IN THE SUPREME COURT OF THE STATE OF MISSOURI

CACH, LLC,

Plaintiff/Respondent,

v. SC 91780

JON ASKEW,

Defendant/Appellant.

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

Associate Division

Honorable Dale Hood, Judge

BRIEF *AMICUS CURIAE* OF COMMERCIAL LAW LEAGUE OF AMERICA IN SUPPORT OF RESPONDENT

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Statement of Interest

The Commercial Law League of America ("CLLA") is a 116-year-old national organization of attorneys, commercial collection agencies, and other experts in credit and finance, actively engaged in the fields of commercial law, bankruptcy and reorganization. The CLLA is the publisher of the award-winning *Commercial Law Journal* and *Commercial Law Bulletin.* It has long been associated with the representation of creditor interests, and promoting the fair, equitable, and efficient administration of commercial and bankruptcy cases for all parties-in-interest. The CLLA is staunchly committed to policing its own industry and regularly provides articles and presentations to its members on consumer and commercial law issues.

Through its representatives, the CLLA has testified before Congress on numerous occasions, and has provided expert testimony in the fields of collections, bankruptcy and reorganization. CLLA has appeared as an *amicus curiae* before federal and state courts in a number of cases.

Members of the CLLA represent collection agencies, credit grantors, and debt purchasers in a variety of collection activities and disputes. The issues raised in this case regarding a debt collector's evidentiary burden, including the requisite testimony for business records admissions and an assignor's documentary chain of title, will have a significant impact on the CLLA's members and their clients.

Introduction & Industry Background

The debt collection industry -- which includes collections, debt buying, debt transfers and assignments, and legal efforts -- provides an invaluable economic benefit and favorably impacts local, state and national interests. It ensures that banks, businesses, and all levels of governments have access to cash and credit in order to continue operating. This industry helps keep the prices of goods and services from being unnecessarily inflated due to 'bad' debt defaults and charge-offs. It also facilitates the financial environment so that consumers can continue to obtain the credit necessary for purchasing essential goods and services. Although the debt industry is not perfect, the vast majority of its operations is respectful of consumers, and adhere to the letter and spirit of the law.

Debt collection has increased in the recent past as a direct result of the increased use of credit and the increased number of accounts in default. Since the 1970s, legislated consumer protections have continued to increase and match the increased volume of collection activity. Consumers today are afforded far more protection from abusive business and collection practices than 30 years ago. These protections come in the form of federal statutes, including, the Truth in Lending Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, a host of state-specific statutes and regulations, investigations by state attorney generals, the

Federal Trade Commission, and the newly created Consumer Financial Protection Bureau.

Nearly every person utilizes credit in some form. The most obvious credit purchases are houses and home improvement, vehicles, groceries, student loans, and common day-to-day consumer buying. Right or wrong, American lives are increasingly dependent on credit. Access to credit stems from the creditor's reliance on the consumer's promise to repay, and alternatively when a default occurs, on an ability to recover the outstanding balance (or a portion thereof), through lawsuits, debt collection, or selling defaulted accounts. The presumptions underlying these business activities allow the creditors to continue to extend credit so individuals may have access to the necessary credit they have come to expect. If debt collection and debt buying becomes impractical through oppressive evidentiary standards, creditors would virtually cease to offer credit, because they could not longer depend on the possibility of recouping the loss.

Debt collection and debt buying is no different than any other business. The debt industry's companies rely on their business records kept internally, as well as those kept by their predecessor(s) in interest. For over 60 years, this Court has held that records of a business are admissible if, to the satisfaction of the court, a custodian can testify to the offeror's record keeping, and to the business record's time and mode of preparation. This Court has never held a distinct business or

industry to a different, heightened standard of proof; has never required a custodian to have personal knowledge of a particular record; has not required a custodian to be employed by the document-offering business.

Askew is now asking this Court to abandon decades of precedent, and specifically hold one company and one industry to a higher standard than any other party. Such a change is unwarranted and unnecessary. This modification to Missouri's evidentiary rules would essentially prevent the future admission of any credit or transactional instrument that is purchased, assigned and/or transferred. The practical result would also mean that legal collections of charged-off accounts would likely end.

This request for alteration of Missouri's laws is particularly offensive when the trial record is reviewed. Askew admitted that he obtaining the credit card, utilized the credit extended him, failed to repay the amounts borrowed, and admitted that the account was assigned to CACH. The documentary evidence was supported by witness testimony, and seriously weighed after considerable arguments by the parties. The judge exercised great care and discretion in admitting the applicable evidence, and issued a ruling in line with it. Such a decision should not be disturbed.

Argument

I. STANDARD OF REVIEW

On appeal, the ruling of a court-tried case should be affirmed "unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law."[1] Trial courts are specifically "afforded 'broad discretion' in determining whether the parties complied with section 490.680 [the business records exception to hearsay]."[2] It is long been held that the "bottom line" of this exception is the discretionary determination by the trial court of the record's trustworthiness.[3]

Further, "[t]he admission or exclusion of evidence lies within the sound discretion of the trial court, and the trial court's ruling will not be disturbed absent

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[1] *Rosehill Gardens, Inc. v. Luttrell,* 67 S.W.3d 641, 645 (Mo.App. W.D. 2002) (citing *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976); *Laclede County v. Douglas,* 43 S.W.3d 826, 827 (Mo. banc 2001)).

[2] *Discover Bank v. Smith,* 326 S.W.3d 120, 123 (Mo.App. S.D. 2010) (quoting *Alberswerth v. Alberswerth*, 184 S.W.3d 81, 102 (Mo.App. W.D. 2006)).

[3] *Id.* (quoting *Davolt v. Highland,* 119 S.W.3d 118, 134 (Mo.App. W.D. 2003) (quoting *Rouse Co. of Mo., Inc. v. Justin's, Inc.,* 883 S.W.2d 525, 530 (Mo.App. E.D. 1994)).

abuse of discretion."[4] "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration."[5] Lastly, after a finding of abuse of discretion, "[t]he admission of evidence claimed to be hearsay is reversible error only if the complaining party is prejudiced."[6]

II. MISSOURI HAS A STRONG ECONOMIC INTEREST IN ALLOWING DEBTS TO BE COLLECTED BY LEGAL MEANS, UNDER THE SAME EVIDENTIARY AND PROCEDURAL RULES THAT APPLY TO EVERY LITITAGANT

Heightening Missouri's evidentiary standards solely for purchased/assigned accounts would have a tremendous long-term impact on the entire credit industry, and would likely cause a decline in credit availability and an increase in costs.

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[4] *Huffy Corp. v. Custom Warehouse, Inc.,* 169 S.W.3d 89, 92 (Mo.App. E.D. 2005) (quoting *Nelson v. Waxman,* 9 S.W.3d 601, 603 (Mo. banc 2000)).

[5] *Id.*

[6] *Ozark Appraisal Services, Inc. v. Neale,* 67 S.W.3d 759, 767 (Mo.App. S.D. 2002) (quoting *City of Rolla v. Armaly*, 985 S.W.2d 419, 424 (Mo.App. S.D. 1999)).

Further, altering the evidentiary rules in this manner would have adverse ripple effects in commercial litigation throughout Missouri's courts.

A. Missouri Benefits from the Recoveries Achieved by the Credit Industry

Missouri and the U.S. derive great economic value from the credit industry, which includes debt collections, the buying, selling and servicing of debts, and the assignment of credit accounts. This value is elevated after the original creditor has charged-off the original account. In Askew's First Point Relied On, he requests that this Court raise the evidentiary standard for purchased/assigned accounts, by requiring a separate records custodian to attest to the creation and maintenance of each document within the account's business records, including the account's chain of title. Where the vast majority of accounts are transferred, purchased, and/or assigned at some time in the account's life cycle, such an evidentiary standard would become virtually insurmountable, and would have a suffocating ripple effect throughout Missouri trial courts. Such an alteration would also contribute additional stress to the precarious economy and consumers' fickle reliance on credit.

The current economic climate is uncertain, at best. Currently, unemployment rates continue to hover around 9%[7], defaults rates continue to rise[8], foreclosures may be on an upswing[9], and the economy looks like its facing another recession.[10] Student loan default rates are also getting national attention, as it seems more

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[7] Danielle Kurtzleben, *Jobs Report Disappoints, but Unemployment Falls to 9 Percent,* US News (November 4, 2011) *at* *http://www.usnews.com/news/articles/2011/11/04/jobs-report-disappoints-but-unemployment-falls-to-9-percent*.

[8] S&P Indices, *September Sees Increase in All Credit Line Default Rates Except Autos,* Market Watch (October 18, 2011) *at* *http://www.marketwatch.com/story/spexperian-credit-default-indices-september-sees-increases-in-all-credit-line-default-rates-except-autos-2011-10-18*.

[9] Alex Veiga, *Mortgage Default Warning Surged in August,* Associated Press (September 15, 2011) *at* *http://finance.yahoo.com/news/Mortgage-default-warnings-apf-157937671.html*.

[10] David Leonhardt, *Rising Fears of Recession,* The New York Times (September 7, 2011) *at* *http://www.nytimes.com/2011/09/08/business/economy/american-economy-on-the-verge-of-a-double-dip-recession.html*.

unlikely that students will be able to repay their education debts.[11] Consumers and businesses can be easily overwhelmed by the effects of potential credit defaults.

Defaults are equally devastating for the companies to whom these debts are owed and assigned. Payment defaults lead to increased credit write-offs and losses for businesses, which translates to tightened credit standards, budget cuts, and employee lay-offs. In turn, decreased consumer spending leads to decreased business revenues. The consequence is a rather challenging cyclical predicament.

One common way for businesses to find alternative revenue streams is to send their defaulted accounts to a collection agency for collection or sell them to a debt buyer, rather than trying to collect themselves. Businesses and government bodies have successfully utilized collection agencies to recoup delinquent accounts. In one year alone, U.S. businesses charged off $152 billion in debt losses.[12] Debt collectors returned $40.4 billion to these businesses, and back into

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[11] Tamar Lewin, *Student Loan Default Rates Rise Sharply in Past Year,* The New York Times (September 12, 2011) *at* http://www.nytimes.com/2011/09/13/education/13loans.html.

[12] Alan Goforth, *Getting Bills Paid Can be a Good Thing, Collectors Say,* Kansas City Star (October 28, 2011) *at* http://www.kansascity.com/2011/10/28/3235624/getting-bills-paid-can-be-a-good.html.

the U.S. economy.[13] This was a 20.9% reduction in bad debt write-offs.[14] This translated to a $354/year savings to U.S. households, because businesses did not have to raise prices to cover these write-offs.[15] If the collection agency fails to recover the debt, the next best way to regain a portion of their lost revenue, is for the business or government to sell/assign the account and remove the debt from their books.

By selling their "bad" debt, businesses improve their efficiency by focusing on their particular operations, rather than trying to collect their defaulted accounts. This transfer of debt allows businesses to continue functioning, and keeps their employees working. Debts of all kinds are sold and assigned, by a variety of businesses and governmental entities. For example: car dealers assign vehicle contracts to the finance companies, doctors sell their medical practices (and their accounts receivables) at retirement, and merged banks transfer their accounts to the acquiring entity. These debts can also be sold, often a discounted price, due to their decreased likelihood of return, to a debt buyer who then attempts to collect the outstanding balances.

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[13] *Id.*

[14] *Id.*

[15] *Id.*

Governments also sell or assign their debts to decrease deficits.[16] This is necessary, simply because cities and states have millions of dollars in unpaid bills, including unpaid fines and fees for simple traffic violations. For example, New York City has $680 million in unpaid fines, Washington DC has $355 million, Milwaukee has $58 million and Detroit has $30 million.[17] These bills are not just a problem for big cities. Columbia, Missouri reported that it had over $36,000 in unpaid parking tickets.[18] If a fraction of these sums could be collected by collection

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[16] Brian Parkin & Rainer Buergin, *Germany to Sell More Government Debt in 2011 as Growth Slows, Budget Shows,* Bloomberg (August 17, 2010) *at* http://www.bloomberg.com/news/2010-08-17/merkel-s-government-to-sell-more-debt-in-2011-as-growth-slows-draft-shows.html; Floyd Norris, *Data Shows Less Buying of U.S. Debt by China,* The New York Times (January 21, 2011) *at* http://www.nytimes.com/2011/01/22/business/economy/22charts.html.

[17] Ashley Halsey, III, *Your Credit May Take a Hit from Unpaid Traffic and Parking Tickets,* Washington Post (October 31, 2011) *at* http://www.washingtonpost.com/local/commuting/your-credit-may-take-a-hit-from-unpaid-traffic-and-parking-tickets/2011/10/31/gIQABPVLZM_story.html.

[18] Brennan David, *City of Columbia Recoups Nearly $15,000 in Unpaid Parking Fines,* Columbia Daily Tribune (July 31, 2011) *at*

agencies or sold to debt buyers, it would create an impressive impact on these cities. For example, if these debts were sold for 10% of their total value, New York City would receive a $68 million payday, without spending anything.

Nationally, debts of failed banks are sold daily through the Federal Deposit Insurance Corporation (FDIC). The FDIC was created by Congress in 1934 to maintain stability and public confidence in the nation's financial system by insuring deposits, examining and supervising financial institutions for safety and soundness and consumer protection, and managing receiverships.[19] In the event of a bank failure, the FDIC acts in two capacities. First, it insures the bank's deposits. Second, the FDIC, as a "Receiver," assumes the task of ***selling and collecting the assets of the failed bank*** and settling its debts.[20]

Missouri is not immune. Twelve Missouri banks have failed since October 1, 2000.[21] Pursuant to the FDIC mandate, these banks' accounts have been sold to debt purchasers, who will attempt to collect the defaulted accounts. As with other

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http://www.columbiatribune.com/news/2011/jul/31/city-of-columbia-recoups-nearly-15000-in-unpaid/.

[19] *About FDIC,* Federal Deposit Insurance Corporation, *http://www.fdic.gov/about/* (last visited November 8, 2011).

[20] *Id.*

[21] *Id.*

accounts, the failed banks' "bad" debts need to be collected to recover the FDIC's (and thus the taxpayers') investment. These transactions transcend traditional economic barriers, impacting consumers, other banks, businesses and the government.

B. Askew's Effort to Create Special Rules for the Credit Industry, in Place of the Business Records Exception Statute, by Requiring a Chain of Title Witness for Every Offered Document Would Have Devastating Consequences

Obviously, the debt collection industry has broad economic impact. This case raises the issue of the effect that evidentiary standards will have on the legal collection of debts. Askew's Point One and the National Consumer Law Center's *Amicus* both insist that the debt collection industry should be specifically constrained to a heightened degree of proof, by altering over 60 years of precedent and disregarding the trial court's discretion in admitting evidence.

The decision to be made by this Court will have vast commercial implications for commercial financial operations, many governmental interests, and every facet of the debt collection industry. Requiring that a "chain of title" witness testify for every business record document sought to be admitted could cause commercial litigation to come to a screeching halt.

It is wholly improbable that such a "chain of title" witness would be available, and likely would not be known. Debts are often sold and/or assigned by failed banks and closed businesses. Obviously, a failed business or bank has no employees, or any interest in supplying a witness. It would therefore be virtually impossible to find a records custodian to attest to the debt and supporting documents. This requirement would also be an inefficient means to collect debts, as the expenses of litigating such cases would simply become cost prohibitive. Ultimately, proving the "chain of title" would become completely impractical in costs and reasonableness.

The commercial implications to both consumers and the economy would also be dramatic. Defaults in consumer accounts would likely rise, as some consumers would have little motivation to pay their bills, since the debt would be virtually uncollectable after charge-off and/or assignment. Further, this could also make businesses reluctant and more selective in credit extension, thereby widening the economic disparities.

The impact of Askew's request would also halt the sale of accounts and "bad" debt by financial institutions, businesses and governments, as debt purchasers would not be able to efficiently collect the accounts. This may also lead to the possibility that creditors, banks and governments will be responsible for absorbing 100% of their charged-off debts. Such risk could cause countless banks

and businesses to greatly decrease profitability and/or simply fail, thereby leading to a substantial increase in the costs of credit.

And, as the debt purchasers and assigns start to realize that their purchased accounts are virtually uncollectable, it is probable that these debt purchasers will seek indemnity from the original sellers of these accounts. These accounts were sold based on the foundation that they were reasonably collectable; a contrary determination could be construed as a breach of contract. These factors would have a massive impact on any one conducting business within the state, but particularly for Missouri's businesses and government entities.

Askew's position is not only commercially unreasonable and potentially dangerous for commerce, it would place additional unjustified burdens on businesses trying to prove a legal case. ***Askew wants "debt buyers" (and the industry as a whole) to be held to a higher evidentiary standard than all other litigants, on the theoretical ground that consumers need greater protections from debt collectors than any other commercial enterprise. This position completely disregards the intricate framework of existing consumer protection statutes, regulations, and rules that already provide substantive protections for consumers, as well as the existing court and evidentiary rules which give them adequate legal assurances.*** With all of these legislative and judicial protections for

consumers, additional evidentiary requirements need not to be mandated by this Court.

III. CONTRACTS IN THE CREDIT INDUSTRY SHOULD BE ENFORCED UNDER THE SAME STANDARDS IN PLACE FOR ALL CONTRACTS

Contracts and their assignments, particularly credit cards and/or other debt instruments, should not be treated any differently than other documentary evidence, simply because they are being offered by an unpopular company or group. CACH met Missouri's evidentiary standards when proving its right to collect the Askew debt, and therefore, CACH is entitled to affirmation of its judgment.

A. While the Creation, Extension, and Management of Credit has Dramatically Evolved over the Past Several Years, these Changes Do Not Signify a Need for Enhanced Obstacles to the Enforcement of their Contracts

While credit documentation was historically completed by hand, in person or through the mail, today's credit industry has evolved and embraced technology. Most, if not all, credit applications are completed online or over the phone. A "wet-ink signature" no longer exists in many cases. Although a consumer's signature or

"blue ink" was previously the indicia of authenticity, the means to enter and execute a contract has progressed, virtually eliminating this requirement.

In the credit card industry, after the consumer's credit application is completed and accepted (whether online, by email, or over the phone), the credit card and cardholder agreement are sent to the consumer. The consumer then has the opportunity to review the terms of the credit he/she obtained before using the credit card. Consumers are rarely asked to execute and return the credit card agreement. Such execution is neither practical nor necessary, as the consumer already has possession of the credit card, and has been authorized to use it.

This exchange by the consumer and the credit card company is an exemplar of a typical contract's offer, acceptance and consideration. The credit agreement and the credit card form the creditor's offer of credit. Consumers do not need to sign the credit agreement, but simply utilize the credit card to accept this offer. The extension and use of this credit constitutes the consideration necessary for the consummation of the initial contract. This contract continues, with a new implied contract to repay created every time the consumer uses the card or makes a payment. Missouri shares this view with the majority of courts.[22] Similar logic

[22] *See Citibank (South Dakota), N.A. v. Wilson,* 160 S.W.3d 810, 813 (Mo.App. W.D. 2005); *Bank of America v. Jarczyk,* 268 B.R. 17, 21-22 (W.D.N.Y. 2001).

supports the conceptual application of "silence as acceptance," especially when goods or services are received and there is a clear opportunity to reject.[23]

In the consumer credit industry, regardless of the credit's use, the assignment and/or transfer of credit accounts is routine. Vehicle installment contracts, home mortgages, and other secured or unsecured loans are typically assigned to another creditor before the first payment is ever made. Assignment of such contracts does not invalidate or alter the credit contracts, rather it simply changes who is entitled to enforce the terms of the agreement and receive the payments. Consumers cannot deny their financial obligations when their account is assigned; the intentional use of credit demands responsibility. Credit should be obtained and utilized wisely, within a consumer's means, with an awareness of the charges assessed to their account, and the incumbent obligation to pay the account.

B. Under the Business Records Exception, the Burden of Proof is the Same for an Original Creditor and an Account Assignee or any Other Litigant

Maintenance of accurate business records that reflect the balance of a consumer's account are tantamount to the success of the creditor's business, as

[23] *See Pride v. Lewis,* 179 S.W.3d 375, 379-80 (Mo.App. W.D. 2005) (citing *Moore v. Kuehn,* 602 S.W.2d 713, 718 (Mo.App. E.D. 1980) and *Wilson,* 160 S.W.3d at 813).

well as to those prospective collection operations that must rely on those account's corresponding documentation. Courts have long held that these records are "assumed to be accurate" because they are systematically entered by people that have an interest in ensuring accuracy.[24]

Due to this assumption, federal courts (in interpreting the FDCPA) have often held that collectors are permitted to rely on the records of the original creditor.[25] The basis for these rulings is an agency relationship between the collector and creditor, and the fact that no statute requires a collector to independently investigate the veracity of the original creditor's records.[26] The Seventh Circuit went one step further, and with a summary judgment decision, held that once the collector has demonstrated they had no knowledge of account

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[24] *Smith,* 326 S.W.3d at 123 (quoting *Davolt,* 119 S.W.3d at 134 (quoting *Piva v. General American Life Insurance Co.,* 647 S.W.2d 866, 877 (Mo.App. W.D. 1983)).

[25] *See e.g. Clark v. Capital Credit & Collection Services*, 460 F.3d 1162, 1177 (9th Cir. 2006); *Jenkins v. Heintz*, 124 F.3d 824, 833-34 (7th Cir. 1997); *Smith v. Transworld Systems Inc*., 953 F.2d 1025, 1032 (6th Cir. 1992); *Edwards v. McCormick*, 136 F. Supp. 2d 795, 804 (S.D. Ohio 2001); *Jenkins v. Union Corp*., 999 F. Supp. 1120, 1140-41 (N.D. Ill. 1998).

[26] *Id.*

inaccuracies, it was the duty of the consumer to provide evidence to the contrary.[27] Therefore, it is only logical that a *purchaser* of these accounts should be able to rely on those same records with the same credence – especially when there is no affirmative evidence of inaccuracy or impropriety in record making/keeping.

Missouri has never mandated a greater burden of proof for a purchased or assigned contract; the evidentiary requirements and exceptions are therefore identical. Business records carry innate truthfulness, regardless of their origins, because they are created near the time an event occurs, by someone with a duty or job to make the record.[28] Once the foundation requirement can be met to the judge's satisfaction, the business record is generally admissible.[29] When evidence is based upon these sound admission fundamentals, the ruling of the trial court should be affirmed.

Trial courts are "afforded 'broad discretion' in determining whether the parties complied with section 490.680."[30] The "bottom line" of the business records exception is the discretionary determination by the trial court of the

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[27] *Heintz*, 124 F.3d at 831.

[28] William A. Schroeder, *Missouri Evidence,* 22A MOPRAC § 803(6).1 (3d ed. 2011).

[29] *Id.*

[30] *Smith,* 326 S.W.3d at 123 (quoting *Alberswerth,* 184 S.W.3d at 102).

record's trustworthiness.[31] Furthermore, determination of evidentiary foundation is with the "sound discretion of the trial court."[32] The trial court's admission of evidence can only be reversed through a finding of abuse of discretion[33] and prejudice.[34] Askew cannot demonstrate that the trial court did not weigh the evidence,[35] or that it committed reversible error. The trial court's findings were not "against the logic of the circumstances,"[36] and Askew suffered no prejudice.[37]

Beyond his inability to show prejudice, Askew's argument fails where the admission of evidence was proper. Even if the documents at issue had been solely offered by CACH based upon the business records exception, their admission was

[31] *Smith,* 326 S.W.3d at 123 (quoting *Davolt,* 119 S.W.3d at 134 (quoting *Justin's,* 883 S.W.2d at 530)).

[32] *Neale,* 67 S.W. 3d at 766 (quoting *Estate of West v. Moffatt,* 32 S.W.3d 648, 653 (Mo.App. W.D. 2000)).

[33] *Huffy,* 169 S.W.3d at 92 (quoting *Nelson,* 9 S.W.3d at 603 (quoting *Oldaker v. Peters,* 817 S.W.2d 245, 250 (Mo. banc 1991)).

[34] *Neale,* 67 S.W.3d at 767 (quoting *Armaly*, 985 S.W.2d at 424).

[35] *Luttrell,* 67 S.W.3d at 645 (citing *Murphy,* 536 S.W.2d at 32 and *Douglas,* 43 S.W.3d at 827).

[36] *Huffy,* 169 S.W.3d at 92 (quoting *Nelson,* 9 S.W.3d at 603).

[37] *Neale,* 67 S.W.3d at 767 (quoting *Armaly,* 985 S.W.2d at 424).

still appropriate. Documents are properly admitted under the business records exception if, in the ***opinion of the court***, the custodian testifies as to the document's identity and preparation, and that it was made in the ordinary course of business.[38] For over 60 years, this Court has held that the record custodian does not have to have personal knowledge of the record's preparation, the custodian does not have to be employed by the business offering the record, and that the record does not have to be offered by the business that prepared it.[39]

This Court was presented with a very similar question in 1959, shortly after the initial revisions to Missouri statute §490.680 were finalized. The Court in *Rossomanno* reversed the trial court, and held that the excluded witness testimony regarding the document preparation should have been allowed, even though the medical records at issue were prepared 6 years before the custodian's employment with the office began, the custodian had only been employed with the office one month at the time of her testimony, and that the custodian had no knowledge of how records were kept prior to her employment.[40] *Rossomanno,* also concluded that a custodian could testify if, "in the opinion of the court, ***the sources of***

[38] *See e.g. Estate of Newman,* 58 S.W.3d 640, 647 (Mo.App. W.D. 2001).

[39] *See Id.; Fisher v. Gunn,* 270 S.W.2d 869, 878 (Mo. 1954); *Rouse Co. of Missouri, Inc. v. Justin's,* 883 S.W.2d 525, 530 (Mo.App. E.D. 1994).

[40] *Rossomanno v. Laclede Cab Company,* 328 S.W.2d 677, 682 (Mo. banc 1959).

information, method and time of preparation were such as to justify [the document's] admission."[41] This ruling was supported in part on the opponent's admission that he had visited the doctor's office during the period in which the record was made.[42] In this Court's view, "[t]o require more would, as a practical matter, seem to enforce the attendance and testimony of the various persons who co-operated [sic] in making the record, which is the very thing the [statute] seeks to obviate."[43] "Reasonable liberality" is imposed in Section 490.680, and to "construe the [statute] too strictly would be to repeal it."[44]

For the same reasons articulated in *Rossomanno*, documents transmitted from one business to another, during the regular course of business, by someone with a duty to transmit them, also satisfies the business records exception. These records continue to carry the same inherent truthfulness, as their preparation and transmission remain within the same scope of the business's duty to maintain accurate data.

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[41] *Id.* (quoting Mo.Ann.St. § 490.680) (emphasis in original).

[42] *Rossomanno,* 328 S.W.2d at 683.

[43] *Rossomanno,* 328 S.W.2d at 682 (citing 6 Wigmore on Evidence, 3d Ed., § 1707).

[44] *Rossomanno,* 328 S.W.2d at 682.

With this rationale, it is impractical and unreasonable for a record-offering party's business to have to establish proof of the mode of preparation for each document it receives in the ordinary course. When accounts are sold and assigned, as is frequently the case with charged-off debts, a batched package of documents (which includes the data regarding each assigned account) is transmitted from the original creditor to the debt purchaser. These account documents, initially generated by the original creditor, represent the necessary records to establish which debts/accounts are being purchased and assigned. With the inherent trustworthiness of business records, and the subsequent transfer of these same records, the purchaser of these (debt) records should only need their records custodian to testify as to when the records were received (***time and mode of preparation***), and how they were maintained after receipt from the transferring entity. To hold otherwise would bring to life the fears expressly articulated by this Court in *Rossomanno*.

Askew would have this Court disregard Missouri's precedent, and forget the "bigger picture" that serves as one of the benchmarks of our judicial system: the sound discretion of the trial court. Such discretion is particularly relevant when considering the admission of evidence under the business records exception to hearsay. Trial courts, unlike any higher level court, are witness to all of the evidence presented, contemporaneously weighing the credibility and admissibility.

The Askew trial court was satisfied that CACH's documents were sufficiently trustworthy as to allow their admission as business records. The trial record demonstrates that there was substantial discussion and *voire dire* conducted before the contested evidence was admitted. Obviously, the trial court took great pains to consider the documentary and testimonial evidence. When presented with Askew's objections, the trial court did not find the objections sufficiently compelling to exclude the evidence, and approved the appropriateness of CACH's documents.

C. Askew's View of the Business Records Exception Would Render it Nearly Meaningless by Requiring an Impossible Level of Testimony

The purpose of the business records exception was to replace the antiquated and technical common law rules, with a more expansive hearsay exception.[45] The *Rossomanno* decision clearly heralds the concept that the business records exception should be liberally construed – and specifically declined to limit the exception 60 years ago. To believe Askew would be to deprecate the express concerns raised by the *Rossomanno* court, and deny a litigant the right to the court's decision that it supported and fully proved. According to Askew, a debtor could admit to all amounts due, his/her failure to pay, and acknowledge the assignment of his/her account, and wholly avoid liability due to a lack of a witness

[45] *Rossomanno,* 328 S.W.2d at 682 (citing *Melton v. St. Louis Public Service Co.,* 363 Mo. 474, 251 S.W.2d 663, 669 (1952)).

from the original creditor (even if the creditor no longer exists, such as a failed bank taken over by the FDIC). Such action is unwarranted and unnecessary.

Several other federal and state courts have addressed Askew's line of evidentiary thinking, and not found it compelling. Federal courts favor the admission of evidence, rather than exclusion, "if it has any probative value at all."[46] With this guiding principal in mind, courts have allowed the admission of evidence, even when the custodian did not *make* the document in question.[47] The central tenant of document admission in federal courts is whether the custodian is familiar with the offeror's record keeping practices.[48]

Although states vary greatly in their evidentiary and regulatory requirements, the vast majority of states routinely allow assigned contracts to be

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[46] *Phoenix Associates III v. Stone,* 60 F.3d 95, 101 (2nd Cir. 1995) (quoting *In re Ollag Construction Equipment Corp.,* 665 F.2d 43, 46 (2nd Cir. 1981)).

[47] *See United States v. Childs,* 5 F.3d 1328, 1333 (9th Cir. 1993); *United States v. Doe,* 960 F.2d 221, 223 (1st Cir. 1992); *United States v. Parker,* 749 F.2d 628, 633 (11th Cir. 1984).

[48] *See e.g. Thanongsinh v. Board of Education,* 462 F.3d 762, 777 (7th Cir. 2006) (quoting *United States v. Jenkins,* 345 F.3d 928, 935 (6th Cir. 2003)); *United States v. Ray,* 930 F.2d 1368, 1370 (9th Cir. 1991).

proven through business records, including the bill of sale.[49] Illinois is the only state with "heightened" evidentiary standards. In sharp contrast to Askew's request, even with a "heightened" standard, Illinois' does not mandate that multiple custodians be present to admit various business records, Illinois simply requires debt buyers to prove their assignments through the presentment of the purchase/assignment contract, rather than by an affidavit of assignment.[50] Here, CACH met even Illinois' "heightened" requirement, providing its bill of sale, along with multiple other supporting documents.

In sum, there has been no demonstration that the ruling of the trial court was an abuse of discretion, or that such ruling constituted prejudicial error. CACH's evidence was admitted as business records after substantial discussion regarding CACH's witness, and with consideration to Askew's admissions. This evidence sufficiently satisfied the trial court. There can be no error without prejudice, and therefore, Askew's request should be denied.

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[49] *Hunt v. Federated Financial Corp. of America,* -- So.3d ---, 2011 WL 2937407, *3 (Ala.Civ.App. 2011); *U.S. Equities Corp. v. Raab,* 2011 WL 3587408 (Conn.Super., 2011) (not reported in A.3d); *Taraldsen v. Dodeka, LLC,* 2011 WL 2653274 (Tex.App.-Houston, 2011) (not reported in S.W.3d).

[50] *See Unifund CCR Partners v. Shah,* 407 Ill.App.3d 737, 743-45, 946 N.E.2d 885, 91-93 (2011).

IV. ADEQUATE STATUTES AND REGULATIONS PROTECT CONSUMERS SO THAT GUTTING THE BUSINESS RECORDS EXCEPTION IS NOT NECESSARY

Consumer protections come from all areas of government, including federal and state statutes and regulations, governmental agencies, rules of court, pleading standards and evidentiary requirements. These laws and standards can be enforced by consumers through affirmative legal action, or can be enforced through various governmental agencies like the Federal Trade Commission or Consumer Financial Protection Bureau. Statutes and regulations are carefully drafted to create a balance between a consumer's right to be free from abuse and harassment, and the creditors' rights to collect legitimate debts.

Congress continues to make consumer protection a high priority, as is evidenced in the recent creation of the Consumer Financial Protection Bureau ("CFPB" or "Bureau"). Created in 2010, the CFPB's mission is "to protect consumers by carrying out Federal consumer financial laws."[51] The Bureau conducts rule-making, supervision, and enforcement for numerous Federal consumer protection laws,[52] like the Fair Credit Reporting Act, Home Owners

[51] *Learn About the Bureau,* Consumer Financial Protection Bureau, http://www.consumerfinance.gov/the-bureau/ (last visited November 8, 2011).

[52] *Id.*

Protection Act, Fair Debt Collection Practices Act, Home Mortgage Disclosure Act, and Truth in Lending Act.[53] CFPB also takes consumer complaints and educates consumers about financial products.[54] Congress gave the CFPB a "broad general mandate…to use all its powers to prevent 'unfair, deceptive and abusive' practices in any area of consumer financial services."[55]

Another well-known consumer protection statute is the Fair Debt Collection Practices Act ("FDCPA"). "Congress enacted the FDCPA in 1977, 91 Stat. 874, to eliminate abusive debt collection practices, to ensure that debt collectors who abstain from such practices are not competitively disadvantaged, and to promote consistent state action to protect consumers."[56] In September 2011, alone, 917

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[53] 12 U.S.C.A. § 5481.

[54] *Learn About the Bureau,* http://www.consumerfinance.gov/the-bureau/.

[55] Knox Dobbins & Jason Stone, *Introduction to The Consumer Financial Protection Act of 2010 An Annotated Guide* (North Law Publishers, Inc. 2011) (citing 12 U.S.C. § 5531).

[56] *Jermane v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,* 130 S.Ct. 1605, 1608, (2010) (citing 15 U.S.C. § 1692(e)).

FDCPA cases were filed in U.S. District Courts.[57] These actions facilitate the correction of technical FDCPA violations in the debt industry, and thus serve the purpose for which the Act was intended.

Consumer initiated legal action is not the only means consumers find protection. The Federal Trade Commission (FTC)[58], CFRP[59], and state attorney general offices regularly accept consumer complaints related to debt collection. In 2010, the FTC received and investigated 140,036 debt collection complaints.[60] The Missouri Attorney General also receives numerous complaints each year, although those specifically related to debt collection are unknown.[61] In addition to federal

[57] *FDCPA Case Statistics,* ACA International, http://www.acainternational.org/compliance-fdcpa-case-statistics-21301.aspx (last visited November 10, 2011).

[58] *Before You Submit a Complaint,* Federal Trade Commission, *https://www.ftccomplaintassistant.gov/* (last visited November 8, 2011).

[59] *Learn About the Bureau,* http://www.consumerfinance.gov/the-bureau/.

[60] *FTC Submits 2011 Fair Debt Collection Practices Report to Congress,* Federal Trade Commission (March 21, 2011) *at* http://www.ftc.gov/opa/2011/03/fairdebt.shtm.

[61] *Mission Statement,* Missouri Attorney General Chris Koster *at* *http://ago.mo.gov/Consumer-Protection.htm* (last visited November 8, 2011).

regulations, a few of which are listed above, most states (and even some cities) have enacted consumer protection legislation, many of which mirror the FDCPA, aimed at debt collection practices.

Not surprisingly, each state's burdens of proof and evidentiary standards are unique. Most states do not have heightened evidentiary requirements for debt collectors or purchasers – meaning that a debt buyer does not have to present any additional evidence to prove the debt in trial. Where there are such heightened evidentiary requirements, however, they have nothing to do with the type of wholesale rejection of the business records exception that Askew proposes, as noted in the Illinois statutory requirement.[62]

These state-specific statutes further demonstrate the existence of an expansive regulatory network primarily designed to protect consumers. The debt collection industry has been heavily regulated for decades; these statutes are the best way to ensure ethical debt collectors are not punished for the misdeeds of a few. If Missouri believes that debt collection and purchased debts need to be more regulated, through either licensing or heightened pleading requirements, such changes should be objectively proposed and enacted, not determined solely on one case's facts. Legislation is the most effective means to create a level playing field,

[62] *See Shah,* 407 Ill.App.3d at 743-45.

using impartial standards, prospectively employed, and equally applied to all secured and unsecured transactions and litigants.

Further, none of these consumer protection statutes or regulations seek to actually eliminate debt collection. Rather, these statutes specifically acknowledge the importance of debt collection and a desire to ensure that ethical debt collectors are given an opportunity to conduct their business.[63] When a collector can meet these standards, they effectively prove their legal right to a judgment in their favor. The few "bad apple" collection agencies that have violated these laws suffer the consequence of their actions, and should not serve as the models that destroy all of the economic benefit provided by the compliant, ethical agencies.

Just as there are some "bad apples" in the collection industry, there are also unprincipled actors in the consumer and consumer-attorney industry. Consumers often utilize their prior work experience in the collection industry to take advantage of law-abiding collection agencies through selective recordings, deceit, and vexatious litigation.[64] Further, some consumer attorneys have disregarded their duties of candor and honesty, and instead, needlessly pursued litigation that is

[63] *See* 15 U.S.C.A. § 1692(e).

[64] *See Ford v. Principal Recovery Group, Inc.,* 2011 WL 4549200 (W.D.N.Y. 2011); *Kinder v. Allied Interstate, Inc.,* 2010 WL 2993958 (not reported in Cal.Rptr.3d) *cert. denied* 131 S.Ct. 2447, 179 L.Ed.2d 1235 (2011).

unsupported by the evidence.[65] Nonetheless, consumers and their advocates that misrepresent themselves are not the typical litigants, and thus should not be used to discredit the mistreated consumer who may deserve redress. With every industry and group, there is bound to be some "bad apples" at the polar ends of their association; all members of the group should not be castigated simply to punish the few. Askew's position, that the Court should rewrite a well-established evidentiary rule, is not the appropriate response. The Court should affirm, as the trial court properly admitted the business records and other evidence, weighed that evidence, and reached a decision within its sound discretion.

V. CACH's EVIDENCE WAS ADMISSIBLE ON GROUNDS OTHER THAN THE BUSINESS RECORDS EXCEPTION, AND THUS THERE WAS NO ABUSE

There can be no abuse in the trial court's admission of the Credit Application, Credit Agreement, Bills of Sale, Cancelled Checks, or Account Statements where all of these documents were admissible evidence as admissions by a party opponent, non-hearsay or cumulative to the evidence already admitted. Askew primarily based his objections to the admission of this documentary evidence as hearsay. The cornerstone of these objections stems from CACH's

[65] *See Lancaster v. Trans Union, LLC,* 2011 WL 3610051 (N.D.Ill. 2011); *Rhinehart v. CBE Group, Inc.,* 714 F.Supp.2d 1183, 1185-86 (M.D.Fla. 2010).

witness testimony, which Askew believed to be inadequate, and therefore inadmissible. Even without due consideration to the business records exception, these documents were still admissible for other reasons.

General Conclusion

Debt buying and assignment is a way of life. Continuing to allow purchased, assigned and transferred debts to be collected ensures that creditors will be able to offer products to consumers at reasonable prices, and ensure that consumers can continue to obtain credit. Existing regulatory and statutory protections already balance the competing interests of consumers and those seeking to collect debts. Further, Missouri's law governing when documents qualify as business records, requiring a judge to determine their admissibility, provides adequate protection in this industry as it does in every other industry and type of litigation in this State. Although some debt collectors and debt buyers choose to utilize unconscionable tactics, that is not the practice of all or even most of the industry. CACH, the entire credit industry, and the national economy, should not be punished for the bad acts of a select few.

Whether a debt is being collected by an original creditor, an assignee, or a purchaser, the burden of proof is the same. CACH met that burden by establishing assignment of Askew's account, producing the original application Askew signed, and through Askew's admitted receipt and use of the credit card. There was

substantial evidence to support the verdict rendered by the trial court. Evidentiary standards should not be heightened for debt purchasers simply because this consumer received an unfavorable ruling.

CLLA respectfully requests that this Court affirm the trial court's ruling, affirming that all litigants face the same evidentiary standard, and solidifying this Court's long standing principal that the trial court's satisfaction of trustworthiness is the "bottom line" regarding admission of evidence.

November 17, 2011

Respectfully submitted,

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CERTIFICATION

Respondent hereby certifies that the foregoing Brief *Amicus Curiae* for Commercial Law League of America in Support of Respondent includes all of the information required by Missouri Rule 55.03 and states that the Brief complies with the limitations of Missouri Rule 84.06(b). This *Amicus Curiae* is 8,054 words long.

CERTIFICATE OF SERVICE

The undersigned hereby subscribes and certifies that on the 17th day of November, 2011, a copy of the foregoing was affixed with proper First Class postage, deposited in the U.S. Mail, and addressed to the following attorneys of record, 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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