations for documents created by Providian, Washington Mutual, or Worldwide. CACH failed to fulfill the foundational requirements of §490.680 with regard to **Exhibits 2, 7, 9 or 11**, and the trial court abused its discretion in admitting these documents into evidence.

To warrant reversal, improperly admitted evidence must have prejudiced the defendant. *Alberswerth v. Alberswerth*, 184 S.W.3d 81, 102 (Mo. App., 2006). The admission of **Exhibits 2, 7, 9 and 11** prejudiced Askew. **Exhibits 7 and 9** purported to offer evidence of the chain of assignment of Askew's account. Without them, CACH could not establish that Worldwide owned the account, and in turn, could not establish that CACH owned it. Likewise, **Exhibit 11** was the only evidence supporting CACH's claim for breach of contract. **Exhibit 2** was evidence supporting CACH's claim for account stated. These documents clearly prejudiced the defendant, and reversal is warranted. See *American Family Mut. Ins. Co. v. Millers Mut. Ins. Ass'n*, 971 S.W.2d 940, 942 (Mo. App. E.D., 1998).

Second Point Relied On: The trial court erred in ruling that CACH proved standing to sue, because CACH failed to meet its burden in proving it had been

assigned Askew's account, in that CACH did not provide the requisite documentary evidence of assignment of each link in the chain of assignment, and Eakins' testimony regarding assignment was hearsay and in violation of the best evidence rule.

Standard of Review

Standing is a matter of law, and is reviewed *de novo*. *Missouri State Medical Assn'n v. State*, 256 S.W.3d 85, 87 (Mo.banc., 2008). The judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron,* 536 S.W.2d 30 (Mo., 1976).

An Assignee Must Prove Each Link in the Chain of Assignment

> "Standing is a jurisdictional matter antecedent to the right to relief. It asks whether the persons seeking relief have a right to do so. Where, as here, a question is raised about a party's standing, courts have a duty to determine the question of their jurisdiction before reaching substantive issues, for if a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented. Lack of standing cannot be waived." *Farmer v. Kinder*, 89 S.W.3d 447 (Mo., 2002) (internal citations omitted).
>
> "[P]roof of an assignment of the account is essential to a recovery in an action on an account accruing to another in his own right. Thus, the assignment of the accounts from [the original creditors] to [the debt

collector] was an essential element of [the debt collector's] action on an open account and necessary to establish its standing to sue." *Midwestern Health Management, Inc. v. Walker*, 208 S.W.3d 295 (Mo. App., 2006).

In order to prove standing, an assignee must prove ownership of the account. When there are multiple links in a chain of assignment, it stands to reason that the assignee must prove each link in the chain in order to establish its ownership of the account. This was the conclusion reached in *Mitchell v. St. Louis Argus Publishing Co.*, 459 S.W.2d 1 (Mo. App., 1970). The *Mitchell* Court was presented with the question of whether or not Mr. Mitchell was the proper owner of certain shares of stock. Mr. Mitchell had purchased the stock from Mrs. Reed, who had been assigned the stock from her children. The *Mitchell* Court concluded, "In essence, this litigation turns upon the validity, not of Mrs. Reed's sale to Mr. Mitchell, but of the validity of the assignments by the children to Mrs. Reed." *Mitchell*, 459 S.W.2d at 6. Like the *Mitchell* case, this case turns not only upon the validity of Worldwide's sale to CACH, but on the validity of Washington Mutual's ownership of the account and on the assignment by Washington Mutual to Worldwide.

The First Link In the Chain of Assignment is Missing

To prove that it had standing to sue, CACH was required to prove each link in the chain of assignment of Askew's account. As evidence of the first link in the chain, CACH offered the Bill of Sale from Washington Mutual to Worldwide (**Exhibit 7**). As stated in the previous Point Relied On, **Exhibit 7** was inadmissible, so there is no documentary evidence of the first link in the chain.

Yet even if, for the sake of argument, **Exhibit 7** were admissible, it would not have aided CACH. This Bill of Sale is from Washington Mutual, but there was no admissible evidence of Washington Mutual's ownership of Askew's account. While Eakins testified that Washington Mutual and Providian are now the same entity (TTr. p. 82) that testimony was inadmissible hearsay, and while the monthly statements (**Exhibit 2**) were from Washington Mutual, they were likewise inadmissible for lack of foundation. So the Court is left with no admissible evidence that the assignor in the first link in the chain owned the account to begin with.

Furthermore, the Bill of Sale does not identify Askew by name or account number. On its face, there is nothing linking the Bill of Sale to Askew's account. Instead, the Bill of Sale purports to transfer ownership of a list of accounts identified in a separate document called an Account Schedule, which was allegedly attached as Appendix A to a Purchase And Sales Agreement between Washington Mutual and Worldwide. Neither the Account Schedule nor the Purchase and Sales Agreement were offered at trial. Therefore, there was no documentary evidence of an assignment of Askew's account from Washington Mutual to Worldwide presented at trial, and consequently no admissible evidence of the first link in the chain. CACH failed to prove by a preponderance of admissible evidence that Worldwide had been assigned Askew's account. CACH therefore could not prove, in turn, that CACH had been assigned Askew's account, and so CACH lacked standing to sue.

Eakins' Testimony Regarding Assignment Violated the Best Evidence Rule

"The best evidence of the terms of a contract or instrument in writing is the writing itself, and parole evidence is not admissible unless the instrument is lost or its absence is satisfactorily explained." *Mundis v Kelchner*, 176 S.W.2d 565 (Mo. App., 1943). Here, there was no evidence that the Account Schedule and the Purchase and Sales Agreement referenced in **Exhibit 7** were lost, and their absence was not explained. These missing documents were material to the case, and their contents were contested. Therefore, parole evidence of what those documents may or may not have contained was inadmissible hearsay and in violation of the Best Evidence Rule. Nonetheless, the trial court accepted parole evidence of the contents of the Account Schedule, in the form of Eakins' testimony that the Bill of Sale pertained to Askew's account (TTr. p. 18-22). Eakin's testimony was accepted over Askew's hearsay objection (TTr. p. 18-22), but no objection was even necessary, as the trial court cannot consider inadmissible parole evidence in interpreting a contract even if the evidence was admitted without objection. *Kelly v. State Farm Mutual Automobile Insurance Co*., 218 S.W.3d 517 (Mo. App., 2007). (internal cites omitted).

Askew is aware that this Court recently decided the case of *Renaissance Leasing LLC v. Vermeer Mfg. Co*., 322 S.W.3d 112 (Mo., 2010), which allowed oral testimony of ownership of a piece of mining equipment. This Court's decision in *Renaissance* was based on *Hallmark v. Stillings*, 648 S.W.2d 230 (Mo. App., 1983). The Hallmark court went out of its way to distinguish tangible personal property from intangible property which requires a "formal instrument of creation or transfer," stating:

> "…ownership of some types of personalty, e.g., a chose or contract right such as an interest in a joint bank account, is ordinarily indicated by a formal instrument of creation or transfer, while other kinds of personalty are ordinarily acquired without any instrument of acquisition or transfer except such as would be hearsay itself. The personal property with which we are concerned--livestock and household furnishings--are not items to which one ordinarily acquires a formal "title."" *Id.* at 233-234.

While proof of ownership of tangible personal property having no paper trail chain of title may be demonstrated through oral testimony, proof of ownership of intangible property with a paper trail chain of title, such as a credit card account, is subject to the Best Evidence Rule. Oral testimony of ownership of an account with a paper trail is therefore hearsay not within any exception. Askew's account has a formal instrument of creation and instruments of transfer. CACH failed to properly admit those documents into evidence. Oral testimony of ownership of Askew's credit card account was inadmissible hearsay. To rule otherwise, as the trial court did in the instant case, would render the Best Evidence Rule meaningless. Because there was not a preponderance of admissible evidence of the first link in the chain of assignment, CACH lacked standing to sue.

The Second Link in the Chain of Assignment was Missing

CACH lacked sufficient proof of the second link in the chain, as well. As evidence of the second link, CACH offered **Exhibit 8**, a bill of sale from Worldwide to CACH,

(TTr. p. 22-23; A-28) which did not identify Askew or his account number. CACH also offered **Exhibit 9**, a redacted page from an Excel spreadsheet consisting of one line of information concerning Askew's account with Providian. There is nothing on the face of **Exhibit 9** that either identifies what the document is, or connects it to any other exhibit. Eakins testified that **Exhibit 9** is a redacted page from the Account Sale Agreement referenced in **Exhibit 8** (TTt. p. 38) and that **Exhibit 9** is not CACH's document (TTr. p. 38). As was discussed above, **Exhibit 9** is inadmissible and, for the reasons discussed above, testimony from Eakins concerning **Exhibits 8 and 9** was hearsay not within any exception and in violation of the Best Evidence Rule.

Therefore, the only admissible evidence pertaining to the second link in the chain of assignment is **Exhibit 8**. This second bill of sale does not mention Askew or his account number. Additionally, the bill of sale purports to assign unknown accounts from Worldwide, and as we have seen, there is no admissible evidence before the Court that Worldwide ever owned Askew's account. **Exhibit 8**, standing alone, is insufficient evidence of the second link in the chain of assignment. Having failed to prove the second link in the chain of assignment by a preponderance of admissible evidence, CACH lacks standing to sue.

Point Two Conclusion

As **Exhibits 7 and 9** and Eakins' testimony were all inadmissible, there was not a preponderance of admissible evidence before the trial court proving that CACH had been assigned Askew's account. CACH therefore lacked standing to sue. "[I]f a party lacks

standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented." *Farmer v. Kinder*, 89 S.W.3d 447 (Mo., 2002). A suit dismissed for lack of standing is dismissed without prejudice. *Stix & Co. Inc. v. First Mo. Bank & Trust Co.*, 564 S.W.2d 67, 70 (Mo. App., 1978). CACH's case should be dismissed without prejudice for lack of standing to sue.

Third Point Relied On: The trial court erred when it granted judgment to CACH on Account Stated because there was insufficient evidence of the elements of an Account Stated, in that CACH failed to prove that a final and correct balance was agreed to by the parties and failed to prove that Askew promised to pay the balance sought by CACH.

Standard of Review

This Point involves the misapplication of the law to the factual record of the case, and as such is reviewed de novo. *Missouri State Medical Assn'n v. State*, 256 S.W.3d 85, 87 (Mo.banc., 2008). The judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron,* 536 S.W.2d 30 (Mo., 1976).

CACH's Account Stated Fails

Askew's First and Second Points Relied On are dispositive of this case. As has been briefed, CACH lacked standing to sue, and so the Court need not reach the substantive

issues of the case. But, for the sake of argument, if the Court did reach the substantive issues, CACH could not prevail on its account stated theory of recovery.

> "[A]n account stated is an agreement between parties, having had previous financial transactions, that a balance struck is correct and due between them, and a promise by the debtor, either express or implied, to pay the balance. It is a new cause of action arising from the prior monetary transactions, and amounts to an admission of liability by the debtor. If the debtor makes no express promise to pay, the retention of the account rendered for a reasonable time without objection admits to the account and implies a promise to pay. The circumstances of a particular case determine the reasonable period of time that an account may be retained without objection." *Rice's Feed Service, Inc. v. Dodson*, 904 S.W.2d 475 (Mo. App. S.D., 1995).

CACH failed to prove that a correct and final balance was agreed to, and failed to prove that Askew promised to pay the balance.

There Was No Agreement as to a Correct and Final Statement

"One essential element of an account stated is an agreement by both parties that the amount set forth in the account is correct and is understood as a final adjustment or statement." *Whelan's, Inc. v. Bob Eldrige Const. Co., Inc*., 668 S.W.2d 244 (Mo. App. W.D., 1984), citing *Perbal v. Dazor Manufacturing Corp*., 436 S.W.2d 677, 684 (Mo., 1968). Here, there was no evidence of an agreement as to a correct and final balance on the account. **Exhibit 2**, comprised of the monthly statements, is inadmissible for lack of

foundation. Even if the monthly statements had been admissible, they did not provide evidence that the parties agreed to a final and correct balance on the account. **Exhibit 2** consisted of only seven non-sequential monthly statements taken from a nine-year long account. The last of these showed a balance of $6,159.39, but does not identify this amount as a final adjustment or balance (A-21). According to CACH's Petition, the account balance was $5,936.10 (LF p. 8). According to Eakins, the account balance was $6,436.10 (TTr. p. 24). There was no evidence presented that any of these amounts was "correct and is understood as a final adjustment or statement." *Id*.

Askew Did Not Expressly Agree to Pay the Balance

CACH may argue that Askew's wife, on behalf of Askew, expressly agreed to pay the balance of $6,436.10. She did not. According to Bramford's phone log, on February 13th, 2008, Mrs. Askew said that the Askews did not have any funds and could not settle the account. The debt collector in Bramford's office then offered Mrs. Askew a payment arrangement of $1500 down and $200 per month. Mrs. Askew stated that she did not have the whole $1500, and said she could pay "$500 on the 29th of this month [February], and $1000 on 3/31/08." (A-32). Nowhere in that conversation, and nowhere in the entire phone log, is any particular total balance amount mentioned *by* Mrs. Askew, or even mentioned *to* Mrs. Askew.

Furthermore, there was no admissible evidence that Mrs. Askew was authorized to bind her husband to a contract, or even that Mr. Askew was aware of his wife's telephone conversation. Eakins testified that her notes state that CACH had permission to speak with Mrs. Askew (TTr. p. 81-82). This testimony was hearsay not within any exception,

and was allowed over Askew's objection (TTr. p. 81). Yet even if that statement had been admissible, that statement is not evidence that Mrs. Askew had authority to bind her husband to a contract. Rather, it was only evidence that, by communicating with Mrs. Askew about Mr. Askew's account, CACH was not violating 15 U.S.C. §1692c(b) of the Fair Debt Collection Practices Act (hereinafter "FDCPA"), which prohibits a debt collector from communicating information about a debt to a third party without permission.

Mrs. Askew made a $500.00 payment to Collect America. At best, this is only evidence that at one point Mrs. Askew was under the belief that the best course of action was to pay Collect America some money. It is not evidence that Mr. Askew agreed to pay a balance of $6,436.10. There are many reasons why people agree to pay debt collectors some amount of money, even when they disagree with the total balance. As Askew testified, Mrs. Askew was being "terrorized" by Bramford's office (TTr. p. 102). The fear tactics of Bramford's office are evident from the phone log. According to the log, Mrs. Askew's second payment of $1,000 was to be made on 3/31/08. Mrs. Askew called on 3/24/08 to advise that she needed to pay her mortgage and the funds would not be available to pay Bramford's office. She was told that if she stopped payment on the check, the balance in full ("bif") would become due and Bramford's office would no longer accept payments. The record goes on to state "advised urgency" (A-32). Obviously there was no legal reason why payments could no longer be accepted on the account. Rather, this tactic was used to create a false sense of fear and urgency in Mrs. Askew. This conversation was followed by Bramford's office depositing Mrs. Askew's

check on 3/28/08 – not on 3/31/08 as previously discussed – and Mrs. Askew calling back on 3/29/08, frantically trying to stop the check for fear of losing her house.

There was no evidence offered at trial that Askew expressly agreed to pay the balance of $6,436.10. Rather, there was only evidence that Mrs. Askew was intimidated into making a payment on the account.

Askew Did Not Implicitly Agree to Pay the Balance Sought by CACH

CACH may also argue that Askew was mailed monthly statements to which he did not object, thereby implying a promise to pay the amount indicated on the last monthly statement. Those statements, comprising **Exhibit 2,** were inadmissible, as discussed above, and so there was no admissible evidence to support an implicit account stated theory of recovery. Yet even if the monthly statements had been admissible, an implicit account stated theory of recovery should still fail in this case.

No appellate court in Missouri has addressed the issue of whether an account stated theory of recovery premised upon an implied promise to pay through silent retention of a monthly statement is an appropriate theory of recovery for a credit card debt (other than the Appellate Court in the instant case). However, a strikingly similar issue was addressed in *Citibank v. Mincks* 135 S.W.3d 545 (Mo. App. S.D., 2004). In *Mincks*, a credit card company argued that a defendant who did not object to a monthly statement within the sixty days prescribed by §1666 of the Truth in Lending Act was precluded from disputing the balance at trial. In rejecting this argument, the *Mincks* court pointed out that if Citibank's argument were accepted, a consumer who failed to contest the balance within sixty days, "through ignorance, inadvertence, or purposeful action-

would completely forfeit his right to contest the debt owed in a collection lawsuit….In our view, this interpretation of the statute leads to an absurd result." *Id*. Allowing a debt collector such as CACH to pursue a credit card debt via an implied account stated theory of recovery leads to the same absurd result. A consumer who let a few months go by and failed to contest the balance on a monthly credit card statement would forfeit his right to contest the debt at trial.

Further illumination on this issue can be found in 15 U.S.C. §1692(g) of the FDCPA, which governs the debt collector's responsibility to provide the consumer with written notice of certain information concerning the debt, including the amount of the debt and the name of the creditor. Within that section, §1692g(c) states, "The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer." While this section of the FDCPA is not controlling here, it is informative that the Missouri Court of Appeals and Congress's explicit prohibition within the FDCPA both agree that it would be unjust to allow a consumer's silence in the face of a collections statement to imply an admission of liability for the stated balance. Yet that is what CACH would urge this Court to do.

"Mere failure to object [to a bill] is not conclusive but raises a rebuttable presumption of an account stated." *Chisler v. Staats*, 502 S.W.2d 424 (Mo. App., 1973). Here, the presumption is rebutted by the fact that Askew disputed the account with CACH (Ttr. p. 92), as evidenced by Bramford's phone log (**Exhibit B**), the dispute letter sent by Askew (**Exhibit D)** (A-38), and by Askew's denials in his Answer and Defenses to CACH's Petition (LF p. 11). So while there was no admissible evidence before the

court that Askew had agreed to pay the particular balance sought by CACH, there was admissible evidence that he had *not* agreed to that balance.

Point Three Conclusion

The Court need not reach the issue of CACH's account stated theory of recovery, because CACH lacked standing to sue. But if the Court did reach the issue of account stated, it would find that CACH had failed to prove by a preponderance of admissible evidence that Askew had agreed to a correct and final balance on the account, or that Askew had agreed, either expressly or implicitly, to pay any particular balance. For these reasons, CACH's account stated theory of recovery would fail.

Fourth Point Relied On: The trial court erred when it granted judgment to CACH on Breach of Contract because there was insufficient evidence of a breach of contract, in that there was no contract between the parties in evidence, no evidence of a meeting of the minds between the parties, and no evidence of a legally recoverable amount of damages.

Standard of Review

This Point involves the misapplication of the law to the factual record of the case, and as such is reviewed de novo. *Missouri State Medical Assn'n v. State*, 256 S.W.3d 85, 87 (Mo.banc., 2008). The judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron,* 536 S.W.2d 30 (Mo., 1976).

CACH Cannot Recover On a Breach of Contract Theory

Askew's First and Second Points Relied On are dispositive of this case. As has been briefed, CACH lacked standing to sue, and so the Court need not reach the substantive issues of the case. Yet if the Court did reach the issue of CACH's breach of contract theory of recovery, it would find that CACH failed to prove the elements of its claim by a preponderance of admissible evidence. A claim for breach of contract requires proof of the following elements: 1) A meeting of the minds regarding all of the essential elements of the contract or agreement; 2) consideration provided by each party to the contract; 3) assent by the parties to the terms of the contract or agreement; 4) breach by one party and performance by the other; and 5) damages proximately arising therefrom. *Leo Journagan Constr. Co., Inc. v. City Utilities of Springfield, Mo.*, 116 S.W.3d 711, 717 (Mo. App., 2003).

"Before a plaintiff can establish a breach of contract, he or she must first establish the existence of a contract." *Pride v. Lewis*, 179 S.W.3d 375, 379 (Mo. App., 2005), citing *Volker Court, LLC v. Santa Fe Apartments, LLC*, 130 S.W.3d 607, 611 (Mo. App., 2004). As discussed above, **Exhibit 11**, the Providian card member agreement, was inadmissible hearsay, because there was no proper foundation laid for it. CACH's claim for breach of contract therefore fails, as there is no contract in evidence before the court. Additionally, "there can be no enforceable agreement unless the contracting parties may be identified with reasonable certainty." *Shofler v. Jordan*, 284 S.W.2d 612 at 614 (Mo. App., 1955). Even if **Exhibit 11** had been admissible, it does not contain Askew's name or account number (A-30 to A-31).

CACH Failed To Prove a Meeting of the Minds

Even if **Exhibit 11** were admissible, there is no evidence before the Court that Askew had agreed to its terms. It is true that when a consumer receives a cardholder agreement, reads it, understands it, and then uses the card to make purchases, his acceptance of the agreement may be implied by his use of the card. *Citibank (South Dakota), N.A. v. Wilson*, 160 S.W.3d 810 (Mo. App., 2005). The *Wilson* Court stated:

> "Acceptance of an offer need not be made by spoken or written word. *Envtl. Waste Mgmt., Inc. v. Indus. Excavating & Equip. Inc*., 981 S.W.2d 607, 612 (Mo. App. 1998). An offer may, instead, be accepted by the offeree's conduct or failure to act. *Id*. This is especially true where services are rendered under circumstances such that the party benefited thereby knows the terms on which they are being offered. *Id." Id.* at 813.

However, unlike the case at bar, there was no dispute that Wilson had received and read the credit card agreement, so there was no issue of a meeting of the minds in the *Wilson* case. *Wilson,* 160 S.W.3d at 810. Here, there was no evidence that **Exhibit 11** was ever sent to Askew, or that he ever received it or read it. In fact, Askew's uncontradicted testimony was that he had not seen **Exhibit 11** prior to litigation (TTt. p. 93).

Eakins testified that card agreements are generally mailed with the applications (TTr. p. 48). However, she also testified that she had no knowledge of the business practices of Providian in 1998 (TTr. p. 48) and, contrary to Eakins' testimony, all of the evidence indicates that **Exhibit 11** was not mailed with the application in this case. The

application refers to June 18th, 1998 in the future tense (A-14) and **Exhibit 11** refers to November, 1998 in the past tense (A-30) so the application was sent to Askew at least five months before **Exhibit 11** was even drafted. Second, the application card itself states that an agreement would be sent to Askew at a later date, not that the agreement was enclosed with the application. "It is elementary that in order to make a contract there must be, among other things, a meeting of the minds of the contracting parties regarding the same thing, at the same time." *Southern Real Estate & Finance Co. v. Park Drug Co.*, 344 Mo. 397 (Mo., 1939) *citing State ex rel. Equitable Life Assur. Society v. Robertson et al.*, 191 S.W. 989 at 991 (Mo., 1916).

Even if there had been evidence that Askew had received and read **Exhibit 11**, there is no evidence that he used the card to make purchases after receiving it. **Exhibit 2** was inadmissible, but even if the monthly statements had been admissible, they do not reflect a single purchase on the account (A-15 to A-21) much less a purchase made after November, 1998. Therefore, Unlike the *Wilson* case, there is no use of the card after receipt of **Exhibit 11** by which the court could imply Askew's acceptance of **Exhibit 11**'s terms and conditions. Finally, Askew's uncontroverted testimony was that he did not agree to **Exhibit 11's** terms (TTr. p. 93). CACH did not prove a meeting of the minds, and so its breach of contract claim fails.

CACH Failed to Prove Contract Damages

CACH failed to prove that the balance sought was calculated pursuant to a contract. Even if Askew had agreed to its terms and conditions, **Exhibit 11** would not aid CACH in collecting any particular balance.

> "It has long been settled that, for a contract to be valid and enforceable, the essential terms thereof must be certain or capable of being rendered certain through application of the ordinary canons of construction or by reference to something certain or, as the same thought has been expressed frequently in other language, that the terms of the agreement must be sufficiently definite to enable a court to give it an exact meaning." *Shofler v. Jordan*, 284 S.W.2d 612, 614 (Mo. App., 1955) (internal cites omitted).

The fifth paragraph of **Exhibit 11** explains that the interest rate on the account is based upon the prime rate published in the *Wall Street Journal* (A-30). Without the relevant issues of the *Wall Street Journal* in evidence, there was no evidence before the Court as to what interest rates were agreed to, or whether or not those rates in fact corresponded to the rates charged on the account.

In that vein, even if CACH had proven a contract, in order to collect damages, CACH must have proven that the balance it sought was calculated pursuant to the terms of that contract.

> "It is essential … that plaintiff show not only that he suffered damages but he must also show the amount of the damages with sufficient certainty to warrant the jury in estimating their extent…. And if the party upon whom rests the burden of this proof leaves the jury to grope wholly in the dark, or to mere conjecture, he ought not to recover any substantial damages." *Truck Ins. Exchange v. Bill Rodekopf Motors, Inc*., 623 S.W.2d 612 (Mo. App. W.D., 1981) (internal cites omitted).

CACH failed to produce any evidence in this regard. **Exhibit 2** was inadmissible, but even if it had been admissible, there was no evidence than any of the seven monthly statements contained the final balance on the account. **Exhibit 9** stated a balance on the account, but was likewise inadmissible.

Even if **Exhibit 9** itself had been admissible, the balance and other account information contained within **Exhibit 9** would still be hearsay not within any exception.

> "Although a record shown to comply with the [Missouri Uniform Business Records as Evidence] Act is itself admissible, the Act does not make admissible any evidence which would be incompetent if offered in person. … For example… a recital in a highway patrol report that a 'car had been reported stolen to the Kansas City Police earlier in the day,' was excluded as hearsay on hearsay as contrasted to an offer of the Kansas City police record showing a report of theft of the car which would present a different situation." *Tri-State Motor Transit Co. v. Navajo Freight Lines, Inc*., 528 S.W.2d 475, 485-486 (Mo. App., 1975).

"If the content of the record could not have been testified to by the reporter had he been offered as a witness present in court, then that content will not be admitted into evidence as a part of a business record." *State v. Boyington,* 544 S.W.2d 300, 305 (Mo. App., 1976). Here, the balance listed in **Exhibit 9** was a dollar figure from Washington Mutual, passed on to Worldwide, which in turn passed it on to CACH. Worldwide's document, **Exhibit 9,** contained hearsay that Worldwide itself would not have been able to testify to. So even if Eakins could have laid a foundation for Worldwide's document,

the balance it contained was still hearsay not within any exception. Likewise, any testimony from Eakins concerning a balance amount would likewise be hearsay not within any exception.

So even if it could satisfy the other elements of its cause of action, CACH could not prove any amount of legally recoverable damages. CACH's breach of contract theory must fail.

Point Four Conclusion

The Court need not reach the issue of CACH's breach of contract theory of recovery, because CACH lacked standing to sue. But if the Court did reach the issue of breach of contract, it would find that CACH failed to put a contract between the parties into evidence, failed to prove by a preponderance of admissible evidence there was a meeting of the minds between the parties, failed to prove what the essential and material terms of that contract were, and failed to prove that the damages sought were calculated pursuant to that contract. For these reasons, CACH's breach of contract theory of recovery should fail.

GENERAL CONCLUSION

The trial court erred when it admitted **Exhibits 2, 7, 9, and 11** into evidence because Eakins was not qualified to sponsor the documents, and proper foundations as business records were not laid for these documents pursuant to §490.680. The trial court further erred when it allowed Eakins to testify regarding the alleged assignments of Askew's account, because said testimony was hearsay not within any exception and in violation of the best evidence rule. Absent these exhibits and this testimony, there was no evidence that CACH had been assigned Askew's account, and so CACH lacked standing to sue. The trial court's judgment in favor of CACH should be reversed, and CACH's case should be dismissed without prejudice.

Additionally, even if **Exhibits 2, 7, 9, and 11** had been admissible, CACH still would have failed to prove the elements of an account stated by a preponderance of admissible evidence. CACH failed to prove that there was an agreement between the parties as to a correct and final balance due, or that Askew promised to pay a particular account balance.

Finally even if **Exhibits 2, 7, 9, and 11** had been admissible, CACH failed to prove the elements of a breach of contract by a preponderance of admissible evidence. There was no contract between the parties, no evidence of a meeting of the minds between the parties as to the essential terms of a contract, and CACH did not demonstrate that the damages it sought were calculated pursuant to the contract that it alleged controlled the account. Therefore, it could not recover on a breach of contract theory. So

even if the exhibits had been admissible, the trial court's judgment in favor of CACH should be reversed.

CERTIFICATION

Appellant hereby certifies that the foregoing Substitution Brief includes all of the information required by Missouri Rule 55.03 and states that the Brief complies with the limitations of Missouri Rule 84.06(b). According to the word count function of Microsoft® Word 2008, this Substitution Brief is 12,388 words long.

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Certificate of Service

The undersigned hereby subscribes and certifies that a copy of the foregoing was affixed with proper First Class postage, deposited in the U.S. Mail on October 12th, 2011, and addressed to the following attorney(s) of record, said attorney(s) having also been served a copy of the foregoing via the Supreme Court of Missouri's electronic filing system:

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