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

SUBSTITUTE REPLY BRIEF OF APPELLANT JON ASKEW

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Eakins: The Unqualified Witness

CACH's Statement of Facts is saturated with argument and misrepresentations. Askew encourages the Court to instead rely upon Askew's objectively stated facts. The most egregious of CACH's misrepresentations, repeated continuously throughout its Substitute Response Brief[1], is the statement that Eakins received records training with Providian, Washington Mutual and Worldwide. To disperse the obfuscation concerning Eakins' qualifications to lay foundations for these companies' documents, Askew presents the following exchange between Askew's Counsel and Eakins, concerning **Exhibit 11**, the Providian cardmember agreement:

> Q: And do you have any personal knowledge about the business practices of Providian in 1998?
>
> A: No.
>
> Q: All right.
>
> A: I'm not sure I understand that question.
>
> Q: And do you – are you aware of whether – You don't have any information that Mr. Askew ever even received this Providian document do you?
>
> THE COURT: Do you understand the question, ma'am?

[1] Hereinafter "SRB".

THE WITNESS: I –

THE COURT: It's a yes or no.

THE WITNESS: It – I can say that I have been to bank training with most of the major banks that we deal with, and it is common practice that when an account holder receives the application, that the cardholder agreement that's in effect at the time is accompanied with the application. (Ttr. 48).

In the entire transcript, this was the only testimony concerning any training Eakins received, and it was presented on cross-examination in response to whether she knew if Askew had ever received **Exhibit 11**. There was no attempt by CACH at any time during the trial to present any evidence that Eakins had trained at Providian, Washington Mutual or Worldwide, or that she was in any way qualified to lay foundations for documents created by those companies.

Additionally Eakins was wrong about **Exhibit 11** being sent with the application, as **Exhibit 11** was not even drafted until several months after the account was applied for. This is additional evidence that Eakins was unfamiliar with Providian's business practices.

***Asset v. Lodge*: A Distinction Without A Difference**

CACH argues that *Asset v. Lodge*, 325 S.W.3d 525 (Mo. App., 2010) is distinguishable from the case at bar because the *Lodge* witness's testimony was

based on "mere conjecture" (SRB 24). The following testimony of Michael Beach, the *Lodge* witness, is taken from the *Lodge* trial transcript (see Appendix):

Q Now, could you give the Court a little bit of your background as well on part of the time that you worked for Asset Acceptance, what your background in this area is?

A I've been in the credit industry since 1990 approximately. I've worked for Asset Acceptance for the last ten years. Prior to that, I worked for private law firms and prior to that my practice law firms I worked in the credit industry with a credit union, I was a staff attorney. That was a credit union that had extensive lending in collection activities.

Q Did the credit union also issue credit cards?

A They issue credit cards, signature loans, secure automobile loans.

Q In your employment with the credit union did you become familiar with the practices of credit card companies and how they keep records, different documents that are executed between borrowers or card holders and the credit union?

A Yes, I did.

Q And also in the course of your duties as an attorney and also in working for Asset Acceptance LLC have you acquired knowledge about how records are kept and how documents are

prepared in the credit card industry generally?

A Yes, I have.

Q Now, I'll direct your attention are you familiar with the account that we filed suit here on today involving Ms. Marjorie Lodge?

A Yes, I'm familiar with Marjorie Lodge's account. (Appendix 1-2).

Eakins' essentially non-existent testimony concerning her qualifications as a sponsor for the original creditor's records was far less specific and enlightening than Beach's. Nonetheless, Eakins' testimony amounts to "I trained at some banks" whereas Beach's amounts to "I've worked at a credit union and in the industry." Neither testified as to specific training at the specific companies that created the documents at issue, or whether their general training had anything to do with the records which they were attempting to sponsor. There is no significant distinction between the two witnesses' testimony. Neither was qualified to lay foundations for another entity's business records.

The Straw Man Fights Back

CACH characterizes Askew's position as arguing that a sponsor must personally witness the creation of each document, then CACH offers some cases to knock down this straw man (SRB 21). First, Askew does not allege anything of the kind. Second, the cases cited by CACH in this argument concern witnesses

from companies that actually created the documents. So, these cases support Askew, not CACH, and review of these cases offers additional justification for Askew's position. For instance, *Nash v. Sauerberger,* 629 S.W.2d 491, 492 (Mo. App. E.D., 1981) allowed the transmission of documents from one person to another *within the same company that created the documents.* The *Nash* court relied on *State v. Boyington,* 544 S.W.2d 300, 305 (Mo. App., 1976) for this, stating:

> "But all the Act does is eliminate the hearsay objection to the report itself; "... it does not make admissible any evidence which would be incompetent if offered in person." Therefore, before any item in such a record may be admitted into evidence under the Act, it must be shown to be " '... based on the entrant's own observation or on information of others whose business duty it was to transmit it to the entrant.' (citation omitted)" State v. Boyington, 544 S.W.2d 300, 305 (Mo.App.1976)." *Nash v. Sauerberger*, 629 S.W.2d at 492. (other internal citation omitted).

Note that even if transmitted from one employee to another within the same company, the document must still be based on the information of the transmitter, not based on information of the receiver. *Boyington* likewise dealt with records transmitted between employees within the same company, and offers the following further illumination:

> "The writing sought to be admitted as a business record must relate to a condition, act or event which is an integral part of the business activity. A writing which does not pertain to a matter 'in which the business was a direct participant, but to some incident, circumstance, or activity outside that business,' is not properly admissible as a part of the business record." *Boyington*, 544 S.W.2d at 305. (internal cites omitted).

Here, CACH was not a direct participant in the matters referred to in **Exhibits 2, 7 or 11**, so under *Boyington* these exhibits are not admissible by CACH as business records. This reasoning pervades the long line of caselaw, beginning with this Court's decision in *State v. Anderson*, 413 S.W.2d 161 (Mo., 1967), holding that the sponsor of a business record must be from the company that actually created the document.

CACH incorrectly argues that all of the sponsors in the *Anderson* line of cases failed to testify as to the elements of §490.680 (SRB 19), implying that the sponsors' status as employees of companies that did not create the documents was irrelevant to the decisions in those cases. Most of the decisions in this line found that the sponsor failed to testify as to the elements of §490.680 in *addition* to not being qualified to do so by virtue of their employment with other companies. The courts in these cases would not bother to discuss the employment status of the witnesses if that status did not effect the witnesses' ability to lay foundations for the documents. Additionally, CACH's statement is untrue: In *Zundel v.*

Bommarito, 778 S.W.2d 954 (Mo. App., 1989), the sufficiency (or lack thereof) of the sponsor's testimony regarding the elements of §490.680 was not even mentioned by the court. Instead, the court refused to allow a bank's records custodian to qualify documents as business records solely because the documents were not created by the bank:

> "We find the exclusion of Exhibits 14, 15 and 16 was not error for the following reasons…. The evidence was hearsay and was not, as plaintiff argues, an exception as a business record. *The business records exception to the hearsay rule applies only to documents generated by the business itself.* Here the evidence plaintiff sought was not documents generated and qualified by the bank during the bank's course of business. These documents were part of a file belonging to the bank, *they were not generated by the bank and thus are not business records of the bank.* 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 1986."
>
> *Id.* at 958 (emphasis added).

This ruling is consistent with the reasoning of *Boyington* and many other cases. Also consistent with this logic is the line of cases holding that business records cannot contain hearsay. Among these is *State v. Vance*, 633 S.W.2d 442

(Mo. App. W.D., 1982), holding that a police report containing statements made to the reporting officer contains hearsay:

> "…the Act does not make all records competent evidence regardless of by whom, in what manner, or for what purpose they were compiled or offered. Qualification under the Act does not make admissible any evidence which would be incompetent if offered in person. 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. The report contained statements made by White to Officer McGaughy, based upon White's observations, and, as such, was hearsay and not admissible under any exception to the hearsay rule. As the trial judge noted, if Officer McGaughy had been present to testify, he could not have testified as to what White had told him."
>
> *Id.* at 444.

The logic that drives these cases is applicable to the case at bar, in that the documents at issue here are effectively statements made by Worldwide to CACH, and statements made by Washington Mutual to Worldwide. CACH cannot testify as to what Worldwide told it, and CACH cannot testify as to what Washington Mutual told Worldwide. Which is what CACH would be doing if it were allowed to lay a foundation for these documents. All of these cases, and many more, are

consistent with each other, and each provides ample reasoning against CACH's position.

The Documents Were Inadmissible

CACH wrongly states that Eakins laid proper foundations for each document in question. Eakins was not qualified to lay foundations for the documents in this case, so the Court need not reach the question of whether or not she adequately testified to each of the elements required by §490.680 for each document. But if, for the sake of argument, she had been qualified to lay the foundations, she failed to do so. Askew invites the Court to review his Substitute Brief for an analysis of the lack of foundation pertaining to each individual document. However, Askew is compelled to address a few of CACH's arguments on this issue.

CACH cites *Dickerson v Director of Revenue, State of Mo*., 957 S.W.2d 478, 480 (Mo. App. E.D., 1997) for the proposition that "if the opponent of the proffered records fails to produce any evidence that contradicts the content of the records, the trial court must admit the records into evidence." The *Dickerson* court relied upon *Tebow v. Director of Revenue, State of Mo.,* 921 S.W.2d 110, 113 (Mo. App. W.D., 1996) for this statement, and the *Tebow* court was clear that this only applies if the proponent has already complied with all of the requirements of §490.680. As discussed by the *Dickerson* court, "Petitioner advances three reasons why we should affirm the trial court's decision to exclude

the records from evidence *despite the director's compliance with the foundational requirements of the statute*." *Id.* (emphasis added). Hearsay does not become admissible simply because it is not contradicted, and CACH's reliance on *Dickerson* is misplaced.

CACH states that it is more than just a "conduit to the flow of records" (SRB 20), yet CACH is in the exact position that the debt buyers in *Lodge* and *C & W Asset Acquisition, LLC v. Somogyi*, 136 S.W.3d 134 (Mo. App. S.D., 2004) were in when the Appellate Court used that term. Each company allegedly purchased a debt, and attempted to lay foundations for the original creditor's documents in an effort to collect on the debt. There is no difference in the debt collectors' relationships to the documents in question.

CACH argues that this case is similar to *State v. Carruth*, 166 S.W.3d 589 (Mo. App., 2005). The witness in *Carruth*, a highly qualified fingerprint technician, testified at length as to the mode of preparation of the fingerprint cards which she was sponsoring, and which are prepared the same way in all police stations. In contrast, Eakins did not testify as to the mode of preparation of any of the documents in this case, despite CACH's repeated insistence to the contrary.

Lastly, CACH argues that the Court should defer to the trial court (SRB 20). There is ample evidence that the trial court, which merely signed off on CACH's proposed findings of fact and conclusions of law, lacked careful consideration of the issues presented. For example, no foundation of any kind was laid for **Exhibit 2** pursuant to §490.680, yet the trial court admitted it into

evidence. Additionally, four decades of case law tell us the trial court erred when it admitted these documents into evidence. No deference need be given in the face of such a clear abuse of discretion.

Without Exhibits 2, 7, 9 and 11 Askew Wins

CACH argues that it would still prevail without the documents at issue. CACH's argument necessarily assumes that Eakins' testimony can serve as an independent source of evidence, without any documentation to support it. This assumption underscores CACH's approach to this entire case -- namely, that CACH is so "reliable" the Court should simply allow CACH to disregard the rules of evidence. CACH relies entirely upon Eakins' hearsay testimony for this argument, but all of Eakins' testimony is based upon her review of the very documents CACH claims it could prevail without. For example, it is impossible for Eakins to have "personal knowledge" of the assignment from Washington Mutual to Worldwide, which did not even involve CACH. CACH's argument overlooks its need to prove standing through proof of assignment of the account, which cannot be achieved without **Exhibits 7 and 9**. Without **Exhibits 2 or 9**, CACH has no proof of a balance on the account. Without **Exhibit 11**, CACH lacks proof of the existence of a contract or any justification for contract damages, either of which is fatal to its breach of contract claim. Finally, CACH lacks proof of a meeting of the minds.

The Documents Are Not Verbal Acts

The Missouri Creditor's Bar argues that some of the documents at issue are verbal acts and therefore not hearsay. (Amicus Brief p. 4-9). This Court has said:

> "However, that [verbal acts] rule permits the use of extra judicial statements only when such statements are not offered as evidence of the fact stated, but are offered 'irrespective of the truth of any assertion they may contain.' 6 Wigmore on Evidence (3rd ed.), § 1772, p. 191 (1940)." *State v. Schuh*, 497 S.W.2d 136, 138 (Mo., 1973).

Here, the documents are offered for the assertions they contain. For example, **Exhibit 9** is offered for the account balance it indicates and for the proposition that CACH's bill of sale pertains to Askew's account. **Exhibit 11** is offered to support CACH's contentions that Providian was allowed to assign the account, and that compound interest, fees and contract interest rates were authorized on the account. **Exibits 7 and 8** are offered to support the assertion that CACH owns Askew's account. The documents therefore fall outside the verbal acts rule and are hearsay. As this Court has stated:

> "'As a general rule, the execution or authenticity of a private writing must be established before it may be admitted in evidence.' 32 C.J.S., Evidence, Secs. 733 and 741; 20 Am.Jur., Evidence, Sec. 922, p. 776; Ramsey v. Waters, 1 Mo. 406 (bill of sale); Lewin v. Dille, 17 Mo. 64 (contract); Wonderly v. Lafayette County, 150 Mo.

635, 644, 51 S.W. 745, 45 L.R.A. 386 (assignment)…Tittman v. Thornton, 107 Mo. 500, 509, 17 S.W. 979, 16 L.R.A. 410 (assignment); Johnson v. American Ry. Exp. Co., Mo.App., 245 S.W. 1071, 1072 (contract); Ruckman v. R. C. Stone Mill. Co., 139 Mo.App. 256, 259, 123 S.W. 69 (contract). Plaintiffs had the burden of proof to establish a valid assignment." *Cummins v. Dixon*, 265 S.W.2d 386, 394 (Mo., 1954).

CACH was required to lay foundations for the documents pursuant to §490.680, and it failed to do so. The documents were inadmissible hearsay.

CACH LACKS STANDING

Eakins' Testimony Regarding Assignment Was Inadmissible

CACH attacks Askew's argument concerning the inadmissibility of Eakins' testimony regarding standing, by attempting to distinguish the instant case from *Kelly v. State Farm Mutual Automobile Insurance Company*, 218 S.W.3d 517 (Mo. App., 2007) (SRB 38). *Kelly* holds that parole evidence in interpreting a contract is inadmissible even without objection. First, CACH argues that the *Kelly* opinion only applies to the interpretation of ambiguous contracts, despite the fact that the *Kelly* court did not limit its holding in that way. Next, CACH argues that the documents in the instant case are unambiguous and need no interpretation (SRB 38). **Exhibits 7 and 8** are completely ambiguous, as they are bills of sale that do not even identify what accounts they are allegedly transferring, and they

state that they transfer those accounts pursuant to the terms and conditions of agreements that were not produced at trial. **Exhibit 9** is an unlabeled strip of redacted data, which does not identify what it is, or what bill of sale, if any, it applies to. **Exhibit 11** is an agreement that does not even mention what party it supposedly binds. The documents in this case are extremely ambiguous and are utterly dependant upon interpretation.

CACH also cites *Keystone Agency, Inc. v. Herrin*, 585 S.W.2d 313 (Mo. App. W.D., 1979). In that case, Appellant didn't buy the note from the original company when the originator went out of business – Appellant owned the original company. The *Keystone* court found that the witness's testimony that it owned the Dobson corporation was admissible absent any defense on that issue (*Keystone*, 585 S.W.2d at 315) just as Eakins' testimony that Square Two Financial owns CACH is admissible absent any defense brought on it. But CACH misapplies the *Keystone* case, as that case is inapplicable to the issue of the admissibility of Eakins' testimony regarding the assignment documents, particularly in the face of Askew's stalwart defense on this issue.

Bizarrely, CACH correctly states that the best evidence rule applies to proof of the operative terms of substantive writings (SRB 40), while simultaneously (and incorrectly) arguing that the rule does not apply to the operative terms of the obviously substantive writings that are at issue in this case. CACH then misrepresents *Hallmark v. Stillings*, 648 S.W.2d 230, 234 (Mo. App. S.D., 1983). *Hallmark* addresses the inadmissibility of testimony concerning

ownership of property requiring "a formal instrument of creation or transfer." Obviously, the formal instruments of transfer in this case are **Exhibits 7, 8 and 9**, as well as the purchase agreements referenced in each bill of sale. Eakins' testimony regarding CACH's alleged ownership is the very kind of inadmissible testimony *Hallmark* prohibits.

The Bills of Sale Would Be Insufficient, Even If They Were Admissible

Even if the bills of sale had been admissible, they would still be insufficient to prove standing. Contrary to CACH's argument, the bills of sale at issue are nothing like a car title. A car title is issued by a state agency (the Department of Revenue), pursuant to a precise statutory and regulatory framework. The DOR keeps detailed records of the entire chain of title for a vehicle, and issues a certified and sealed title identifying the one car that title applies to with the year, make, model and vehicle identification number. **Exhibit 7** is more like a self-serving, hand-written note that simply states, "C hereby sells a lot of cars to D, as is, with no warranties." Like **Exhibit 7**, nothing in this second example identifies what is being sold, or establishing a chain of title from A to B to C demonstrating that C owns the cars and is able to legally transfer them to D. Yet CACH would argue that this unreliable scrap of paper is sufficient to prove D's ownership of one specific car, allowing D the right to repossess it.

CACH cites *American First Federal v. Battlefield Ctr.,* 282 S.W.3d 1, 5 (Mo. App., 2009) for the proposition that any bill of sale demonstrates transfer of an

account (SRB 42). However, *Battlefield* does not stand for such a broad proposition, and the *Battlefield* facts are easily distinguished from the case at bar. *Battlefield* involved the assignment of a loan and guaranty interest for a single account. In the *Battlefield* case, the asset sale agreement, which specifically named that one and only account, was in evidence, but the bill of sale was not. So in the *Battlefield* case, unlike the case at bar, there was no ambiguity over what account was actually being assigned by the document that was offered at trial. Obviously, a bill of sale such as **Exhibit 7**, that does not specify what accounts it allegedly transfers, would not support CACH's claim of assignment of Askew's specific account even if **Exhibit 7** had been admissible.

CACH spends considerable effort arguing that a full chain of title is not necessary to prove standing, and that CACH is only required to prove the last link in the chain of assignment (SRB 45-46). Askew believes the unjust and illogical nature of this argument is self-evident, but will point out that, in addition to the Missouri precedent previously cited in his Substitute Brief, courts in other jurisdictions have found that proof of the full chain of title is necessary to establish standing in collections cases. See *Unifund v. Shah*, 946 N.E.2d 885 (Ill. App. 2011); and *Colville v. Koch*, 234 F.2d 157, 161 (C.A.9 (Cal.), 1956).

Exhibit 9 is One Document, Not Two

CACH argues that **Exhibit 9** is both a redacted page from Appendix A to the Purchase And Sales Agreement between Washington Mutual and Worldwide referenced in **Exhibit 7**, and that **Exhibit 9** is simultaneously a redacted page from the Account Sale Agreement between Worldwide and CACH referenced in **Exhibit 8**. (SRB 9). CACH even goes so far as to refer to **Exhibit 9** as "Account Schedule/list of accounts" in an effort to promote this misperception (SRB 43). **Exhibit 9** is not admissible, but even if it were, CACH's argument that it is simultaneously a redacted part from two different documents is disingenuous at best. **Exhibit 7** states:

> "Washington Mutual Bank, for value received and in accordance with the terms of *the Purchase and Sale Agreement by and between Washington Mutual Bank and Worldwide Asset Purchasing II, LLC*…does hereby…transfer the Accounts listed in the *Account Schedule attached* (as may be amended in accordance with the Agreement) *as Appendix A to the Agreement,* without representation or warranty of collectability, or otherwise, except to the extent stated in the Agreement." (emphasis added).

Exhibit 8 states:

> "Worldwide Asset Purchasing II, LLC ("Seller") for value received and pursuant to the terms and conditions of an *Account Sale Agreement by and between Seller and CACH, LLC* ("Buyer")…does hereby… convey to Buyer…all right, title and interest of Seller in

and to those certain *Accounts as defined in the Agreement*, without recourse and without representation of or warranty or collectability, or otherwise, except to the extent provided for within the Agreement." (emphasis added).

The Account Schedule attached as Appendix A of the Purchase and Sale Agreement between Washington Mutual and Worldwide is a different document than the Account Sale Agreement between Worldwide and CACH. Two distinct transactions were conducted at arm's length between different companies, using different documents, with different names. The first was between Washington Mutual and Worldwide. The second was between Worldwide and CACH. These transactions may have been conducted on the same day. They may have even transferred the same information. But they did so through different documents. The Account Schedule from the first transaction is not the same document as the Account Sale Agreement from the second transaction between different companies.

Eakins only testified that **Exhibit 9** corresponds to **Exhibit 8** (Ttr. 38) and Eakins admitted that **Exhibit 9** contains CACH's internal tracking number (Ttr. 39-40). The first assignment, referred to by **Exhibit 7**, did not even involve CACH, so the Account Schedule referenced in **Exhibit 7** would not contain CACH's internal tracking number. **Exhibit 9** pertains only to the second bill of sale, and even if it were admissible, **Exhibit 9** would have no bearing on the

sufficiency of evidence for the first assignment in the chain. CACH's representation to the contrary should be disregarded.

Askew Cannot and Did Not Waive The Issue of Standing

CACH repeatedly states that Askew testified that "he would not pay a debt he did not owe" (SRB 44) and attempts to use this to prove various elements of its claim, including standing. The trial transcript reveals that CACH twists the nature of the relevant testimony in an effort to draw an illogical conclusion from a faulty premise:

> Q: Okay. Do you make a habit of paying on debts that you don't owe?
>
> A: Well, and because Bamford's office terrorized my wife on the phone—
>
> Q: I'm just asking yes or no.
>
> MR. DEVEREUX: Well, I'd like him to be given an opportunity to answer, Judge.
>
> THE COURT: Well, the—
>
> THE WITNESS: No, you asked—
>
> THE COURT: Wait, wait.
>
> THE WITNESS: I'm sorry, Your Honor.

THE COURT: Maybe the Court could refocus everyone. I agree that the witness should be allowed to answer, but it was a yes or no question.

THE WITNESS: Then restate the question, please.

BY MS. JONES:

Q: Do you make a habit of paying on debts that you don't owe?

A: No. (TTr. p. 102).

The question was whether Askew makes a *habit* of paying on debts that he does not owe. The question was not whether Askew did so in this instance. No one makes a *habit* of paying debts they do not owe, even if they would pay such a debt once or twice given extenuating circumstances. Askew was obviously trying to explain the extenuating circumstances in this instance, when the Court instructed him to answer with a simple yes or no. This forced answer to an unfair question forms the flawed basis of CACH's argument. CACH then spins this into the all-encompassing statement that "Askew testified he does not pay debts he does not owe" (SRB 47).

Just as the factual basis for CACH's argument is flawed, so too is the logical conclusion. For CACH then asserts that by making a payment, Askew has admitted that CACH owns his account and therefore has standing to sue (SRB 44). To draw an analogy, if a man in a trench coat standing on a street corner offered to sell Mrs. Askew the Brooklyn Bridge, and she made a payment to him, that payment would not be evidence that the Brooklyn Bridge was actually Mr.

Trenchcoat's to sell. This is circular logic. The fact that a payment was made to CACH is not evidence that CACH was legally entitled to that payment. At best, it is merely evidence that CACH told Mrs. Askew that it had a right to collect on the account and she was gullible enough to believe it. Additionally, Askew testified that he had no knowledge regarding any purported transfers of his account. (TTr. 13.). A person with no knowledge of something cannot admit the truth or falsity of that thing, and certainly cannot be held to have implicitly done so. Finally, acceptance of CACH's argument would amount to a waiver of the issue of standing, and lack of standing cannot be waived. *Farmer v. Kinder*, 89 S.W.3d 447 (Mo., 2002).

Askew's Arguments Are Properly Raised

CACH argues that several arguments were not raised in Askew's original brief. CACH argues that Askew failed to address the issue of damages within his original brief and is therefore prohibited from doing so now (SRB 61). CACH is mistaken, as this issue was addressed on pages 35 and 36 of Askew's original brief. CACH also argues that Askew neglected to address CACH's failure to prove that a balance was struck with regard to its account stated claim. Askew addressed this on pages 31 and 32 of his original brief. CACH also claims that Askew did not allege lack of foundation for **Exhibits 7, 9, and 11** in its original Appellate brief (SRB 32). Askew addressed this on page 41.

Additionally, the admissibility of **Exhibits 7 and 9** go to the issue of CACH's standing to sue, which was addressed on pages 24 through 28 of Askew's original brief. Standing may be raised at any time, including for the first time before the Supreme Court. *State ex rel. Mathewson v. Board of Election Com'rs of St. Louis County*, 841 S.W.2d 633 (Mo., 1992). "Lack of standing cannot be waived." *Farmer*, 89 S.W.3d at 447. So even if, for the sake of argument, Askew had not raised these points in his first brief, he could still do so now. This is equally true of other parts of the standing argument, including CACH's failure to prove a full chain of title on the account, and the inadmissibility of Eakins' testimony concerning the assignment of the account. It would be nonsensical for the Court to rule that only parts of a standing argument can be raised at any time, or that only parts of the standing issue cannot be waived. Rather, the whole issue of standing must be resolved before the Court reaches the substantive issues of the case, for if CACH has not proven standing by a preponderance of admissible evidence, the Court lacks jurisdiction to hear the substantive issues and must dismiss CACH's case. *Id.*

THEORIES OF RECOVERY

CACH Did Not Prove An Account Stated

The Court need not reach the issue of CACH's account stated theory of recovery, as CACH has not proven standing to sue. But should the Court reach

the substantive issues of this theory, Askew relies on his Substitute Brief, and will only make the following comments regarding CACH's arguments.

CACH repeatedly states that Askew authorized his wife to bind him to an agreement (SRB 50). CACH's overreaching argument is derived solely from Eakins' testimony that CACH merely had permission to speak with Mrs. Askew about Askew's account (TTr. p. 81-82). There was no evidence that Mrs. Askew was authorized to bind Aksew to an agreement. And even if Mrs. Askew had such authority, Mrs. Askew only made a payment, she did not promise to pay the entire balance.

CACH mischaracterizes Askew's argument when CACH claims that Askew objects to **Exhibit B** (SRB 51). It is Eakins' testimony concerning inferences she derives from **Exhibit B** that constitutes hearsay, not **Exhibit B** itself. Eakins admitted that Bramford's notes are not part of CACH's records or files (Ttr. 81-82). Eakins was unqualified to testify concerning Bramford's notes, and her testimony that the payment arrangement with Mrs. Askew would have been for the full balance, despite the fact that that information is not contained within the notes, should be disregarded by the Court.

Likewise, the fact that Mr. and Mrs. Askew share a checking account is typical of married life, and does not imply that Askew authorizes or oversees every check written by his wife. The fact that the letter disputing the account with CACH, written when the second check was stopped, was from both Mr. and Mrs. Askew is not evidence that the first check was authorized by Askew. Rather, it is

further evidence that Mr. Askew himself only became involved with the CACH situation after Mrs. Askew wrote the checks.

CACH repeatedly states that Askew agreed to pay the balance in full, (SRB 50) presumably on the assumption that if this statement is repeated often enough, it will be believed despite the lack of evidence supporting it. Askew did not agree to pay the balance sought by CACH. Instead, Askew's wife merely made a payment. By asking the Court to rule that a payment on a credit card account implicitly binds Askew to a promise to pay whatever arbitrary balance is sought by a debt collector, CACH advocates the "absurd result" warned against by the Appellate Court in *Citibank v. Mincks,* 135 S.W.3d 545, 559 (Mo. App. S.D., 2004). This further justifies Askew's position that an account stated theory of recovery should not be applied to a credit card account.

Finally, CACH states that the only evidence that Mrs. Askew was "terrorized" by Bramford's office was Askew's statement to that effect (SRB 54). But Bramford's call notes reveal the truth of Askew's assertion, and contrary to CACH's claim, the trial court did not make a finding that Askew's wife was not terrorized (SRB 55).

CACH Did Not Prove A Breach of Contract

The Court need not reach the issue of CACH's breach of contract theory of recovery, as CACH has not proven standing to sue. But should the Court reach

this issue, it will find CACH's arguments riddled with faulty logic and mis-cited caselaw.

CACH argues that, by signing the application, Askew agreed to be bound by the terms and conditions of the cardmember agreement. But this is moot, as **Exhibit 11** is inadmissible, so there is no agreement before the Court, and we don't know what terms and conditions are referenced by the application.

Even if, for the sake of argument, **Exhibit 11** were admissible, there is no evidence that Askew ever received it. CACH argues that because the application states that a cardmember agreement would be sent to Askew upon receipt of the application, **Exhibit 11** must have been sent to him (SRB 59). This type of circular logic pervades CACH's brief. The truth is that **Exhibit 11** didn't even exist until five months after Askew's application was filled out. There is no evidence before the Court that Askew ever received **Exhibit 11**, much less read it, understood it, or agreed to its terms.

CACH next misrepresents *Citibank (South Dakota) v. Wilson,* 160 S.W.3d 810 (Mo. App., 2005), wrongly stating that under *Wilson* Askew's use of the card constitutes a meeting of the minds (SRB 60). In *Wilson*, the consumer acknowledged having received the revised terms and conditions for her credit card, and acknowledged that she then used her card to make purchases. The *Wilson* court held that Wilson's acceptance of the revised terms and conditions could be implied from her use of the card after having received them. *Id.* at 813. In *Wilson*, unlike the case at bar, there was no issue of the meeting of the minds,

no mention of a meeting of the minds, and the *Wilson* court did not rule that this one action on the part of the consumer (the use of the card) proved two elements of a breach of contract claim (acceptance and meeting of the minds). CACH's representation to the Court in this regard is a fabrication.

CACH further misrepresents *Wilson* by wrongly stating that Askew's failure to cancel the card after notice of the change of terms constitutes acceptance of those new terms (SRB 60). Again, *Wilson* only holds that use of the card to make purchases after having received the new agreement implies acceptance of those new terms. Here, there is no evidence that Askew ever received **Exhibit 11**, or that he even used the card after **Exhibit 11** was drafted. *Wilson* is inapplicable to the facts of this case.

CACH Did Not Prove Contract Damages

In an effort to prove contract damages, CACH attempts to apply an element of an account stated to its breach of contract theory of recovery. CACH argues that Mrs. Askew's partial payment implies an agreement to pay the balance in full (SRB 61, 62). This argument does not apply to a breach of contract theory.

Next, CACH argues that the information contained within **Exhibit 9** is not hearsay within hearsay, but offers no case law to support its stance. Obviously Askew does not "suggest that every item contained within a business record is double hearsay" (SRB 62). Rather Askew correctly points out that the information contained within **Exhibit 9**, such as the account balance, is hearsay contained

within that document, as it was told to CACH by Worldwide, who was told by Washington Mutual. (please see Askew's Substitute Brief, page 41, for discussion).

CACH cites *Wahl v. Midland Credit Management, Inc.*, 556 F.3d 643 (7th Cir., 2009) for the argument that a debt collector is entitled to treat the entire account balance as principal without accounting for how the account balance was derived (SRB 62). CACH's argument is severely misplaced. In *Wahl*, Midland sent Wahl a debt collection letter, containing the total balance due labeled as "principal." Although Wahl did not dispute the total amount owed, Wahl sued Midland, alleging that labeling the balance as "principal" when it was actually made up of principal and interest violated 15 U.S.C. §1692e(2)(A)'s prohibition against the misrepresentation of the character of the debt. *Id.* The *Wahl* court ruled that since Wahl did not dispute the balance amount itself, the misrepresentation was not material and therefore not actionable.

Wahl has been followed by a few other cases (each in the Seventh Circuit). In each, there was no dispute as to the actual dollar amount owed on the account.[2]

[2] See *Wahl v Midland Credit Management, Inc*, 556 F.3d 643, 646 (7th Cir., 2009) stating, "Plaintiff does not argue that Defendants misrepresented the total amount of the debt they were seeking."; *Humes v Blatt, Hasenmiller, Liebsker & Moore*, 2007 WL 2793398 (S.D. Ind. 2007) stating "No facts are in controversy"; *Hahn v Triumph Partnerships*, LLC, 2009 WL 529562 (C.A. 7 (Ill)) stating, "Hahn does

In each case, the consumer admitted owing the amount which the debt collector was trying to collect, and was merely quibbling about how the debt collector chose to label the amounts. In contrast, Askew asserts that CACH is attempting to collect amounts he does not legally owe. Additionally, each of those cases pertained to whether or not the debt collector violated §1692e(2)(A) of the FDCPA, not whether the debt collector proved contract damages.

When misapplied as CACH suggests, the *Wahl* decision would have a ridiculously unjust outcome: a creditor could charge 1,000% interest and $1,000 per month in fees, then simply assign the account to a debt collector, who could re-label it all "principal" and claim that there is now no duty to break down the balance.

"Missouri law is well-settled that an assignee acquires no greater rights than the assignor had at the time of the assignment." *Citibank v Mincks*, 135 S.W.3d 545 (Mo.App. S.D. 2004). And any defense valid against an assignor is valid against its assignee. *Id.* A creditor is not allowed to collect the portions of a balance that are made up of contract rate interest, fees, interest on interest or interest on fees absent a written contract allowing for those charges. *Affiliated Acceptance Corporation v Boggs,* 917 S.W.2d 652, 658 (Mo.App. W.D. 1996). CACH does not have an admissible written contract in evidence before the Court

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not deny owing $1,134.55 [the amount the debt collector was trying to collect]…. Applying an incorrect *rate* of interest would lead to a real injury."

allowing for those charges, and so cannot justify the legality of the balance it seeks to collect.

Policy Considerations

CACH and its friends argue at great length that the debt collection industry is a boon to society[3], and that because it is regulated its records are inherently trustworthy. To the contrary, the debt collection industry is regulated precisely because its notoriously nefarious business practices are a blight on society. Congress felt so strongly about this that it included the following statement as the actual beginning of the FDCPA:

> "There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." §1692a.

[3] CACH and its friends repeatedly stress the economic benefits of debt collectors returning profits to the banks that they collect for. While some debt collectors collect debt for original creditors, CACH is a debt *buyer*. It keeps the money it collects from Missourians, returning nothing to society. Nor does it employ anyone (Ttr. 17-18).

In his recent article, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, published in the University of Maryland's Journal of Business and Technology Law, No. 2011-32, Peter Holland makes the irrefutable argument that corruption, questionable business practices, negligent record keeping[4], and fraudulent records[5] are rampant in the banking and debt buying industries. None of the documents at issue in this case are inherently reliable, and no private industry's documents should be assumed as such by a court of law.

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[4] For example, see CNN report entitled *JPMorgan's Plastic Explosives*, June 24, 2011, about the bank abandoning millions (or possibly billions) of dollars in credit card lawsuits when a whistleblower revealed that JPMorgan's "contemptible failure to maintain proper records – exposed during the foreclosure scandals of the past year – hasn't been limited to their boom-and-bust mortgage businesses."

[5] For example, on the television program *60 Minutes*, a robo-signer admitted to signing 4,000 documents per day as an officer of five different banks. He did so as part of a group of people who did nothing but sign fraudulent affidavits all day. In reality, he was never an officer of any bank." *60 Minutes: The Next Housing Shock* (CBS News television broadcast Apr. 3, 2011), available at http://www.cbsnews.com/video/watch/?id=7361572n (beginning at minute mark 6:47).

Having said that, Askew does not seek to impose a more stringent evidentiary standard on the debt collection industry than that which is imposed on any other litigant, despite the repeated misrepresentation of CACH and its friends to the contrary. All documents from all industries should be treated the same and held to the same foundational standards before being admitted as business records. Nor does Askew ask the Court to change its interpretation of §490.680, as CACH and its friends wrongly represent.

Rather, Askew asks the Court to uphold over four decades of Missouri precedent consistently interpreting our Missouri statute to require that, in order to be admissible, business records must be proven trustworthy from the time of their creation, and not merely from when the most recent party touched them. Courts throughout Missouri have been enforcing §490.680 in accordance with Askew's interpretation for years in debt collection cases.[6] Yet contrary to CACH's self-serving warnings of economic collapse, the debt collection industry continues to thrive in Missouri. According to Case.net, CACH has filed 1,341 collections lawsuits in Missouri so far this year. Of the 768 that have been resolved, 64%

[6] For examples, see *Arrow Financial Services, LLC v. Elmore*, 08SL-AC15565; *Asset Acceptance, LLC v. McClendon*, 0822-AC14179; *Dodeka, LLC v. Mack*, 0822-AC18037; *Portfolio Recovery Associates, LLC* v. Mason, 10LW-AC00373; and *Asset Acceptance v. Lodge*, 325 S.W.3d 525 (Mo. App., 2010).

have resolved through default or consent. Missouri's business records law is not laying waste to the economy or to CACH's business.

It is CACH, not Askew, that seeks to change the law in Missouri, to erode our business records exception to the hearsay rule to accommodate its hearsay-driven business model. But CACH must be held to the same standard as any other litigant. §490.680 specifies that each foundational element must be testified to, including that the document "was *made* in the regular course of business," not "transmitted" to the offerer, as the Federal Rule allows.

Some out-of-state cases, in interpreting other business records statutes, have allowed a debt collector to lay foundations for an original creditor's records. One of those cases stated the rationale behind its decision:

> "[T]o hold otherwise would severely impair the ability of assignees of debt to collect the debt due…" *Krawczyk v. Centurion Capital Corp*., 2009 WL 395458*4, citing *Beal Bank, SSB v. Eurich*, 831 N.E.2d 909, 914 (Mass. 2005).

Unfortunately, the *Krawczyk* court was convinced to indulge the debt collector's business model. But it is CACH that must change its business model to conform to the laws of Missouri, by simply providing a records custodian or a business records affidavit from the original creditor. This generally would not "severely impair" CACH's ability to collect debts, and in fact, is what most debt collectors routinely do when trying cases in Missouri.

In this particular case, CACH argues that the creators of these documents are

no longer in existence. This is a rare situation. However, CACH is not *entitled* to prevail at trial, and hearsay does not become admissible simply because the originator of the information is no longer available. When a witness dies before being able to testify, hearsay evidence of what that witness would have said does not suddenly become admissible. Instead, the case is lost, because the rules of evidence must be obeyed. Companies like CACH buy these defaulted accounts for pennies on the dollar[7], precisely because they assume the high risk of un-collectability. These debts are typically purchased without any warranty as to collectability, accuracy, or availability of records for any particular account. This is why CACH does not want to be required to have the documents sponsored by the creators. In the situation where the original creditor is unable or unwilling to provide a foundation for its documents, CACH is free to pursue collection of that account through less litigious means, such as collections telephone calls and collections letters. But if CACH chooses to file a lawsuit in an attempt to collect a debt, and then chooses to proceed to trial, CACH is required to base its case on admissible evidence, just like any other litigant.

Conclusion

CACH relied on Eakins' hearsay testimony to attempt to lay foundations

[7] *Harvey v. Great Seneca Financial Corp.,* 453 F.3d 324, 327 (6th Cir., 2006); *Portfolio Acquisitions, L.L.C. v. Feltman*, 909 N.E.2d 876 (Ill. 2009).

for documents that were not CACH's business records, including **Exhibits 2, 7, 9, and 11.** Eakins was not qualified to lay foundations for these documents. Even if Eakins had been qualified, she did not lay proper foundations for these documents by testifying to each foundational element as required by §490.680. For both of these reasons, the documents are inadmissible hearsay.

Eakins' testimony regarding the assignments of Askew's account was inadmissible hearsay and in violation of the best evidence rule. Documents of creation and transfer pertaining to Askew's account exist. Those documents are material to the case, are disputed, and are the best evidence of themselves. Therefore, testimony regarding the assignment of Askew's account, an intangible property with a paper trail chain of title, is inadmissible.

Absent the documents and Eakins' testimony, CACH failed to prove that it had been assigned Askew's account by a preponderance of admissible evidence. CACH therefore lacked standing to sue, and its case should be dismissed without prejudice.

Even if CACH had proven standing by a preponderance of admissible evidence, CACH's account stated theory should fail because an account stated should not apply to a credit card account. Even if an account stated could apply to a credit card account, CACH failed to prove that Askew agreed to the balance sought or made an unconditional promised to pay that balance.

Even if CACH had proven standing by a preponderance of admissible evidence, its breach of contract theory should fail. CACH failed admit a contract

into evidence, failed to prove a meeting of the minds, failed to prove that Askew accepted the terms that CACH is attempting to enforce, and failed to prove contract damages.

For all of these reasons, the trial court's judgment in favor of CACH should be reversed.

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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 Substitute Reply Brief is 7,749 words long.

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 November 28th, 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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