IN THE SUPREME COURT OF THE STATE OF MISSOURI

SC 91780

CACH, LLC

Plaintiff/Respondent

v.

JON ASKEW

Defendant/Appellant

SUBSTITUTE RESPONDENT'S BRIEF OF CACH, LLC

EVANS & DIXON, LLC

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STATEMENT OF FACTS

Respondent CACH, LLC[1] filed a petition against Appellant Jon Askew,[2] alleging CACH purchased and was assigned a defaulted credit card account of Askew (L.F. 8-10).[3] CACH alleged Breach of Contract, Account Stated, and Suit on Account as alternate theories of recovery (L.F. 8-10).

At trial, CACH presented the testimony of Diana Eakins.[4] Eakins is the keeper of records for CACH, though CACH has no employees (Tr. 17-18). CACH is a wholly owned subsidiary of Square Two Financial Corporation, formerly Collect America (Tr. 17, 81).

Eakins is an authorized agent of CACH, and has personal knowledge of the purchase and assignment of distressed debts by CACH, including the purchase and assignment of the credit card account of Askew, Account No. 4254490300448469, from the original owner Providian Bank (Tr. 17-20). Providian Bank was purchased by Washington Mutual (Tr. 18-19, 82-83). There was no testimony, however, that Providian

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[1] Hereinafter "Respondent" or "CACH."

[2] Hereinafter "Appellant" or "Askew."

[3] Matters referred to herein that are contained in the Legal File shall be designated as (L.F.__). Matters referred to herein that are contained in the Trial Transcript shall be designated as (Tr.__).

[4] Hereinafter "Eakins."

is "now" or currently Washington Mutual.[5] Providian Bank/Washington Mutual sold Askew's account to Worldwide Asset Purchasing II, LLC[6] (Tr. 18, 21). CACH purchased Askew's account with others in bulk from Worldwide (Tr. 18, 21, 23, 32). CACH is the current owner of Askew's account (Tr. 23).

Eakins trained at most of the major banks CACH deals with, and Providian/Washington Mutual is one of the banks from which CACH purchases debt (Tr. 18-21, 48).[7] Eakins has knowledge as to the mode of preparation of the documents offered into evidence, and how those documents were kept (Tr. 21-24, 44, 48).

When Eakins was asked if she had personal knowledge of Providian's business practices in 1998, she responded, "no…I'm not sure I understand that question" (Tr. 48).[8] Askew's attorney did not rephrase or clarify the question (Tr. 48). Directly thereafter, Eakins testified she trained with the major banks with which CACH deals (Tr. 48).

CACH offered into evidence Exhibit 7, a bill of sale from Washington Mutual Bank to Worldwide (Tr. 44). Exhibit 7 is a bill of sale that is kept in Eakin's custody and control (Tr. 20-22). Eakins testified as to the mode of preparation of Exhibit 7, stating it

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[5] See Appellant's Substitute Brief (hereinafter "S.B."), 7.

[6] Hereinafter "Worldwide."

[7] Askew claims Diana Eakins (hereinafter "Eakins") did not testify she had training with Providian or Washington Mutual Bank (S.B. 7).

[8] Askew claims Eakins testified she did not have personal knowledge of Providian's business practices in 1998 (S.B. 10).

is generated in the ordinary and normal course of business and is created at or near the time of the transaction when the accounts are purchased (Tr. 20-22).[9]

CACH also offered into evidence Exhibit 8, a bill of sale from Worldwide to CACH (Tr. 44). Askew does not contest the admissibility of Exhibit 8. The two bills of sale, Exhibits 7 and 8, were executed on the same date (Tr. 22-23).

The Account Schedule/list of accounts referenced in the bills of sale was admitted into evidence as Exhibit 9 (Tr. 50).[10] Eakins stated that Exhibit 9 is a redacted Excel spreadsheet listing the accounts purchased by CACH, and it is kept under her possession, custody, and control (Tr. 23-24). As to the mode of preparation of Exhibit 9, Eakins testified it is generated in the ordinary and normal course of business and created at or near the time when the accounts are purchased (Tr. 24).[11] Exhibit 7 references Exhibit 9 as an attachment to the bill of sale, listing the accounts purchased and transferred (the "Account Schedule"). Eakins testified Exhibit 9 came with a bill of sale (Tr. 23). Exhibit 8 references Exhibit 9 as a document attached to the purchase agreement listing the accounts purchased and transferred. Eakins testified Exhibit 9 is also a redacted part

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[9] Askew claims Eakins offered no testimony concerning the mode of preparation of Exhibit 7 (S.B. 9).

[10] Askew claims the Account Schedule was not admitted into evidence (S.B. 8- 9).

[11] Askew claims Eakins offered no testimony concerning the mode of preparation of Exhibit 9.

of the purchase agreement (Tr. 38). Eakins testified both Exhibits 7 and 8 are in CACH's file for Askew and these bills of sale transferred Askew's account to CACH (Tr. 22-23).

CACH also offered into evidence Exhibit 11 (Tr. 50). Eakins identified Exhibit 11 as a Providian National Bank Visa account agreement that was part of CACH's file for Askew's account, and is kept under her possession, custody, and control (Tr. 44- 46). Eakins stated credit card agreements are not individual-specific, and she does not know of any credit card agreement that contains a signature (Tr. 49). Eakins testified as to the mode of preparation of Exhibit 11, stating it was transmitted in the ordinary and normal course of business and was the agreement in effect near the time the cardholder (Askew) received the Application (Tr. 44, 48).[12]

CACH also presented the testimony of Appellant Jon Askew. Askew admitted he had a credit card account with Providian Bank (Tr. 4, 93). CACH offered into evidence Exhibit 1, an application for a Providian Visa Membership Card, which states, "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)." Askew does not contest the admissibility of Exhibit 1. In response to Respondent CACH, LLC's Second Request for Admissions, 1(d), (Exhibit 13), Askew admitted Exhibit 1 contained his signature (Tr. 7). Askew changed his testimony at trial, stating, "In looking over my signature, the first name sort of looks like it, but that's not how I sign my name" (Tr. 5, 7). Exhibit 1 states

[12] Askew claims Eakins offered no testimony concerning the mode of preparation of Exhibit 11.

above the signature, "I have read the enclosed brochure." At trial, Askew denied ever receiving a brochure (Tr. 101). Askew admitted Exhibit 1 contained his correct address and social security number (Tr. 5).

CACH also offered into evidence Exhibit 2, Washington Mutual account statements from 2006 and 2007 (Tr. 85). Those account statements contained the account number for Askew's credit card account (Tr. 18). Askew admitted the account statements contained his correct address (Tr. 7-9).

After CACH purchased the debt, Askew's wife agreed to pay the full placement amount to CACH, $6,436.10, through a down payment of $1,500 (paid in one payment of $500 and a second payment of $1,000), and $200 per month thereafter until paid in full (Tr. 50-55, 65-66). Askew gave permission for his wife to speak on his behalf (Tr. 81-82).

Exhibit B is a record from CACH's attorney Bamford, which describes the conversation between Askew's wife and Bamford on 2/13/08, wherein a payment arrangement was reached. Eakins testified if there were an agreement for a lesser amount than the $6,436.10 placement, it would have been in CACH's notes (Tr. 65-69).

CACH offered into evidence Exhibit 5, a $500 check made payable to Collect America (of which CACH is a wholly owned subsidiary) on 2/29/08, and Exhibit 6, a $1,000 check made payable to Collect America, on 3/28/08, from the joint Gateway Metro Credit Union Account of "Jon J Askew & Vicky" (Tr. 10-11, 17, 51-52). The account number on the memo line of these checks matches the credit card account

number affiliated with Jon Askew (Tr. 51). The check marked Exhibit 6 was later stopped (Tr. 51-52). Askew does not contest the admissibility of Exhibits 5 and 6.

While Askew testified his wife wrote the checks from their joint checking account, he also testified he made the payments (Tr. 10-11, 102). Askew stated he does not pay debts he does not owe (Tr. 102).

CACH offered into evidence Exhibit 3, the joint checking account records of Askew and his wife, from Gateway Metro Credit Union (Tr. 11). Askew does not contest the admissibility of Exhibit 3. Exhibit 3 shows a $500 payment made from the joint checking account, which corresponds with the $500 payment in Exhibit 5 made to Collect America/CACH on Askew's credit card account (Tr. 10).

Askew improperly raised new issues and arguments in his Substitute Brief that were not raised in his Appellant's Brief filed in the Eastern District. These issues include: CACH's alleged failure to lay a proper foundation for Exhibits 7, 9, and 11 (S.B. 20-22); CACH's alleged failure to establish a chain of title (S.B. 24-26); Eakins' testimony of ownership of the account allegedly being a violation of the Best Evidence Rule (S.B. 26-28); and CACH's alleged failure to prove the second element of account stated (S.B. 31-32).

Askew has also chosen to abandon certain arguments that were raised in his Appellant's Brief filed with the Eastern District, such as the argument that Exhibits 1, 5, 6, and 8 were improperly admitted, and the argument that Askew should have prevailed on his counterclaim.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR IN ADMITTING EXHIBITS 2, 7, 9, and 11 INTO EVIDENCE, FOR THE REASONS THAT:

A.

EXHIBITS 2, 7, 9, AND 11 WERE EXCEPTIONS TO THE HEARSAY RULE, BECAUSE THEY WERE SPONSORED BY A QUALIFIED WITNESS WHO SATISFIED EACH OF THE REQUIREMENTS OF THE MISSOURI BUSINESS RECORDS ACT, SECTION 490.680.

B.

ASKEW MADE NO CLAIM THAT THERE WAS AN IMPROPER FOUNDATION LAID FOR EXHIBITS 7, 9, AND 11 IN HIS APPELLANT'S BRIEF FILED WITH THE EASTERN DISTRICT, THEREBY ABADONING THE ISSUE.

C.

SHOULD THE COURT CONSIDER THE FOUNDATIONAL REQUIREMENTS FOR EXHIBITS 7, 9, AND 11, THE COMPETENT AND SUBSTANTIAL EVIDENCE DEMONSTRATES THAT THE FOUNDATIONAL REQUIREMENTS FOR THESE EXHIBITS, AS WELL AS EXHIBIT 2, WERE MET, AND THE DOCUMENTS WERE SUFFICIENTLY TRUSTWORTHY.

D.

EVEN WITHOUT THESE EXHIBITS, CACH WOULD STILL PREVAIL.

Nash v. Sauerberger, 629 S.W.2d 491 (Mo.App.E.D. 1981)

Rossomanno v. Laclede Cab Co., 328 S.W.2d 677 (Mo. 1959)

State v. Carruth, 166 S.W.3d 589 (Mo.App. W.D. 2005)

Tomlin v. Alford, 351 S.W.2d 705 (Mo. 1961)

II.

THE TRIAL COURT DID NOT ERR IN FINDING CACH POSSESSED STANDING TO SUE, FOR THE REASONS THAT:

A.

CACH PROVED IT HAD STANDING TO SUE THROUGH THE BILLS OF SALE, THE TESTIMONY OF EAKINS, AND THE ADMISSIONS OF ASKEW. ASKEW ABANDONED HIS ARGUMENT REGARDING THE BEST EVIDENCE RULE BY FAILING TO RAISE THE ISSUE IN HIS APPELLANT'S BRIEF FILED WITH THE EASTERN DISTRICT. ASSUMING, ARGUENDO, THAT THE ISSUE WAS PRESERVED, THE BEST EVIDENCE RULE IS INAPPLICABLE TO THIS CASE.

B.

ASKEW ABANDONED HIS ARGUMENT REGARDING CHAIN OF TITLE BY FAILING TO RAISE THE ISSUE IN HIS APPELLANT'S BRIEF FILED WITH THE EASTERN DISTRICT. ASSUMING THAT ISSUE WAS NOT

ABANDONED, CACH PROVED THE CHAIN OF TITLE BY A PREPONDERANCE OF THE EVIDENCE.

American First Fed., Inc. v. Battlefield Center, L.P., 282 S.W.3d 1 (Mo.App.E.D. 2009)

Chevalier v. Dir. of Rev., 928 S.W.2d 388 (Mo.App.W.D. 1996)

Keystone Agency, Inc. v. Herrin, 585 S.W.2d 313 (Mo.App.W.D. 1979)

Renaissance Leasing, LLC v. Vermeer Mfg. Co., 322 S.W.3d 112 (Mo. 2010)

III.

THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF CACH ON ACCOUNT STATED, FOR THE REASONS THAT CACH PROVED ALL THE ELEMENTS OF ACCOUNT STATED BY A PREPONDERANCE OF THE EVIDENCE, AND ASKEW FAILED TO PRESERVE THE ISSUE OF WHETHER THE SECOND ELEMENT OF ACCOUNT STATED WAS SATISFIED.

Anderson v. Stanley, 753 S.W.2d 98 (Mo.App. E.D. 1988)

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

Ozark Mountain Timber Products v. Redus, et. al., 725 S.W.2d 640 (Mo.App.S.D. 1987)

Rosehill Gardens, Inc. v. Luttrell, 67 S.W.3d 641 (Mo.App.W.D. 2002)

IV.

THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF CACH ON BREACH OF CONTRACT FOR THE REASONS THAT CACH

PROVED ALL THE ELEMENTS OF BREACH OF CONTRACT BY A PREPONDERANCE OF THE EVIDENCE, INCLUDING EVIDENCE OF A CONTRACT, AND A LEGALLY RECOVERABLE AMOUNT OF DAMAGES.

Citibank (South Dakota), N.A. v. Wilson, 160 S.W.3d 810, 813 (Mo.App.W.D. 2005)

Keveny v. Mo. Military Acad., 304 S.W.3d 98, 104 (Mo. 2010).

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

Wahl v. Midland Credit Management, Inc., 556 F.3d 643 (7th Cir. 2009)

V.

THE NATIONAL CONSUMER LAW CENTER'S AMICUS BRIEF IS NOT GERMANE TO THE ISSUES BEFORE THE COURT. THE AMICUS BRIEF CONTAINS ALLEGATIONS COMPLETELY DIVORCED FROM THE RECORD HEREIN, AND IS MERELY AN ATTEMPT TO PREJUDICE CACH BY CITING TO EGREGIOUS BEHAVIOR OF OTHER DEBT COLLECTORS.

Clark v. Capital Credit & Collection Services, 460 F.3d 1162 (9th Cir. 2006)

Smith v. Transworld Systems, Inc., 953 F.2d 1025, 1032 (6th Cir. 1992)

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN ADMITTING EXHIBITS 2, 7, 9, and 11 INTO EVIDENCE, FOR THE REASONS THAT:

A.

EXHIBITS 2, 7, 9, AND 11 WERE EXCEPTIONS TO THE HEARSAY RULE, BECAUSE THEY WERE SPONSORED BY A QUALIFIED WITNESS WHO SATISFIED EACH OF THE REQUIREMENTS OF THE MISSOURI BUSINESS RECORDS ACT, SECTION 490.680.

B.

ASKEW MADE NO CLAIM THAT THERE WAS AN IMPROPER FOUNDATION LAID FOR EXHIBITS 7, 9, AND 11 IN HIS APPELLANT'S BRIEF FILED WITH THE EASTERN DISTRICT, THEREBY ABANDONING THE ISSUE.

C.

SHOULD THE COURT CONSIDER THE FOUNDATIONAL REQUIREMENTS FOR EXHIBITS 7, 9, AND 11, THE COMPETENT AND SUBSTANTIAL EVIDENCE DEMONSTRATES THAT THE FOUNDATIONAL REQUIREMENTS FOR THESE EXHIBITS, AS WELL AS EXHIBIT 2, WERE MET, AND THE DOCUMENTS WERE SUFFICIENTLY TRUSTWORTHY.

D.

EVEN WITHOUT THESE EXHIBITS, CACH WOULD STILL PREVAIL.

Standard of Review

"The admissibility of evidence lies within the sound discretion of the trial court." ***C&W Asset v. Somogyi,*** 136 S.W.3d 134, 137 (Mo.App.S.D. 2004). "Therefore, there can be no error absent a showing that the court abused its discretion." ***Id.*** On appeal, the Court should "presume the trial court's ruling is correct." ***Id.*** It should reverse only when the "ruling is clearly against the logic of the circumstances then before the Court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." ***Id.***

A. EXHIBITS 2, 7, 9, AND 11 WERE EXCEPTIONS TO THE HEARSAY RULE, BECAUSE THEY WERE SPONSORED BY A QUALIFIED WITNESS WHO SATISFIED EACH OF THE REQUIREMENTS OF THE MISSOURI BUSINESS RECORDS ACT, SECTION 490.680.

a. Interpretation of Section 490.680

Section 490.680, the Missouri Uniform Business Records as Evidence Act, 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." **R.S.Mo.** §490.680.

The clear language of the statute states a record "shall" be competent evidence if any "custodian," or even another "qualified witness," testifies as to the statutory requirements. As Askew concedes, "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.W.D. 2003); quoting ***Piva v. Gen. Am. Life Ins. Co.,*** 647 S.W.2d 866, 877 (Mo.App.W.D. 1983) (S.B. 19). The statute, on its face, contains no requirement that a sponsoring witness be an employee of the entity which created the records. If the legislature had intended there be such a requirement, it would have been written into the statute. *See* ***Betz v. Kansas C. S. R. Co.,*** 314 Mo. 390, 411 (Mo. 1926) ("legislative intention is to be ascertained by means of the words it has used").

Askew cites to several cases[13] in support of his assertion that a sponsoring witness must be an employee of the entity which created the records. However, in each of these cases, the offerer had no knowledge of the identity or mode of preparation of the documents, and could not testify the records were prepared in the ordinary and normal course of business, thus failing to satisfy Section 490.680.[14]

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[13] *See* S.B. 16, wherein Askew cites to ***State v. Anderson***, 413 S.W.2d 161, 165 (Mo. 1967); ***Zundel v. Bommarito***, 778 S.W.2d 954, 958 (Mo.App. E.D. 1989); ***Hamilton Music, Inc. v. York,*** 565 S.W.2d 838, 841 (Mo.App. KC 1978); ***Somogyi,*** 136 S.W.3d at 140; and ***State v. Luleff,*** 781 S.W.2d 199, 201 (Mo.App.E.D. 1989).

[14] ***Id.***

Unlike the offerers in the cases cited by Askew, CACH's custodian satisfied each of the statutory requirements. Askew claims Eakins did not testify she had any training at Providian, Washington Mutual, or Worldwide (S.B. 7). However, Eakins testified she trained with the major banks from which CACH purchases debts, one of which is Providian/Washington Mutual (Tr. 18-19, 48). Eakins further testified she is familiar with the mode of preparation of the documents at issue herein, Exhibits 7, 9, and 11 (Tr. 21-24). This Court must view the evidence and reasonable inferences drawn therefrom in the light most favorable to the trial court's judgment. ***Ewanchuk v. Mitchell,*** 154 S.W.3d 476, 478 (Mo.App. S.D. 2005). Given the record here, it is reasonable to infer Eakins had training with Providian Bank, as the Court of Appeals found (Court of Appeals' Opinion,[15] 4). Further, the appellate court "shall give due regard to the opportunity of the trial court to have judged the credibility of witnesses." **MO. R. CIV. P.** 84.13(d)(2). Here, the trial judge weighed the credibility of Eakins, and in his discretion found her testimony credible, and her knowledge of the documents at issue sufficient.

Unlike the witnesses in the cases Askew relies on, here CACH is more than just a "conduit in the flow of records,"[16] and the records were not merely found in CACH's

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[15] Hereinafter "Op."

[16] *See* ***Somogyi,*** 136 S.W.3d at 140, cited by Askew (S.B. 16).

file.[17] Rather, CACH purchased the account and records of Askew, and relied upon those records in its business (Tr. 17, 21- 24, 44-45).

This case does not involve a situation where an offerer of records simply testified regarding hearsay conversations with the original creditor as to how the records were prepared, as Askew suggests (S.B. 19). Rather, Eakins stated she trained with the banks (Tr. 48). Askew failed to question Eakins further. At trial, no evidence was presented to distinguish Eakins' training from the training received by Providian's employees.

Askew suggests CACH's custodian needed to have observed the records being prepared in order to be a qualified witness. This is not a requirement under Missouri law. The personal knowledge requirement of the business records exception is satisfied if the testimony is based on an individual's own observation, or on the information of others whose business duty it was to transmit the information. ***Nash v. Sauerberger***, 629 S.W.2d 491, 492 (Mo.App.E.D. 1981). Missouri courts consistently hold there is no requirement that a sponsoring witness be employed at the time of record creation by the entity which created the records, or that the sponsoring witness have personal knowledge of the origins of the document. *See* ***Rouse Co. v. Justin's,*** 883 S.W.2d 525, 530 (Mo.App.E.D. 1994); ***Rossomanno v. Laclede Cab Co.,*** 328 S.W.2d 677, 681-683 (Mo. 1959); ***Piva,*** 647 S.W.2d at 876-877; ***Collet v. American National Stores, Inc.,*** 708 S.W.2d 273, 277 (Mo.App.E.D.1986). Rather, knowledge of the procedure by which the

[17] *See* ***Anderson,*** 413 S.W.2d at 165; ***Zundel,*** 778 S.W.2d at 958; ***Hamilton Music, Inc.,*** 565 S.W.2d 838 at 841, and ***Luleff,*** 781 S.W.2d at 201, cited by Askew (S.B. 16).

records are created and kept suffices to establish the mode of preparation. ***Piva,*** 647 S.W.2d at 877. Requiring the attendance and testimony of the various persons who cooperated in making a record is the very thing the Business Records Act seeks to obviate. *See* ***Rossomanno,*** 328 S.W.2d at 682. "A reasonable liberality seems to be imposed by the very wording of Section 490.690" (providing the standard for interpretation and construction of Section 490.680) and "to construe [Section 490.680] too strictly would be to repeal it." ***Id.***

CACH's custodian is in a nearly identical position to the custodian/offerer in ***State v. Carruth,*** 166 S.W.3d 589, 591 (Mo.App. W.D. 2005). ***Carruth*** held business records may be admitted into evidence if they were received from a third party in the ordinary and normal course of business and were integrated into the admitting party's records or computer system. ***Id.*** The Court ruled a Missouri Highway Patrol laboratory technician could testify as to fingerprints taken by the St. Louis County Police Department, because the fingerprints were transferred to the Missouri Highway Patrol in the ordinary and normal course of business, were integrated into the Highway Patrol's computer system, and were relied upon by the Missouri Highway Patrol. ***Id.*** While the Missouri Highway Patrol was a separate entity from the St. Louis County Police Department, the Court found all of the requirements of Section 490.680 were satisfied. ***Id.*** Unlike the line of cases in which a record came from another entity and was merely held in the offerer's files, in ***Carruth***, as in the present case, the records were transferred to the custodian in the ordinary and normal course of business, the custodian relied upon them, had knowledge of the mode of their preparation, and complied with all requirements of the

statute. ***Id.*** There is absolutely nothing that limits the holding in ***Carruth*** to criminal cases, as Askew contends (S.B. 17).

This case is also analogous to ***Tomlin v. Alford***, 351 S.W.2d 705 (Mo. 1961). In ***Tomlin***, the Custodian of Records/Assistant Chief of the Special Actions Branch, U.S. Army Records Center, offered records prepared by the Army Medical Hospital. The offerer did not work in the Army Medical Hospital and had no personal knowledge of the accuracy of the entries or by whom and when they were actually made. ***Id.*** at 712. However, the witness was familiar with the manner of the keeping of the records through observation and knowledge of Army regulations. ***Id.*** The Court found the sources of information, method and time of preparation were such as to justify their admission, despite the fact the offerer was not employed in the Medical Hospital. ***Id.*** Similarly, here, based on reasonable inferences from the testimony and the evidence, the trial court found that although Eakins did not work for Providian, she had knowledge as to the sources of information, method, and time of preparation of the records such as to justify their admission (L.F. 24-39, 70).

Askew argues ***Asset Acceptance v. Lodge,*** 325 S.W.3d 525 (Mo.App.E.D. 2010) "is factually nearly identical to the instant case" (S.B. 18). However, there is a major distinction between ***Lodge*** and the instant case, which the Court of Appeals (Op. 4) noted, and which Askew chooses to ignore.

In ***Lodge,*** the custodian for Asset Acceptance stated, "he was familiar with how records were prepared *in the industry*" and the records "'would have had to been' prepared at or near the time of the transaction reflected in the documents." ***Id.*** at 527.

The custodian's testimony in ***Lodge*** was based on mere conjecture regarding his general knowledge of the credit card industry and speculation as to the mode of preparation of the documents. Here, in contrast, the Eastern District held, based on the reasonable inferences from the record:

> "Eakins, on the other hand, testified that she had been to training at the specific institutions which created these documents and was familiar with the mode of preparation used by each. While the witness in ***Lodge*** may not have had the level of familiarity regarding the mode of preparation needed to sponsor the documents, Eakins met that threshold." (Op. 4).

Eakins testified she trained with the banks with which CACH deals, and had knowledge of the mode of preparation of the documents at issue herein, Exhibits 7, 9, and 11 (Tr. 21-24, 44, 48). Thus, Eakins' testimony was not based on mere conjecture and speculation regarding the credit industry, but rather, on her personal knowledge of how the banks created these records.

Further, the "bottom line" regarding the admissibility of the business records is the discretionary determination by the trial court of their trustworthiness. ***Somogyi***, 136 S.W.3d at 138. In contrast to ***Somogyi***, the trustworthiness of the records here was bolstered by the sponsoring witness's presence in court (availability for cross-examination) and the witness's familiarity with the exhibits. *See* ***Id.*** at 139. In ***Somogyi,*** the Court suggested the records might have been admitted if there was evidence of the transfer of the debt and the records. The Court held, "[W]hile Appellant [the debt buyer] asserts that these documents were created by [the original creditor], passed to [the debt

buyer], and then given to [the servicer], there is no way to glean that information from the affidavit or the documents." ***Id.*** There was no live witness in ***Somogyi***. ***Id.*** Here, there was live testimony from Eakins, who was available for cross-examination, and who was familiar with the records (Tr. 17, 21-22, 23-24, 44, 48).

As stated by the Eastern District, "it is not a strict requirement of the business records exception that a document be created by the entity sponsoring it" (Op. 3). Despite what Askew would have the Court believe, his case authorities do not stand for the proposition that a company which purchases and is assigned an account, including the records to an account, cannot lay a foundation for those records through a qualified witness who satisfies each of the requirements of Section 490.680. As can be inferred from the trial court's judgment, the trial judge found Eakins credible, found CACH was not just a conduit in the flow of records, and found Section 490.680 was satisfied (L.F. 70). Askew put on no evidence to show otherwise. Accordingly, the trial court's judgment should be affirmed.

b. Policy Considerations

Providian Bank, the original creditor of Askew's account, has not been in existence since 2005, when it was sold to Washington Mutual.[18] Washington Mutual, which purchased Providian, is also no longer in existence, having been ceased by the

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[18] Eric Dash, ***Bank to Buy Credit Card Business for $6.45 Billion***, N.Y. Times (June 7, 2005), http://www.nytimes.com/2005/06/07/business/07credit.html

Federal Deposit Insurance Corporation (FDIC) in 2008, becoming the largest U.S. bank failure in history.[19]

Although JP Morgan Chase & Co. purchased the banking operations of Washington Mutual, including $307 billion in assets and $188 billion in deposits, it did not purchase accounts or records that had already been sold.[20] As Exhibit 7 demonstrates, prior to being acquired by JP Morgan Chase, Washington Mutual had already sold Askew's account, along with the records involving Askew's account, to Worldwide (Tr. 18-19, 21). Worldwide acted as an intermediary, selling the account and records it purchased to CACH the same date through the bill of sale marked Exhibit 8 (Tr. 22-23).

Neither Providian Bank, nor Washington Mutual, is currently a custodian of Askew's records. The records were sold and transferred to CACH, along with the sale of the account (Tr. 17, 21-24, 44-45). Further, because these banks are no longer in existence, there is no way they could be custodians of the records. If CACH were required to produce a records custodian from Providian Bank or Washington Mutual, there would be no way to ever get records such as Exhibits 2, 7, 9, and 11 into evidence.

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[19] Robin Sidel, David Enrich, and Dan Fitzpatrick, ***WaMu Is Seized, Sold Off to J.P. Morgan, In Largest Failure in U.S. Banking History***, Wall St. J. (Sept. 26, 2008), http://online.wsj.com/article/SB122238415586576687.html

[20] ***Id.***

Even finding the past custodians of records from the failed banks would be difficult, if not impossible.

Banks fail and merge all the time, particularly in the state of today's economy. Since 2009 alone, approximately 385 banks have failed.[21] Interpretation of Section 490.680,[22] in the manner that Askew would like, would render many freely tradable asserts worthless if bought by another entity. This would restrain trade and be detrimental to the American economy. Banks would not want to acquire other failing banks, as many of the failing banks' assets would be of no value. Further, banks often do not collect on defaulted accounts themselves, but instead sell those accounts to debt buyers, because the cost to collect on debts can be high. If debt buyers cannot collect on debts they purchase from banks that dissolve or merge, debt buyers will be less likely to purchase defaulted accounts in the future. This will lead to less profitability for banks, and could lead to future bank failures.

In addition, preventing collection of valid debts hurts American consumers. Banks will be less likely to issue credit cards if they will have difficulty recovering potential losses. Banks will increase fees, costs, and interest rates to cover increased risk.

Here, CACH purchased the credit card accounts originally owned by Providian, a company no longer in existence (Tr. 17, 20-21, 23, 82). CACH received the records to

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[21] Federal Deposit Insurance Corporation, ***Failed Bank List,*** http://www.fdic.gov/bank/individual/failed/banklist.html, (Updated 11/10/2011)

[22] **R.S.Mo.** §490.680.

these accounts in the ordinary and normal course of business and incorporated these records into its own business (Tr. 22-24, 44-45). CACH is now the owner of Askew's account and the *only* company that keeps and maintains the records on Askew's account. In addition, CACH's records custodian had knowledge of how the previous custodians created and maintained their records (Tr. 48). CACH must be permitted to lay the foundation for the records and debts which it purchases and owns, and for which it is now the only custodian. Otherwise, there would be no way to ever collect on valid debts like the one here, rendering them worthless.

c. Federal and Other States' Interpretation of Similar Statutes

Federal Rule of Evidence (hereinafter "**FRE**") 803(6), the federal hearsay exception for business records, is similar in content to Section 490.680. **R.S.Mo.** §490.680. **FRE** 803(6) states as follows:

> "(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the

source of information or the method or circumstances of preparation indicate lack of trustworthiness…."

As with Section 490.680, Rule 803(6) requires that there be testimony of a "custodian or other qualified witness," that the records are kept in the ordinary and normal course of business, are current ("made at or near the time"), and that there be information regarding the mode of preparation ("made…or from information transmitted by, a person with knowledge…"). **R.S.Mo**. §490.680; **FRE** 803(6).

The majority of federal courts have acknowledged the need for entities that are transferred documents, which are incorporated into their business, to be able to admit those documents themselves in court. The "Adoptive Business Records Doctrine," also known as the "Rule of Incorporation," holds a document will be admitted into evidence if "(a) the document is incorporated and kept in the course of the testifying witness's business; (b) that business typically relies upon the accuracy of the contents of the document; and (c) the circumstances otherwise indicate the trustworthiness of the document."[23] The First, Second, Third, Fifth, Eighth, Ninth, Tenth, Eleventh, and D.C. circuits have adopted this doctrine in interpreting Rule 803(6).[24] Two district courts within the Seventh Circuit have also applied the Adoptive Business Records Doctrine.[25]

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[23] ***U.S. v. Childs***, 5 F.3d 1328, 1334 (9th Cir. 1993).

[24] *See* ***U.S. v. Doe***, 960 F.2d 221, 223 (1st Cir. 1992); ***U.S. v. Jakobetz***, 955 F.2d 786, 800-801 (2d Cir. 1992); ***U.S. v. Sokolow***, 91 F.3d 396, 403-404 (3rd Cir. 1996); ***U.S. v. Ullrich***, 580 F.2d 765, 771-772 (5th Cir. 1978); ***Brawner v. Allstate Indem. Co.***, 591

"While the Federal Rules of Evidence are not binding on Missouri courts, they are suggestive."[26] Federal Courts have held that Rule 803(6), which is similar in content to Missouri's Section 490.860, does not require the sponsoring witness of records to be employed by the entity that created those records. **R.S.Mo**. §490.680; **FRE** 803(6). In addition, many states with similar statutes to Section 490.680 have also adopted the Adoptive Business Records Doctrine, such as Colorado, Florida, Louisiana, Maine, Massachusetts, New York, North Dakota, and Texas.[27] The Missouri Court of Appeals-

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F.3d 984, 987 (8th Cir. 2010); ***Childs***, 5 F.3d at 1334; ***U.S. v. Carranco***, 551 F.2d 1197, 1200 (10th Cir. 1977); ***U.S. v. Parker***, 749 F.2d 628, 633 (11th Cir. 1984); ***United States v. Adefehinti***, 510 F.3d 319, 325-26 (D.C.Cir.2007).

[25] *See* ***Makor Issues & Rights, Ltd. v. Tellabs, Inc.***, 735 F.Supp.2d 856, 867 (N.D.Ill. 2010); ***B.P. Amoco Chem. Co. v. Flint Hills Res., LLC***, 697 F. Supp.2d 1001, 10021 (N.D.Ill. 2010).

[26] ***Boyer v. City of Potosi***, 77 S.W.3d 62, 69 (Mo.App.E.D. 2002).

[27] ***Schmutz v. Bolles***, 800 P.2d 1307, 1314 (Colo. 1990); ***WAMCO XXVIII, Ltd. v. Integrated Elec. Env'ts, Inc.***, 903 So.2d 230, 232-233 (Fla.App.S.D. 2005); ***Burdette v. Drushell***, 837 So.2d 54, 62 (La.App. 2002); ***Northeast Bank & Trust Co. v. Soley***, 481 A.2d 1123, 1127 (Me. 1984); ***Beach v. State***, 75 Md.App. 431, 439 (Md.App. 1988); ***Beal Bank, SSB v. Eurich***, 444 Mass. 813, 818 (Mass. 2005); ***Pizza Corner, Inc. v. C.F.L. Transport, Inc.***, 2010 ND 243, P16 (N.D. 2010); ***People v. Markowitz***, 187 Misc.2d 266, 270-271 (N.Y. 2001); ***Bell v. State***, 176 S.W.3d 90, 92 (Tex.App. 2004).

Western District also used a similar approach in ***Carruth***, 166 S.W.3d at 591, wherein the Court held business records may be admitted into evidence if they were received from a third party in the ordinary and normal course of business and were integrated into the admitting party's records or computer system.

Here, Eakins satisfied each of the requirements of the Adoptive Business Records Doctrine. First, Eakins testified CACH received Askew's records in the ordinary and normal course of its business of purchasing debts and incorporated them into CACH's business (Tr. 17, 21-24, 44-45). Second, CACH, as a debt buyer, relies upon the accuracy of the content of these records in its collection of debts (Tr. 17). Third, the circumstances in this case, such as admissions by Askew and payments made by Askew and/or his wife on the account, indicate the trustworthiness of the records, as laid out more fully in Sections I(A) *supra* and I(C) *infra* (Tr. 9-11, 50-55, 65-66, 81-82, 102).

Federal and state courts with similar business records statutes to Missouri have adopted the Adoptive Business Records Doctrine, and a similar approach was also used in Missouri in ***Carruth***. CACH's custodian satisfied the requirements of the Adoptive Business Records Doctrine, and should similarly be permitted to lay the foundation for Exhibits 2, 7, 9, and 11 here.

B. ASKEW MADE NO CLAIM THAT THERE WAS AN IMPROPER FOUNDATION LAID FOR EXHIBITS 7, 9, AND 11 IN HIS APPELLANT'S BRIEF FILED WITH THE EASTERN DISTRICT, THEREBY ABANDONING THE ISSUE.

In his Appellant's Brief filed with the Eastern District, Askew did not assert there was an improper foundation laid for Exhibits 7, 9, or 11. He only claimed there was an improper foundation laid for Exhibits 1 and 2 (Appellant's Brief with the Missouri Court of Appeals, 43). In accordance with Rule 83.08(b), a party's substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." **MO. R. CIV. P.** 83.08(b). As stated in ***Lane v. Lensmeyer,*** 158 S.W.3d 218, 228-230 (Mo. 2005), appellants are barred from presenting new arguments upon transfer. The Supreme Court may not review a claim not raised before the Court of Appeals. ***Id.*** Accordingly, Askew abandoned the issue of whether the foundational requirements for Exhibits 7, 9, and 11 were met.

C. SHOULD THE COURT CONSIDER THE FOUNDATIONAL REQUIREMENTS FOR EXHIBITS 7, 9, AND 11, THE COMPETENT AND SUBSTANTIAL EVIDENCE DEMONSTRATES THAT THE FOUNDATIONAL REQUIREMENTS FOR THESE EXHIBITS, AS WELL AS EXHIBIT 2, WERE MET, AND THE DOCUMENTS WERE SUFFICIENTLY TRUSTWORTHY.

Should the Court decide to consider the foundational requirements of Exhibits 7, 9 and 11, it will find each of the requirements was satisfied. Eakins testified she was the

keeper of records for CACH and had personal knowledge of the debt purchases and assignments of CACH, including the purchase of Askew's account (Tr. 17-18). Eakins further testified she trained with most of the major banks CACH deals with, which would include Washington Mutual/Providian (Tr. 18-19, 48).

Eakins identified Exhibit 7 as a bill of sale that is kept in her custody and control, generated in the ordinary and normal course of business, and created at or near the time of the transaction when the accounts were purchased (Tr. 20-22).

Similarly, Eakins identified Exhibit 9, and testified the document is kept under her control and possession, generated in the ordinary and normal course of business, and created at or near the time when the accounts were purchased (Tr. 23-24).

Eakins identified Exhibit 11 as a Providian National Bank Visa account agreement that was part of CACH's file for Askew's account (Tr. 44, 46). She testified it was kept under her possession, custody, and control, was transmitted in the ordinary and normal course of business, and the agreement would be in effect near the time the cardholder received the application (Tr. 44, 46, 48).

There was also sufficient trustworthiness of the documents marked Exhibit 2, and trustworthiness is the "bottom line" regarding whether to admit records into evidence. ***Somogyi***, 136 S.W.3d at 138. Askew admitted he had an account with Providian, and Eakins testified Providian became Washington Mutual (Tr. 4, 82-83, 93). Exhibit 2 consists of Washington Mutual account statements. These account statements contain Askew's correct name and address (Tr. 7- 8, 9). The account statements also list the same account number as the account for Askew listed in Exhibit 9. Askew admitted to

having this account through testimony regarding the agreement his wife made, with his authority, to pay the balance on the account, and the payments made thereafter (Tr. 9-11, 50-55, 65-66, 81-82, 102).

"The trial court has the discretion to determine if the sources of information, method and time of preparation" were such to justify admission under Section 490.680. *See* ***Dickerson v. Dir. of Rev.***, 957 S.W.2d 478, 480 (Mo.App.E.D. 1997). Here, the trial court properly exercised its discretion in determining the admission of Exhibits 2, 7, 9, and 11 was justified. Further, 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. ***Id.*** At trial, Askew failed to introduce any evidence contradicting the content of these records. Exhibits 2, 7, 9, and 11 were properly admitted.

D. EVEN WITHOUT THESE EXHIBITS, CACH WOULD STILL PREVAIL

Even without Exhibits 2, 7, 9 and 11, CACH presented proof by a preponderance of evidence for each element of an action for account stated and breach of contract. In his Substitute Brief, Askew raised no argument against the propriety of admitting Exhibits 1, 5, 6 and 8. Arguments not contained within a Supreme Court Substitute Brief, even if included in the Court of Appeals Brief, are deemed abandoned. **MO. R. CIV. P.** 83.08(b). Further, the testimony of Eakins and Askew regarding the account, as well as Exhibit B, which was offered by Askew and admitted into evidence, established the elements of CACH's claims.

The elements of account stated are: (1) an agreement between the parties, having had previous financial transactions, (2) that a balance struck is correct and due between

the parties, and (3) a promise by the debtor, either express or implied, to pay the balance. ***Chisler v. Staats***, 502 S.W. 2d 424, 426 (Mo. App. 1973). The testimony of Eakins and Askew, as well as Exhibits 1, 5, 6 and B, show there was an agreement between the parties, having had previous financial transactions (Tr. 4, 50-55, 65-66, 81-82, 93). The testimony of Eakins and Exhibit B demonstrate an agreed upon balance of $6,436.10 (of which $500 had now been paid) (Tr. 50-55, 65-66, 68-69, 81-82). As discussed more fully in Point III below, Eakins' and Askews' testimony, as well as Exhibits 5, 6 and B, show the promise by the debtor to pay the balance (Tr. 50-55, 65-66, 68-69, 81-82).

The elements of breach of contract are: "(1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff." ***Keveny v. Mo. Military Acad.***, 304 S.W.3d 98, 104 (Mo. 2010). Exhibit 1 and Eakins' and Askews' testimony show the existence and terms of the contract (Tr. 4, 18, 24, 56-57, 93). Eakins' and Askew's testimony, as well as Exhibits 5, 6 and B, which show the payment arrangements and payments made, show there was performance by Providian/Washington Mutual and there is an amount owed by Askew (Tr. 4, 50-55, 65-66, 81-82, 93, 100). Eakins's testimony and Exhibits 5, 6, and B also indicate there was a breach by Askew (Tr. 50-55, 65-66, 81-82; Exhibits 5, 6, B). Finally, Eakins' testimony shows the amount still owed (Tr. 55, 65-69).

For the reasons stated above, the trial court's judgment should be affirmed.

II.

THE TRIAL COURT DID NOT ERR IN FINDING CACH POSSESSED STANDING TO SUE, FOR THE REASONS THAT:

A.

CACH PROVED IT HAD STANDING TO SUE THROUGH THE BILLS OF SALE, THE TESTIMONY OF EAKINS, AND THE ADMISSIONS OF ASKEW. ASKEW ABANDONED HIS ARGUMENT REGARDING THE BEST EVIDENCE RULE BY FAILING TO RAISE THE ISSUE IN HIS APPELLANT'S BRIEF FILED WITH THE EASTERN DISTRICT. ASSUMING, ARGUENDO, THAT THE ISSUE WAS PRESERVED, THE BEST EVIDENCE RULE IS INAPPLICABLE TO THIS CASE.

B.

ASKEW ABANDONED HIS ARGUMENT REGARDING CHAIN OF TITLE BY FAILING TO RAISE THE ISSUE IN HIS APPELLANT'S BRIEF FILED WITH THE EASTERN DISTRICT. ASSUMING THAT ISSUE WAS NOT ABANDONED, CACH PROVED THE CHAIN OF TITLE BY A PREPONDERANCE OF THE EVIDENCE.

Standard of Review

The issue of standing is an issue of law, and thus the standard of review on appeal is *de novo*. ***Missouri State Medical Ass'n v. State***, 256 S.W.3d 85, 87 (Mo. 2008).

A. CACH PROVED IT HAD STANDING TO SUE THROUGH THE BILLS OF SALE, THE TESTIMONY OF EAKINS, AND THE ADMISSIONS OF

ASKEW. ASKEW ABANDONED HIS ARGUMENT REGARDING APPLICATION OF THE BEST EVIDENCE RULE BY FAILING TO RAISE THE ISSUE IN HIS APPELLANT'S BRIEF FILED WITH THE EASTERN DISTRICT. ASSUMING, ARGUENDO, THAT THE ISSUE WAS PRESERVED, THE BEST EVIDENCE RULE IS INAPPLICABLE TO THIS CASE.

"Standing to sue ... exists when a party has an interest in the subject matter of the suit that gives it a right to recovery, if validated" and the "issue of standing cannot be waived." ***Midwestern Health Mgmt.***, 208 S.W.3d at 298. In order to demonstrate its standing to sue, an assignee of an account must prove the assignment. ***Id.***

a. CACH Proved Standing Through The Testimony of Diana Eakins, Authorized Agent of CACH

i. Eakins Testified Without Objection To CACH's Ownership of the Account, Establishing Standing to Sue

At trial, Askew testified he had a Providian Bank credit card (Tr. 4, 93). CACH presented testimony of its authorized agent and custodian of records, Diana Eakins. Eakins testified that, as an authorized agent of CACH, she has personal knowledge of the purchase and assignment of distressed debts by CACH, including the purchase and assignment of the credit card account of Askew, Account No. 4254490300448469 with Washington Mutual-Providian Bank (Tr. 17-18). Eakins testified without objection that CACH owns Askew's account (Tr. 23). Eakins further testified without objection that Askew's account was purchased with others in bulk by CACH (Tr. 18). This testimony

establishes CACH's standing to sue. *See* ***Keystone Agency, Inc. v. Herrin,*** 585 S.W.2d 313, 315 (Mo.App.W.D. 1979), ruling the holder of a promissory note may testify that he or she is the holder in order to establish standing to sue.

ii. Askew has Abandoned Any Claim of Error Through His Failure to Object at Trial and Failure to Raise the Best Evidence Rule in the Court of Appeals

Through his failure to object at trial and raise the best evidence rule in his Court of Appeals Brief, Askew failed to preserve his arguments regarding the best evidence rule.

Askew asserts he did not need to object to Eakins' testimony regarding ownership of the account to preserve arguments regarding the best evidence rule on appeal (S.B. 27). He notes "parole evidence in interpreting a contract" is inadmissible even without objection, citing ***Kelly v. State Farm Mutual Automobile Insurance Company,*** 218 S.W.3d 517 (Mo.App.W.D. 2007). In ***Kelly,*** the court was determining whether a contract was ambiguous. ***Id.*** It ruled the contract was not ambiguous, and parole evidence was inadmissible to determine its meaning. ***Id.*** at 522. Here, however, there is no interpretation of the contract needed at all. The bills of sale, Exhibits 7 and 8, and the Account Schedule, Exhibit 9, clearly reflect CACH was transferred and is the owner of the account. Eakins also testified she is the owner of the account. Thus, ***Kelly*** is inapplicable.

Askew was required to object to preserve his argument on appeal. A point is preserved for appellate review only if it is based on the same theory presented at trial. ***Gateway Foam Insulators, Inc. v. Jokerst Paving & Contr., Inc.,*** 279 S.W.3d 179, 188-

189 (Mo. 2009). Unpreserved issues merit only plain error review, if any. ***Id.*** There was no plain error here, because Eakins had personal knowledge of the assignments (Tr. 17-18).

Not only did Askew fail to object at trial, but he also failed to raise the best evidence rule in his Appellant's Brief filed with the Eastern District. In accordance with Rule 83.08(b), a party's substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." **MO. R. CIV. P.** 83.08(b). Here, as stated in ***Lane,*** 158 S.W.3d at 228-230, Askew is barred from presenting this new argument upon transfer.

iii. Even if Askew had Objected That Eakins' Testimony Violates The Best Evidence Rule and Raised this Issue in the Eastern District, The Best Evidence Rule Does Not Apply Here

Should the Court find Askew preserved the issue regarding the best evidence rule without having objected to Eakins' testimony at trial and without raising this issue in the Eastern District, the best evidence rule does not apply here.

Askew argues the best evidence rule prevents oral testimony as to the assignment. However, as stated in ***Chevalier v. Dir. of Rev.***, 928 S.W.2d 388, 392 (Mo.App.W.D. 1996), "There appear to be at least two misconceptions regarding the best evidence rule: 1) that every fact must be proved by the best evidence available to the exclusion of all other evidence; and 2) that whenever a fact is evidenced by a writing, the writing is the only evidence which may be admitted. Neither proposition is true."

"[I]t is generally agreed by courts and commentators today that the [best evidence] rule does not necessarily mean that no evidence other than the "best" and most reliable will ever be permitted." ***Id.*** If it did, no one would ever be permitted to testify that he or she is the owner of a car (because the best evidence would be the title), to testify "as to his or her age (because a birth certificate would be the best evidence)," or to "describe a tangible item without producing the item itself." ***Id.*** at 391. Instead, the best evidence rule should be limited to proof of the operative terms of substantive writings. ***Id.***

"Missouri law requires minimal evidence to establish ownership, with the exception of certificate-of-title property and real property." ***Renaissance Leasing, LLC v. Vermeer Mfg. Co.,*** 322 S.W.3d 112, 122 (Mo. 2010). "Any competent evidence may be introduced to establish the fact of ownership of personal property." ***Id.*** Eakins' testimony of ownership is competent evidence establishing ownership of personal property.

There is nothing in ***Hallmark v. Stillings***, 648 S.W.2d 230 (Mo.App. S.D. 1983), cited to by Askew (S.B. 27), that prohibits testimony as to assignment of intangible personal property. ***Hallmark*** merely holds that some transactions are by formal instrument, while others are not. ***Id.*** Missouri courts explicitly hold that testimony can establish standing to sue regarding intangible property. *See* ***Keystone Agency, Inc.,*** 585 S.W.2d 313 at 315. Further, there is nothing that would justify such a distinction when a person has personal knowledge of a fact. The best evidence rule does not exclude evidence based on personal knowledge, even if documents or other writings would

provide some of the same information. ***Aluminum Products Enter, Inc. v. Fuhrmann Tooling***, 758 S.W.2d 119, 122 (Mo.App.E.D. 1988). If a fact exists independent of the writing, then the best evidence rule does not apply to prohibit testimony as to the fact. ***Id.***

In addition, the existence and execution of a document is not considered proof of the terms of the document, and may be testified to without producing the original document or accounting for its absence. ***Cooley v. Director of Revenue***, 896 S.W.2d 468, 470 (Mo. 1995). Eakins testified a bill of sale was executed between Providian/Washington Mutual and Worldwide, and between Worldwide and CACH (Tr. 18, 20-23, 32). This testimony alone proves standing. *See* ***Keystone Agency, Inc.,*** 585 S.W.2d at 315, ruling standing to sue can be established through testimony.

For all of the above reasons, Eakins' testimony was competent evidence of CACH's standing to sue.

b. CACH Proved Standing Through The Bills of Sale

i. The Bills of Sale Transferred the Account and Established CACH's Standing to Sue

Two bills of sale were entered into evidence, which proved assignment of the account to CACH, Exhibits 7 and 8.

Askew argues the account sale/purchase agreement[28] was material to this case (S.B. 27). However, the purchase agreement is only an agreement as to the terms of the sale of the accounts, such as the price CACH will pay the assignor. The cost and

[28] Hereinafter "purchase agreement"

negotiations of the sale of Askew's account has nothing to do with this case. Rather, the issue is whether CACH owns the account, and it is the bills of sale which transfer the account and show ownership.

As Diana Eakins testified, "a bill of sale is much like a title to a car. It shows the ownership of a property, whether it be a car, a vehicle, or a debt. In this case, a credit card. It…shows the flow of that property…" (Tr. 20). This was the same conclusion reached in ***American First Federal, Inc. v. Battlefield Center, L.P.***, 282 S.W.3d 1, 5 (Mo.App.E.D. 2009), holding it is the bill of sale and not a purchase agreement that assigns the rights to an account.

Exhibit 7 states, "Washington Mutual Bank, for value received….does hereby sell, assign, and transfer [to Worldwide], its successors and assigns, all right, title, and interest in and to the Accounts listed in the Account Schedule…". Exhibit 8 states, "Worldwide…for value received…does hereby sell, assign and convey to [CACH]…all right, title, and interest of [Worldwide]…those certain accounts as defined in the Agreement." Exhibit 9, referred to in Exhibits 7 and 8, lists Askew's account as one of those being transferred to CACH. These exhibits establish that CACH is the current owner of Askew's account.

ii. The Bills of Sale Apply to Askew's account, As Evidenced by the Account Schedule/List of Accounts Purchased (Exhibit 9) And Testimony of Eakins

Askew contends there is no evidence the bills of sale, Exhibits 7 and 8, apply to his account (S.B. 26, 27, 29). However, Eakins' testimony and the Account Schedule (Exhibit 9) evidence that the bills of sale apply to Askew.

Eakins testified from personal knowledge that the bills of sale are part of Askew's file and transferred Askew's account (Tr. 20-23). There was nothing presented by Askew to contradict this testimony.

In addition, contrary to Askew's assertion, the "Account Schedule"/list of accounts transferred through the bills of sale was admitted into evidence, showing the bills of sale apply to Askew's account (as Exhibit 9) (S.B. 8-9). Eakins identified Exhibit 9 as a redacted Excel spreadsheet listing the accounts purchased by CACH (Tr. 23-24). Exhibit 9 is referenced in Exhibit 7 as an attachment to the bill of sale, listing the accounts purchased and transferred (the "Account Schedule"). Eakins testified Exhibit 9 came with a bill of sale (Tr. 23). In addition, Exhibit 9 is referenced in Exhibit 8 as a document attached to the purchase agreement listing the accounts purchased and transferred. Eakins testified Exhibit 9 is also a redacted part of the purchase agreement (Tr. 38). Further, the bills of sale were executed on the same date, creating a reasonable inference that Worldwide was only an intermediary in the transfer of the same accounts from Washington Mutual/Providian to CACH (Tr. 22-23; Exhibits 7, 8).

This Court must view the evidence and reasonable inferences drawn therefrom in the light most favorable to the trial court's judgment. ***Ewanchuk***, 154 S.W.3d at 478. The trial court, in its discretion, determined based on the testimony and documents

submitted that Exhibits 7 and 8 transferred Askew's account (L.F. 29-31, 70). CACH proved ownership of Askew's account by a preponderance of the evidence.

c. CACH Proved Standing Through The Admissions of Askew

Askew acknowledged and admitted that CACH was the owner of the account through the payment arrangement and payments he made to CACH.

Diana Eakins testified that after CACH purchased the debt, Askew's wife, who Askew had authorized to speak with CACH's attorney, agreed to pay the full placement amount to CACH through a down payment of $1,500 (paid in one payment of $500 and a second payment of $1,000), and $200 per month thereafter until paid in full (Tr. 50-55, 65-66, 81-82). This agreement is also evidenced by Exhibit B, a record from CACH's attorney Bamford, which Askew offered and which was admitted into evidence. In addition, there were two payments made to CACH (although one payment was later stopped) by Askew and/or his wife, with authority from Askew (Tr. 9-11, 81-82, 102). Copies of these payments, Exhibits 5 and 6, were admitted into evidence. Askew testified he would not pay a debt he did not owe (Tr. 102). Thus, through the agreement and payments made, Askew admitted he owed CACH, and CACH owned the account. This again establishes standing to sue.

For the reasons stated above, the trial Court did not err in entering judgment in CACH's favor, and the trial court's judgment should be affirmed.

B. ASKEW ABANDONED HIS ARGUMENT REGARDING CHAIN OF TITLE

BY FAILING TO RAISE THE ISSUE IN HIS APPELLANT'S BRIEF FILED WITH THE EASTERN DISTRICT. ASSUMING THAT ISSUE WAS NOT ABANDONED, CACH PROVED THE CHAIN OF TITLE BY A PREPONDERANCE OF THE EVIDENCE.

a. Askew Did Not Preserve The Issue of Chain of Title

In his Appellant's Brief filed in the Eastern District, Askew made no claim that CACH was required to establish a chain of title or that CACH failed to show the chain of title to the account. In accordance with Rule 83.08(b), a party's substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." **MO. RUL. CIV. P.** 83.08(b). Askew is barred from presenting a new argument upon transfer in accordance with Rule 83.03(b). ***Lane,*** 158 S.W.3d at 228-230. As such, Askew's claim that CACH failed to establish a chain of title should be deemed abandoned.

b. Evidence of a Chain of Title Is Not Required

Even if Askew is permitted to argue CACH failed to show the chain of title to the account, there is no such requirement under Missouri law. In an automobile case, for example, testimony of the owner is competent evidence of standing, and the owner does not need to bring in every prior owner of the car or each title to the car to establish standing. Similarly, here, CACH introduced competent evidence establishing ownership of the account, and should not be required to introduce evidence as to every prior transfer. Plaintiffs are simply required to prove by a preponderance of the evidence they were assigned and are the owner of the account. ***Midwestern Health Mgmt.***, 208 S.W.3d 295, 298 (Mo. App. W.D. 2006). "[A]ny competent evidence may be introduced to

establish the fact of ownership of personal property." ***Renaissance Leasing***, 322 S.W.3d at 122.

Askew relies on ***Mitchell v. St. Louis Argus Publishing Co.,*** 459 S.W.2d 1 (Mo.App. 1970), for the notion that chain of title must be established (S.B. 25). However, in ***Mitchell,*** there were issues as to whether legal title to the stock of the decedent was vested in a personal representative or in his heirs, whether legal title could be transferred prior to the court's order of distribution of an estate, and whether assignments of stock were in accord with Section 403.050 of the Uniform Stock Transfer Act in effect in Missouri in 1956, or Section 400.8-309 of the Uniform Commercial Code in effect in Michigan, California, and Massachusetts in 1956. ***Id.*** at 4-5. ***Mitchell*** rested on whether the prior transfers were valid, because there were disputes regarding who had original legal title to the stock, whether there could be transfer of the stock, and whether the transfers were proper pursuant to statute. However, ***Mitchell*** did not require parties to establish chain of title in cases such as this, when there is evidence of ownership and there exists no issue regarding whether the transfers could properly occur. Here, Askew offered no evidence that Providian/Washington Mutual or World Wide Asset Purchasing were unable to transfer the account (in fact, the cardholder agreement, Exhibit 11, explicitly provided for assignment). Further, Askew made no showing that the transfer of his account was invalid, such that CACH would need to introduce additional evidence to prove standing by a preponderance of the evidence. Rather, the uncontroverted testimony from Diana Eakins, the bills of sale and Askew's admissions, all demonstrate CACH owns the account (Tr. 9-11, 18, 21, 23, 32, 102).

c. Chain of Title was Established By a Preponderance of the Evidence

Even if the Court determines CACH needed to establish the chain of title to the account, this was shown by a preponderance of the evidence through Eakins' testimony, the bills of sale, and Askew's admissions.

Chain of title was established through testimony. Askew testified he had a credit card with Providian (Tr. 4, 93). Eakins testified the original owner of the account was Providian, which was purchased by Washington Mutual; Providian/Washington Mutual sold Askew's account to Worldwide; and CACH purchased Askew's account from Worldwide (Tr. 18-19, 21, 23, 32, 82-83).

Chain of title was also established through the bills of sale. Exhibit 7 is a bill of sale showing the transfer of certain bulk accounts, listed in the "Account Schedule" to Worldwide. Exhibit 8, dated the same date as Exhibit 7, shows Worldwide transferred the accounts it purchased to CACH. Eakins testified both Exhibits 7 and 8 are in Askew's file and together served to transfer Askew's account to CACH (Tr. 22-23). In addition, CACH offered Exhibit 9, the redacted Account Schedule/Agreement referred to in Exhibit 7 and Exhibit 8, and which lists Askew's account (Tr. 23-24, 38).

Chain of title was also established through Askew's admissions. Askew admitted CACH was properly transferred the account through the payment arrangement, Exhibit B, and payments made to CACH, Exhibits 5 and 6 (Tr. 9-11, 65-66, 102). Askew testified he does not pay debts he does not owe, and yet he and/or his wife made two

payments to CACH, Exhibits 5 and 6, evidencing that CACH was properly transferred the account (Tr. 9-11, 102).

Though evidence of chain of title is not required in Missouri, all of the above proves the chain of title to the account.

III.

THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF CACH ON ACCOUNT STATED, FOR THE REASONS THAT CACH PROVED ALL THE ELEMENTS OF ACCOUNT STATED BY A PREPONDERANCE OF THE EVIDENCE, AND ASKEW FAILED TO PRESERVE THE ISSUE OF WHETHER THE SECOND ELEMENT OF ACCOUNT STATED WAS SATISFIED.

Standard of Review

Askew incorrectly states the standard of review for his Third Point Relied On is *de novo* (S.B. 30). This point involves issues of fact rather than application of law. Because this is a court-tried case, the judgment will be affirmed "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, 32 (Mo. 1976).[29] "Appellate courts should exercise the power to

[29] ***Murphy*** interpreted the provisions of former Rule 73.01(c), which were transferred in essentially the same form to Rule 84.13(d) effective January 1, 2000. *See* ***Ewanchuk,*** 154 S.W.3d at 478 fn. 3.

set aside a decree or judgment on the ground that it is 'against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong." ***Id.*** "A judgment is presumed correct, and the appellant has the burden of proving it erroneous." ***Ewanchuk,*** 154 S.W.3d at 478. All evidence and all reasonable inferences are viewed "in the light most favorable to the judgment" and "all contrary evidence and inferences" must be disregarded. ***Id.*** Further, in accordance with Rule 84.13(d)(2), the appellate court "shall give due regard to the opportunity of the trial court to have judged the credibility of witnesses." **MO. R. CIV. P.** 84.13(d)(2).

A. Definition of Account Stated

An account stated is: (1) an agreement between parties, having had previous financial transactions, (2) that a balance struck is correct and due between the parties, and (3) a promise by the debtor, either express or implied, to pay the balance. ***Chisler,*** 502 S.W. 2d at 426. It is a new cause of action arising from the prior monetary transactions, and amounts to an admission of liability by the debtor. ***Id.*** Askew claims here that the second and third elements of account stated were not met (S.B. 31).

B. Agreement That a Balance Struck is Correct And Due and a Promise to Pay the Balance

Askew did not address the second element of an account stated, an agreement that a balance is correct and due, in his Appellant's Brief filed with the Eastern District. Askew only addressed the third element of account stated, an express or implied promise to pay the balance. "When matters referenced as alleged error in a point relied on are not developed in the argument portion of a brief, they are deemed abandoned." ***Saunders-***

Thalden and Associates, Inc. v. Thomas Berkeley Consulting Engineer, Inc., 825 S.W.2d 385, 387 (Mo. App. W.D.1992) (Op. 7). Pursuant to Rule 83.08(b), a party "shall not alter the basis of any claim that was raised in the court of appeals brief." **MO. R. CIV. P.** 83.08(b). Thus, Askew should not be permitted to argue a claim he failed to raise in the Eastern District.

However, even if Askew is permitted to argue the second element of account stated, the competent and substantial evidence shows there was an agreement between the parties (L.F. 30, 70). This evidence also proves the third element of an account stated, an implied or express promise to pay the balance (L.F. 30, 70).

Diana Eakins testified that after CACH purchased the debt, Askew's wife, who Askew authorized to speak on his behalf, agreed to pay the full placement amount to CACH ($6,436.10) through a down payment of $1,500 (paid in one payment of $500 and a second payment of $1,000), and $200 per month thereafter until paid in full (Tr. 50-55, 65-66, 81-82). This agreement is also evidenced by Exhibit B, a record from CACH's attorney Bamford, which Askew offered into evidence. While Askew notes the $6,436.10 placement amount is not listed in Exhibit B, Eakins testified there was only authority given for payment arrangements on the full amount of the debt (S.B. 32; Tr. 65-66, 68-69). If there were an agreement for a lesser amount, it would have been documented in CACH's notes (Tr. 65-66, 68-69). The arrangement with Bamford/CACH constitutes an agreement as to the amount due, as well as an express promise to pay the remaining balance.

Askew claims there was no balance struck because CACH's Petition requests $5,936.10, rather than the $6,436.10 which Eakins testified was agreed upon by Askew (S.B. 32). However, the amount requested in CACH's Petition credited Askew for the $500 payment he made on February 29, 2008, reflected in Exhibit 5, after the payment arrangement was made (Tr. 55). While Askew agreed to pay $6,436.10, CACH is not requesting Askew pay a portion of that which was thereafter paid and is no longer due. Further, while the last account statement presented to the trial court showed a balance of $6,159.39, as stated by Askew, this was not identified as a final adjustment or balance, and additional interest accrued by the time the account was transferred to CACH, making the balance at placement $6,436.10, as reflected in Exhibit 9 and testified to by Eakins (Tr. 24) (S.B. 32).

Askew asserts evidence of the payment arrangement is inadmissible hearsay, because the arrangement was made with CACH's attorney Bamford, who was not present in court. However, it was Askew who asked the Court to admit Exhibit B, the records from attorney Bamford's office which evidenced the payment arrangement (Tr. 103-104; Exhibit 9). Askew cannot now claim the trial court wrongfully admitted his own exhibit. Further, ethically, a payment arrangement cannot be made by an attorney without his client's approval (**MODEL RULES OF PROF'L CONDUCT R.** 1.2(a)(2010)). Eakins testified as to the payment arrangement. She was aware of the arrangement, as reflected in the account history, and only used Exhibit B to refresh her recollection as to the date of the arrangement (Tr. 62, 67).

Besides the testimony and evidence of the payment arrangement, CACH admitted into evidence the two checks which were made payable to Collect America, of which CACH is a wholly owned subsidiary, from the joint checking account of Askew and his wife (Exhibits 5 and 6) (Tr. 11, 58). Evidence of partial payment implies an agreement to pay the remaining balance. *See* ***Anderson v. Stanley,*** 753 S.W.2d 98, 100 (Mo.App. E.D. 1988) (part payment "acknowledges the existence of the indebtedness and raises an implied promise to pay the balance"); ***Heidbreder v. Tambke,*** 284 S.W.3d 740, 748 (Mo.App. W.D. 2009) (If the debtor has made payments, it is "assumed that he made such payments as an implied promise to pay the balance"). Further, because Askew's partial payment implies a promise to pay the balance, and Askew admitted he would not pay on a debt he did not owe, the partial payments imply an agreement that the full placement amount is correct (Tr. 102).

Askew argues it was his wife who made the payment arrangement on his account, as well as made the payments, and he is not bound by his wife's actions (S.B. 32-34). However, as the Eastern District found,

> "While generally there is no agency relationship between spouses simply because they are married, such a relationship may be implied when one spouse cloaks the other with apparent authority to act on his behalf. ***Rosehill Gardens, Inc. v. Luttrell,*** 67 S.W.3d 641, 647 (Mo. App. W.D. 2002). This is a fact question to be resolved by the trial court. ***Missouri Farmers Ass'n, Inc. v. Busse,*** 767 S.W.2d 108, 110 (Mo. App. E.D. 1989)." (Op. 7).

This Court must view the evidence *and reasonable inferences drawn therefrom* in the light most favorable to the trial court's judgment. ***Ewanchuk,*** 154 S.W.3d at 478. As the Eastern District found,

> "It is a reasonable inference that an agency relationship existed between Askew and his wife given the fact that he authorized his wife to draw checks on their bank account, that his wife drew such a check to pay the debt, that Askew did not stop payment on the first check, and that Askew testified he does not pay debts he doesn't owe." (Op. 7) (Tr. 9-11, 81-82, 102).

In addition, Askew's wife's name appeared with his on the letter sent to CACH's attorney, again indicating that Askew's wife was acting with his authority (Exhibit D).

Askew argues giving his wife authority to speak with Bamford was only evidence there was no violation of the FDCPA, 15 **U.S.C.** §1692c(b), and not evidence of apparent authority (Tr. 81-82; S.B. 33). The FDCPA does not prohibit discussions with a debtor's spouse, regardless of whether authority is given by the debtor (*See* 15 **U.S.C.** §1692c(d), defining "consumer" under the Act as both the debtor and his or her spouse). In addition, there is nothing to suggest this evidence could only be used in response to Askew's FDCPA Counterclaim. In fact, the evidence was brought out in CACH's case in chief (Tr. 81-82). Askew's authorization cloaked his wife with the apparent authority to act on his behalf, because there would be no other reason for Askew to give such authority if he did not want her actions to be binding on him. *See* ***Rosehill Gardens,*** 67 S.W.3d at 647.

Further, Askew testified at trial he made payments on the account (Tr. 102). He also testified it was his wife who made the payments through their joint checking account (Tr. 9-11). However, Askew's testimony that he made the payments creates a reasonable inference that either he made the payments, or he authorized his wife to do so. This Court must view the evidence and reasonable inferences drawn therefrom in the light most favorable to the trial court's judgment. ***Ewanchuk***, 154 S.W.3d at 478.

Askew claims the only reason the payment arrangement and payments were made on the account was that his wife was "terrorized" by Bamford's office (S.B. 33; Tr. 102). However, there is nothing in Exhibit B, or in testimony offered at trial, to show Askew's wife was "terrorized" in any way. Askew notes he and his wife told Bamford (on 3/29/08), over a month after the payment arrangement was made (on 2/13/08), they might lose their house if they had to continue with the payment arrangement (S.B. 33) (Exhibit B). However, there is nothing which required Bamford to renegotiate the payment agreement previously agreed to by Askew because of this fact. Further, this was after the payment arrangements and payments had been made.

The only evidence presented that Askew's wife was "terrorized" was Askew's self-serving, conclusory statement (Tr. 102). It was for the trial court to weigh the credibility of the witnesses presented and to determine if an agreement was made to pay the balance on the account. Here, Askew presented contradictory testimony throughout the trial, providing ample reason for the trial court to question his credibility. For example, he admitted he signed the credit card application in response to CACH's Second Request for Admissions, 1(d), (Exhibit 13), and then denied it at trial (Tr. 5, 7).

Askew claimed at one point his wife made payments on the account, but later stated he was the one who made the payments (Tr. 10-11, 102). Although Askew signed the credit card agreement stating he read the enclosed brochure, he denied at trial having ever received it (Tr. 101). The trial judge did not find Askew credible. The trial judge did not abuse his discretion in finding Askew's wife was not "terrorized" and that an agreement was in fact made.

Askew notes he (and his wife) disputed the account with CACH, through a letter dated 8/22/08 (Exhibit D), which was many months after the 2/13/08 agreement (Exhibit B) and 2/29/08 and 3/28/08 financial transactions (Exhibits 5 and 6) between Askew and CACH (S.B. 35). While Askew claims a letter sent to attorney Bamford showed he (and his wife) disputed the debt, this alleged letter (Exhibit C) was not admitted into evidence at trial. Moreover, this letter was sent after the agreement was already entered into, and payments were made on the account. Further, Askew's Answer and Counterclaim were also sent long after the agreement and payments were made (L.F. 11, 15). Thus, this evidence does not support Askew's contention that an agreement was not reached.

This case is distinguishable from ***Whelan's, Inc. v. Bob Eldridge Const. Co.,*** 668 S.W.2d 244 (Mo.App.W.D. 1984), relied on by Askew (S.B. 31). In ***Whelan's***, there was no agreement as to the final balance and no proof of prior financial dealings between the parties. ***Id.*** at 247. Here, both were present. Askew's wife, with his authority, entered into an agreement as to the amount owed and two checks were written from Askew and his wife's joint checking account to Collect America, of which CACH is a wholly owned subsidiary.

Askew failed to dispute any of the account statements in this case. He contends no appellate court has held that silence or failure to object to account statements creates a presumption the amounts are valid (S.B. 34). However, ***Chisler,*** 502 S.W.2d at 427, held if a debtor retains an account for a reasonable time without objection, there is a rebuttable presumption it is valid. Askew cites to the FDCPA, 15 **U.S.C.** §1692g(c), to support his contention that retention of an account cannot impute liability. However, 15 **U.S.C.** §1692g(c) states only that the failure of a consumer to dispute the validity of a debt "under this section"—dealing with initial communications by debt collectors only—may not be construed by any court as an admission of liability by the consumer. This statutory provision is wholly inapplicable here, because Askew maintained the account, and received numerous account statements, without objection. Further, according to the contract at issue, Exhibit 11, Askew was required to notify the creditor within sixty days of any errors in billing statements.

Even if Askew's contention were true that retention for a reasonable time without objection does not impute liability, Askew did not simply remain silent or fail to object. Rather, Askew agreed to the balance by entering into the payment arrangement and making payments thereon, as reflected in Exhibits 5, 6 and B (Tr. 9-11, 50-55, 65-66, 81-82, 102).

The instant case is analogous to ***Ozark Mountain Timber Products v. Redus, et. al.,*** 725 S.W.2d 640 (Mo.App.S.D. 1987). In ***Ozark Mountain,*** the court attempted to determine if an account stated had been created for payment of services rendered by Ozark Mountain Timber Products to Westbend. ***Id.*** Echoing ***Chisler,*** the court held that

retention of an account for a reasonable time admits to the existence of an account and implies a promise to pay. ***Id.*** at 648. In ***Ozark Mountain,*** there was also an express promise, in that the debtor's two partial payments recognized its duty to pay that sum, and the debtor's express promise established an account stated with regards to the remainder of the debt. ***Id.*** Similarly, in the present case, two partial payments were made out of Askew's joint checking account (although one was later stopped), as reflected in Exhibit 5 and 6, and Askew's wife, with his authority, agreed to pay the full placement amount (Tr. 9-11, 50-55, 65-66, 81-82, 102).

For the reasons stated above, the judgment of the trial court should be affirmed.

IV.

THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF CACH ON BREACH OF CONTRACT FOR THE REASONS THAT CACH PROVED ALL THE ELEMENTS OF BREACH OF CONTRACT BY A PREPONDERANCE OF THE EVIDENCE, INCLUDING EVIDENCE OF A CONTRACT, AND A LEGALLY RECOVERABLE AMOUNT OF DAMAGES.

Standard of Review

Askew incorrectly states that the standard of review for his Fourth Point Relied On is *de novo*. However, this point involves issues of fact, rather than application of law (S.B. 30). As this is a court-tried case, the judgment will be affirmed "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***, 536

S.W.2d at 32.[30] "Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is 'against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong." ***Id.*** "A judgment is presumed correct, and the appellant has the burden of proving it erroneous." ***Ewanchuk*** at 478. All evidence and all reasonable inferences are viewed "in the light most favorable to the judgment" and "all contrary evidence and inferences" must be disregarded. ***Id.*** Further, in accordance with Rule 84.13(d)(2), the appellate court "shall give due regard to the opportunity of the trial court to have judged the credibility of witnesses." **MO. R. CIV. P.** 84.13(d)(2).

A. Elements of Breach of Contract

Under Missouri law, an action for breach of contract requires proof of the following essential elements: "(1) the existence and terms of a contract; (2) that plaintiff [or plaintiff's assignor] performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff." ***Keveny,*** 304 S.W.3d at 104. Askew claims the first and fourth elements of breach of contract were not met (S.B. 37).

B. Existence and Terms of a Contract

[30] ***Murphy*** interpreted the provisions of former Rule 73.01(c), which were transferred in essentially the same form to Rule 84.13(d) effective January 1, 2000. *See* ***Ewanchuk v. Mitchell,*** 154 S.W.3d at 478 fn. 3.

Askew claims there was no evidence to show existence and terms of a contract, asserting the cardholder agreement was not admissible, was not applicable to him, and there was no meeting of the minds (S.B. 37-39).

However, Askew admitted at trial that he had a credit card with Washington Mutual/Providian (Tr. 4, 93). Askew claims the contract, marked as Exhibit 11, is inadmissible. However, as laid out in Point I above, Exhibit 11 was admissible pursuant to Section 490.680.[31]

Askew asserts the cardholder agreement marked as Exhibit 11 does not apply to him. He provides no evidence in support of this contention, other than noting his signature and name are not on the credit card agreement (S.B. 37). However, Eakins testified that credit card agreements are not individual-specific and she does not know of any credit card agreement that contains a signature (Tr. 49). Eakins also testified Exhibit 11 was the cardholder agreement applicable to Askew's account, kept under her custody and control (Tr. 44, 46).

Askew states he "does not believe" he received the cardholder agreement, and thus alleges he is not responsible for the charges he incurred, as there was no "meeting of the minds" (Tr. 93). The card application states the agreement would be mailed to Askew upon receipt of the application (Exhibit 1). Providian received the application, indicating the cardholder agreement was sent to Askew. Whether Askew does not remember this agreement because it was sent to him twelve years ago, or he did not review it, having

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[31] **R.S.Mo.** §490.680.

simply thrown out the agreement upon receipt, Askew cannot profit from his own ignorance. His failure to read the cardholder agreement cannot constitute a defense when he used the card at issue. Askew's use of a credit card constitutes acknowledgement of and acceptance of the terms in the agreement, and a meeting of the minds. ***Citibank (South Dakota), N.A. v. Wilson***, 160 S.W.3d 810, 813 (Mo.App.W.D. 2005).

Askew also claims he did not agree to the terms in Exhibit 11 (Tr. 93; S.B. 39). This is, again, a self-serving statement with nothing presented to support it. Further, there was evidence to show Askew did agree to the terms of Exhibit 11. As Askew admitted in his response to CACH's Second Request for Admissions 1(d), (Exhibit 13), he signed the credit card application, acknowledging he "read the enclosed brochure" relating to the account and agreed "to be bound by the Account Agreement." Askew admitted at trial that the language in Exhibit 1 bound him to the agreement and all of its terms (Tr. 100). Through Askew's signature, and his use of the credit card, he agreed to be bound by the cardholder agreement. ***Citibank (South Dakota), N.A.***, 160 S.W.3d at 813. Further, as the Eastern District found, even if there were new terms at some point sent to Askew, his failure to cancel an account after notice of the change of terms constitutes acceptance of those new terms (Op. 9). ***Id.*** The trial court thus found that Askew agreed to the terms of the contract (L.F. 28, 70).

Askew claims there is no evidence he used the card and was bound to the cardholder agreement (S.B. 39). However, there was a $6,436.10 final balance on the card, as is reflected in Exhibit 9 and was testified to by Eakins (Tr. 24, 55, 65, 68, 74). Each of the statements contained in Exhibit 2 show balances on the card. Askew's use of

the card can be inferred from the balances thereon. Further, Askew presented no evidence to contradict these balances, or to indicate he did not use the card.

In addition, Askew, or his wife (with his authority), agreed to pay the balance in full through a payment arrangement, and made two payments on that balance, Exhibits 5 and 6, pursuant to that arrangement (though one was later cancelled) (Tr. 9-11, 50-55, 65-66, 81-82, 102). This shows there was a meeting of the minds, as Askew testified he does not pay debts he does not owe (Tr. 102).

Thus, the credit card application, credit card agreement, use of the card, and Askew's admissions arising from the payment arrangement and payments, evidenced the existence of a contract.

C. Askew's Claim that CACH Failed to Prove Contract Damages is Abandoned, But Even if Askew has Preserved this Issue, CACH Proved the Contract Damages.

In his Appellant's Brief filed with the Eastern District, Askew made no claim that CACH failed to prove contract damages. In accordance with Rule 83.08(b), a party's substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." **MO. R. CIV. P.** 83.08(b). Appellants are barred from presenting new arguments upon transfer. ***Lane,*** 158 S.W.3d at 228-230.

However, even if Askew is permitted to make this argument, CACH proved contract damages here (L.F. 29, 70). Eakins testified the amount owed by Askew at placement was $6,436.10 (Tr. 24, 55, 65, 68, 74).

Exhibit 9 also establishes the balance on the account at placement. As described *supra*, Exhibit 9 was admissible. Further, there was absolutely no evidence the final balance listed in Exhibit 9 was double hearsay as claimed by Askew (S.B. 41). To suggest that every item contained within a business record is double hearsay would make the business record statute meaningless. The account balance, like all other information within Exhibit 9, was information prepared and recorded in the ordinary and normal course of business by an individual with personal knowledge, and not some statement made by a third party (Tr. 24).

In addition, Askew admitted $6,436.10 was the final balance on the account, through the agreement made by his wife and the payments made through their joint checking account, as reflected in Exhibits 5 and 6 (Tr. 9-11, 50-55, 65-66, 81-82, 102). After crediting the $500 payment made by Askew/his wife, the total contract damages were $5,936 (Tr. 55).

All of these items establish the contract damages by a preponderance of the evidence. Further, there was no evidence to contradict the placement amount, nothing to suggest that more than $500 was paid on that placement amount, and nothing to suggest the damage amount was "uncertain" or "mere conjecture" as Askew alleges (S.B. 40).

There is no requirement that CACH list every single charge over the account's nine-year history and how it was calculated. To a debt buyer, the placement amount is like principal--the entire amount is owed to them, and how it is broken up has no relevance. ***Wahl v. Midland Credit Management, Inc.,*** 556 F.3d 643, 646 (7th Cir. 2009).

Askew goes so far as to suggest CACH needed to bring in the Wall Street Journal for every date of purchase over the account's nine-year history to show how each variable interest rate on the account was calculated (S.B. 40). There is nothing in the law to support this. Such a requirement would be unreasonable and overly burdensome, and would take up unnecessary time in our courts. All that is required for the contract to be valid and enforceable is for the terms to be certain by the "ordinary canons of construction or by reference to something certain..." ***Shofler v. Jordan,*** 284 S.W.2d 612, 614 (Mo.App. 1955). Here, the contract sufficiently laid out the fees and interest allowed through its terms and through the "reference to something certain"--the prime interest rates published in the Wall Street Journal. ***Id.*** CACH then established the final balance through exhibits and testimony, and there was absolutely nothing presented by Askew, through the Wall Street Journal or otherwise, to contradict it.

For the reasons stated above, the trial court's judgment should be affirmed.

V.

THE NATIONAL CONSUMER LAW CENTER'S AMICUS BRIEF IS NOT GERMANE TO THE ISSUES BEFORE THE COURT. THE AMICUS BRIEF CONTAINS ALLEGATIONS COMPLETELY DIVORCED FROM THE RECORD HEREIN, AND IS MERELY AN ATTEMPT TO PREJUDICE CACH BY CITING TO EGREGIOUS BEHAVIOR OF OTHER DEBT COLLECTORS.

Standard of Review

As this is a court-tried case, the judgment will be affirmed "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***, 536 S.W.2d at 32.

A. The National Consumer Law Center's Brief Discusses Inapplicable Fact Situations, and All Items Actually Relevant Are Addressed in Askew's Substitute Brief.

The National Consumer Law Center's[32] Amicus Brief discusses fact situations that are wholly inapplicable to this case. The Amicus Brief contains allegations completely divorced from the record herein, and is merely an attempt to prejudice CACH by making broad generalizations and citing to egregious behavior of other debt collectors. Everything within the Amicus Brief that actually does apply to this case was addressed in Askew's Substitute Brief and is responded to above. As such, NCLC's Amicus Brief should be stricken.

NCLC's Amicus Brief[33] discusses "aggressive and relentless debt-collection tactics," "threats, intimidation, and harassment," "repeated reporting of…alleged debt[s] on….credit reports," "frequent inability to verify the accuracy of the debt or the amount sought…," and inability of debtors "to afford counsel" (A.B. 6, 10). No such conduct was engaged in by CACH or on its behalf. There was no evidence of "aggressive and relentless debt-collection practices" or "threats, intimidation, and harassment" by CACH, no evidence of CACH reporting improper information (or any information for that

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[32] Hereinafter "NCLC"

[33] Hereinafter "A.B."

matter) on Askew's credit reports, and no evidence of CACH's inability to verify the debt. Further, while inability of a debtor to afford counsel really has no relevance to the merits of a case, the debtor here could afford counsel, not only in the trial court, but also on appeal and to the Supreme Court (where he even retained a second counsel).

NCLC asserts, "sellers frequently refuse to warrant the collectability or the accuracy of the account information" they sell to debt buyers (A.B. 8). Again, this does not apply to the case at hand. There was no evidence here that the sellers did not warrant the collectability or the accuracy of the account information. In addition, even if there were, this does not provide any indication the information provided by the sellers was invalid, but only that the sellers do not want anything further to do with the debt.

NCLC also discusses the "scores of lawsuits" brought by debt collectors that "overwhelmed our courts" (A.B. 7). There was no evidence here of "scores of lawsuits" brought by CACH or that the courts are overwhelmed. Further, the number of cases CACH, or any debt-buyer, brings in court is irrelevant. The number of suits filed provides no indication as to their validity.

NCLC also states, "large numbers of cases" end "in default judgment such that debt-buyers never have to prove them" (A.B. 7). However, a default judgment does not indicate there is no validity to a debt or to a lawsuit. Again, this has no relevance, because this case does not involve a default judgment, and CACH brought the case to trial.

NCLC comments, "debt-buying companies purchase bad debts for just a few cents on the dollar" (A.B. 7). This is again inapplicable to the instant case, because there was

no evidence presented regarding the amount for which CACH purchased the debt. Further, there is no relevance as to the purchase price here, and no evidence the purchase price would have any effect on the validity of the debt.

NCLC also comments on how debt collectors allegedly have no proof in support of their cases, no documentation available other than "a recordless Excel spreadsheet," and that debt collectors try to "puff" up their cases using affidavits signed by their own employees (A.B. 7-8, 11). This is not the case here. At trial, CACH presented a card application, cardholder agreement, account statements, bills of sale, the account schedule, copies of payments made by the debtor, and testimony of its representative and Askew (Exhibits 1, 2, 3, 5, 6, 7, 8, 9, 11). Further, CACH offered no affidavits at all, let alone affidavits to try to "puff" up its case.

NCLC states information that debt-buyers obtain is "often vague, contradictory, and incomplete," without stating in any way how the information is vague, contradictory, or incomplete in this case (A.B. 8). CACH provided numerous documents at trial, and there was no evidence produced that any of the documentation presented contained errors. Further, while NCLC states that, "Armed with only incomplete information, it is not uncommon for debt-buyers to pursue the wrong person or the wrong amount," here Askew admitted he had the Providian account, and admitted that he owed the balance through his wife's agreement (with Askew's authority) to pay the balance and the payments made thereon, as reflected in Exhibits 5, 6 and B (A.B. 9; Tr. 4, 9-11, 50-55, 65-66, 81-82, 93, 102). In addition, there was no evidence Askew was the improper person or the amount requested was incorrect.

NCLC cites to a completely different case wherein a CACH representative stated in deposition he would believe whatever information was provided to him by the banks/original creditors (A.B. 8). NCLC seems to suggest records from banks, regulated by the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision, among other entities, are filled with errors and inaccuracies. There is nothing to support such a radical notion, which is why courts have held that debt collectors may rely on the records provided by original creditors, and have no independent duty to investigate the validity of a debt when there is nothing in the records indicating any inaccuracy. *See* ***Smith v. Transworld Systems, Inc.,*** 953 F.2d 1025, 1032 (6th Cir. 1992); ***Clark v. Capital Credit & Collection Services,*** 460 F.3d 1162, 1174 (9th Cir. 2006).

NCLC argues, "the business records exception to the hearsay rule should apply only if all of the demands of §490.680 are satisfied" (A.B. 12). As discussed above, all the requirements were satisfied in the case at bar. Further, there was evidence that Eakins had training with the major banks from which CACH purchased debt (Tr. 48). While NCLC claims this training may not have been sufficient (A.B. 14), there was absolutely no evidence presented by Askew in support of this contention.

NCLC tries to argue CACH failed to prove standing by listing numerous other collection cases where standing was not proven (A.B. 15-17). Again, NCLC is using completely irrelevant fact situations without looking to the facts that are actually present in this case. NCLC fails to demonstrate any deficiencies in the testimony, bills of sale, or admissions in this case, which were found to establish standing (L.F. 29-31, 70).

NCLC also argues Mrs. Askew's agreement to pay the balance on the account and payments made by Askew or his wife thereafter "should not be treated as an implied promise," because they may have simply just wanted to put the matter to rest (A.B. 17-18). However, there was no evidence that was the case herein. Askew provided no testimony there was some other amount due. Nor did he offer any evidence to show a different amount was owed. Nor was there any testimony at all from Askew's wife. The trial court, in its discretion, weighed the credibility of the evidence and exhibits, and determined there was an agreed upon balance (L.F. 30, 70).

NCLC fails to note that debt collectors hold an important purpose in the American economy. They help return money to banks and lenders, which allows Americans to continue to obtain credit and reduces the cost of borrowing. Further, debt collectors ensure individuals are held responsible for the debts they incur.

The judgment of the trial court should be affirmed.

CONCLUSION

"A judgment is presumed correct, and the appellant has the burden of proving it erroneous." ***Ewanchuk,*** 154 S.W.3d at 478. All evidence and all reasonable inferences are viewed "in the light most favorable to the judgment" and "all contrary evidence and inferences" must be disregarded. ***Id.*** Further, in accordance with Rule 84.13(d)(2), the appellate court "shall give due regard to the opportunity of the trial court to have judged the credibility of witnesses." **MO. R. CIV. P.** 84.13(d)(2).

The trial court did not err in admitting Exhibits 2, 7, 9, and 11. CACH satisfied each of the requirements of Section 490.680. The plain language of the statute does not require that a sponsoring witness be employed by the entity which created the records.

Askew's claim that there was no proper foundation for Exhibits 7, 9, and 11 is deemed abandoned, because this issue was not raised before the Court of Appeals. Should the Court consider this issue, it will find a proper foundation was laid for each of these exhibits, as well as Exhibit 2.

CACH proved standing to sue through the testimony of Eakins, bills of sale, the Account Schedule, and Askew's admissions (Exhibits 5, 6, 7, 8, 9, B). Askew did not raise the issue of chain of title before the Court of Appeals, and thus it is abandoned. However, even if this Court considers the issue, evidence of chain of title is not required under Missouri law. In any event, chain of title was proven. In addition, Askew did not object to Eakins' testimony regarding ownership and did not raise the best evidence rule before the Court of Appeals, and thus has abandoned this issue. Even if the Court

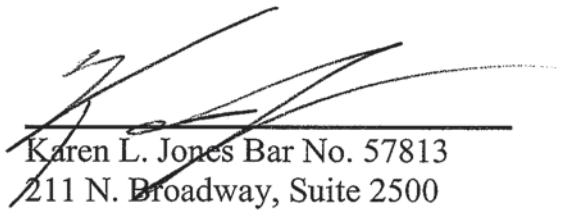
considers the issue, the best evidence rule does not apply to Eakins' testimony of ownership.

CACH proved each element of account stated and breach of contract, with or without the exhibits Askew claims are inadmissible. Askew has abandoned any argument the balance was not correct and due, as this was not raised in his Appellant's Brief filed with the Court of Appeals. Regardless, CACH proved the second element of account stated through the testimony of Eakins and Askew and Exhibit 5, 6 and B, showing an acknowledgement of Askew/his wife that the amount was owed. CACH also proved the third element, a promise by the debtor to pay the balance, through the testimony of Eakins and Askew, and Exhibit 5, 6, and B.

As for breach of contract, CACH proved the existence and terms of the contract, including meeting of the minds. In his Appellant's Brief filed with the Eastern District, Askew did not claim CACH failed to prove contract damages. Thus, the argument is abandoned. Should the Court consider the issue, it will find CACH proved contract damages through the testimony of Eakins and Askew, and Exhibits 5, 6, 9 and B.

NCLC's Amicus Brief discusses fact situations and practices not present in this case. The few issues NCLC raises that are relevant to this case, such as who can testify as to business records and what constitutes a promise to pay, are fully addressed in CACH's response to Askew's Substitute Brief.

For the reasons set forth above, the judgment of the trial court should be affirmed.



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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Respondent Substitution Brief includes all of the information required by Missouri Rule 55.03, and that the undersigned has signed the original. Respondent further states that this Substitute Brief complies with the limitations contained in Rule 84.06(b). Respondent's Substitute Brief contains 16,938 Words, excluding the cover, certificate of service, this certificate of compliancy, signature block, and appendix, according to the word count function of the word processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of Respondent's Substitute Brief was sent to the following, via U.S. mail, First-Class Postage pre-paid, this 16th day of November, 2011, said attorneys having also been served a copy of the foregoing via the Supreme Court of Missouri's electronic filing system:

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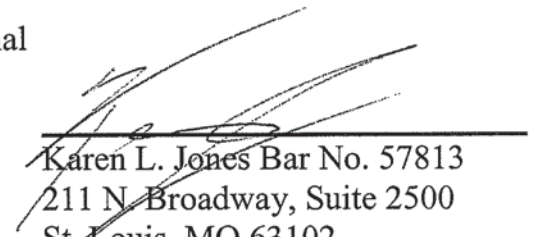

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