No. SC91780

IN THE
SUPREME COURT OF MISSOURI

CACH, LLC,

Plaintiff/Respondent,

v.

JON ASKEW,

Defendant/Appellant.

Appeal from the Circuit Court of St. Louis County
The Honorable Dale Hood, Associate Circuit Judge

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS IN SUPPORT OF RESPONDENT CACH, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

STATEMENT OF INTEREST

The National Association of Retail Collection Attorneys ("NARCA") is a nationwide, not-for-profit trade association of debt collection attorneys. NARCA's members include more than 700 law firms.[1] All NARCA members must meet association standards designed to ensure experience and professionalism. In addition, NARCA's code of ethics imposes obligations of self-discipline beyond the requirements of pertinent laws and regulations.[2]

Among NARCA's many purposes are to further promote the image and function of the legal profession engaged in the collection of consumer debt, creditor rights, and related areas of the law pertaining to consumer credit; to educate the public and members of the credit and collection industry as to all aspects of the industry; to provide an interchange of ideas for its members; to gather and disseminate information and material relevant to consumer credit which

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[1] NARCA, *National Association of Retail Collection Attorneys*, http://www.narca.org/?2010 (accessed November 1, 2011).

[2] NARCA, *NARCA Code of Professional Conduct and Ethics*, http://www.narca.org/?2010/0/ethics_policy/code.html (accessed November 1, 2011).

may be valuable to members and the general public; and to elevate the standards and improve the practice and ethics of consumer collection law.[3]

NARCA submits its amicus brief to oppose the limitation, which the Appellant has requested this court adopt, on a trial court's discretion in admitting trustworthy business records. The interests of NARCA and its Missouri members support the preservation of trial courts' discretion in determining the trustworthiness and admissibility of business records. The amicus brief also sets out some of the far-reaching and damaging implications that limiting trial courts' discretion on matters of business record admissibility would have on Missouri creditors, businesses and individual residents.

[3] NARCA, *Mission and History*, http://www.narca.org/?2010/0/about/mission.html (accessed November 1, 2011).

STATEMENT OF FACTS

Amicus Curiae NARCA accepts the Statement of Facts as set forth in Substitute Brief of Plaintiff/Respondent CACH, LLC, as though fully set forth herein.

NARCA files this amicus brief, consented to by Plaintiff/Respondent CACH, LLC, ("CACH") and not consented to by Defendant/Appellant Jon Askew ("Askew"). The amicus brief is in support of CACH and against the position of Askew in regards to his First Point Relied On. Because the application of the business records exception and the statutory and policy questions therein are of primary concern to NARCA and its members, NARCA does not respond to the ancillary issues raised in Askew's Second through Fourth Points Relied On.

ARGUMENT

Argument Introduction

The case before the Court concerns a purchase and assignment of a debt and its subsequent collection. In this instance, CACH has been assigned the benefit of a credit card contract originally entered into between Askew and Providian Bank. It is important to note that the underlying debt is not disputed in this case. The only real dispute here concerns the admission of highly relevant evidence in the form of various business records that exhibit the debt.

These business records were properly admitted as they were fully incorporated into CACH's own records, CACH relied on the accuracy of them, they are otherwise trustworthy when all other circumstances are considered, and CACH's custodian could and did testify as to the record keeping practices of the businesses that created the records.

Disparaging remarks have been made concerning the debt collection industry by Askew and Amicus Curiae National Consumer Law Center ("NCLC"); however, the singular objective of CACH in this case, and other Plaintiffs in similar cases, is to enforce and satisfy a valid obligation owed under contract. Put simply, one side has fully performed their obligations under a contract and the other has not.

The Economies and Benefits of the Debt Buying Industry

The selling of debt assets can be an economical business tool that benefits everyone. Through the use of specialized entities, which allows institutions to cut down on costs, businesses can make the best out of a bad investment/debt situation. Ky-Ann Lee mentions in her short article on the subject that, "[b]elieve it or not, when the bank assigns the debt, this is at a general benefit to its customers. As a practical matter, the high costs of trying to collect the defaulting debts, is a huge expense which would necessarily be passed on to its customers, possibly in the form of higher interest rates."[4]

Judge Posner of the United States Court of Appeals for the Seventh Circuit Court has agreed with this analysis.

> "There is an innocent reason that creditors can reduce their costs or increase their yield by assigning collection to other firms rather than doing it themselves. It is the same reason that manufacturers sell to consumers through independent distributors and dealers rather than doing their own distribution. Outsourcing phases of the total production process facilitates specialization, with resulting

[4] Ky-Ann Lee, *Why Assign Debt?*, http://www.myersfletcher.com/pdf/debt_06052009.pdf (accessed October 31, 2011).

economies. Specialists in debt collection are likely to be better at it than specialists in creating credit card debt in the first place."[5]

Any company that specializes in purchasing and collecting debt must necessarily rely on the records created by other businesses. It is within the business records of the selling company, and any other intermediate companies, that the details of the contract and proof of the amounts owed is to be found. Thus, the evidence found in these records is highly relevant, even critical, to any debt collection case.[6]

Accurate and Trustworthy Record Keeping Practices in the Banking and Debt Collecting Industries

In general, business records are recognized as being accurate sources of information. It has been said many times "that business records have a high degree of accuracy because the nation's business demands it, because the records are customarily checked for correctness, and because record keepers are trained in

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[5] *Olvera v. Blitt and Gaines*, 431 F.3d 285, 287 (7th Cir. 2005).

[6] Dr. Eric M. Berman, *Proof of Consumer Credit Indebtedness* 26, http://www.ftc.gov/os/comments/debtcollectroundtable3/545921-00017.pdf (December 4, 2009) (citing *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003)).

habits of precision."[7] In addition to the usual reasons for making and keeping accurate business records, the banking industry has extra incentives to insure accurate record keeping. The accuracy of a banking institution's records affects their (and any subsequent creditor's/collector's) ability to enforce their rights under their contracts. This means that the accuracy of the records kept directly and immediately affects a business's bottom line.

The banking and collection industries are heavily regulated both federally and locally. The numerous regulations impose many duties that may be violated by poor record keeping. The Fair Debt Collection Practices Act may be violated in the event a debt collector misrepresents the actual amount owed;[8] threatens action they cannot take;[9] or asks a debtor to pay interests or fees not allowed by law.[10] The Fair Credit Reporting Act provides for civil damages, even punitive and attorney fee awards, for violations in reporting; which could result from inaccurate record keeping practices.[11] The Fair Credit Billing Act applies to open ended

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[7] *United States v. Baker*, 693 F.2d 183, 188 (D.C. Cir. 1982) (citing McCormick, *Evidence*, § 306 at 720 (2d Ed. 1972)).

[8] 15 U.S.C. § 1692e (2006).

[9] *Id.*

[10] 15 U.S.C. § 1692f (2006).

[11] 15 U.S.C. § 1681 et seq. (2006).

credit accounts (credit cards) and governs accurate billing on these accounts, violations of which may lead to civil damages including double finance charges and even attorney fee awards and costs.[12]

Because record keeping practices in the banking and collection industries are both highly regulated and intimately tied to those business's bottom lines, every aspect of the businesses of banking and the collection of debts dictates the need for accurate and trustworthy records. The Federal Trade Commission held a roundtable entitled *Protecting Consumers in Debt Litigation Roundtable* in December of 2009. A white paper entitled *Proof of Consumer Credit Indebtedness* authored by Dr. Eric M. Berman, Esq. resulted from the roundtable.[13] In it, Dr. Berman addresses the need for accurate business records and the duties to transmit accurate records from debt sellers to debt buyers. In summation, Dr. Berman explains that:

> "Since Asset Buyers rely upon the transfer of highly regulated, accurate electronic records in the regular course of their business, and they use the information provided in such records in the regular course of doing business, such evidence should be admissible. Each party in the chain has a duty to maintain

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[12] 15 U.S.C. § 1601 (2006).

[13] *Proof of Consumer Credit Indebtedness*, http://www.ftc.gov/os/comments/debtcollectroundtable3/545921-00017.pdf.

accurate data. Each asset seller has the duty to impart accurate data to its Asset Buyer with the knowledge that the Asset Buyer is going to rely and act upon that data. Testimony or an affidavit from a person who can testify to the nature of the Asset Buyer's business and its record keeping practices is both admissible and sufficient to support an Asset Buyer's application for judgment."[14]

Hearsay and the Business Records Exception Generally

"Hearsay is an 'out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value.'"[15] "The underlying rationale for the hearsay rule is for the purpose of securing the trustworthiness of the assertions."[16] Missouri's business records exception to the hearsay rule is found in Mo. Rev. Stat. §§ 490.660 – 490.690. Mo. Rev. Stat. § 490.680 sets out the exception:

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

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[14] *Id.* at 27.

[15] *State v. Bowman*, 337 S.W.3d 679, 690 (Mo. 2011) (quoting *State v. Kemp*, 212 S.W.3d 135, 146 (Mo. 2007)).

[16] *State v. Link*, 25 S.W.3d 136, 145 (Mo. 2000) (citing *State v. Harris*, 620 S.W.2d 349, 355 (Mo. banc 1981)).

sources of information, method and time of preparation were such as to justify its admission.

This section "shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it."[17] "The fundamental purpose of the business record exception to the hearsay rule is that it 'allows the introduction into evidence of records qualified as business records without the personal appearance of those who prepared the records.' As such, personal knowledge on the part of the custodian as to when or how the record came into existence is simply not a prerequisite to the admission of the custodian's testimony regarding the business record. 'To require more would, as a practical matter, seem to enforce the attendance and testimony of the various persons who co-operated in making the record, which is the very thing the [Uniform Business Records as Evidence] Act seeks to obviate.'"[18]

"The reason the business record exception to the hearsay rule is recognized is the presumptive verity of routine recording of business activities

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[17] Mo. Rev. Stat. § 490.690 (Lexis 2010).

[18] *State ex rel. Fischer v. Sanders*, 80 S.W.3d 1, 4 (Mo. App. W.D. 2002) (internal citations omitted).

done on a regular basis at times close to the transaction recorded."[19] "[T]he bottom line' regarding the admissibility of the business records is the discretionary determination by the trial court of their trustworthiness."[20]

In general, it is far better to allow in relevant evidence and then allow the trier-of-fact to decide its weight based upon their perception of the surrounding circumstances than it is to exclude relevant evidence that may be critical in seeking the truth to the issues presented. The Arkansas Supreme Court quoted well when speaking in general on the rules governing admissibility of evidence:

> '[T]o exclude relevant evidence by any positive and arbitrary rule must be not only absurd in a scientific view, but, what is worse, frequently productive of absolute injustice. It may safely be laid down that the less the process of inquiry is fettered by rules and restraints, founded on supposed considerations of policy and convenience, the more certain and efficacious will it be in its operation. * * * The admission of every light which reason and experience can supply for the discovery of truth, and the rejection of that only which serves not to guide but to bewilder and mislead, is the great principle that ought to be the foundation of every system

[19] *Union Electric Co. v. Mansion House Center North Redevelopment Co.*, 494 S.W.2d 309, 313 (Mo. 1973) (quoting *Mitchell v. St. Louis Argus Publishing Co.*, 459 S.W.2d 1, 6 (Mo. Ct. App. 1970)) (internal citations omitted).

[20] *The Rouse Co. of Missouri, Inc., v. Justin's, Inc.*, 883 S.W.2d 525, 530 (Mo. App. E.D. 1994).

of evidence. Common experience rather than technical rules should be adopted as the test.' 10 R. C. L. 861.[21]

Exemplar Methods for Allowing the Sponsoring of Third Party Business Records by a Receiving Business's Custodian

Courts have found many ways to admit the relevant and often vital evidence found in business records while at the same time keeping faith with the primary purpose behind the requirements of the business records exception to the hearsay rule; namely ensuring the trustworthiness of those records. Three of those methods relevant to the sponsoring of business records by one other than an employee of the business that created the records are detailed below.

Personal Knowledge of an Outside "Qualified Witness" of the Record Keeping Practices of a Business

Missouri's Uniform Business Records as Evidence Law[22] does not, by its own language, require an employee of the business that created a record to be the sponsor of that record. The Act merely requires that the sponsor be the "custodian or other qualified witness."[23] While what constitutes a "qualified witness" is not

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[21] *Watts v. Tidwell*, 178 Ark. 951, 955-956 (Ark. 1929)

[22] Mo. Rev. Stat. §§ 490.660 – 490.690 (Lexis 2010).

[23] Mo. Rev. Stat. § 490.680 (Lexis 2010).

defined, Missouri courts have repeatedly held that "[a]ll that is required under the statute as to the sponsoring witness is that he or she has 'sufficient knowledge of the business operation and methods of keeping records of the business to give the records probity.'"[24] Thus, any person that has sufficient knowledge of the business operations and methods of record keeping of the originating business may sponsor that business's records through their testimony.

Missouri courts have also repeatedly held that, in regards to a witness sponsoring business records, Missouri's Uniform Business Records as Evidence Law "does not require that he or she be employed at the time the . . . record[s] were made or [have] personal knowledge of their origins."[25] In *Rossomanno v. Laclede*

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[24] *In re the Estate of Newman*, 58 S.W.3d 640, 647 (Mo. App. W.D. 2001) (quoting *In the Estate of West v. Moffatt*, 32 S.W.3d 648, 653 (Mo. App. W.D. 2000)); *State v. Williamson*, 836 S.W.2d 490, 499 (Mo. App. E.D. 1992); *Stivers Lincoln-Mercury, Inc. v. Abbott*, 796 S.W.2d 923, 926 (Mo. App. E.D. 1990); *Asset Acceptance v. Lodge*, 325 S.W.3d 525, 528 (Mo. App. E.D. 2010).

[25] *Newman*, 58 S.W.3d at 647 (citing *State ex rel. Hobbs v. Tuckness*, 949 S.W.2d 651, 654 (Mo. App. W.D. 1997); *Rouse Co. v. Justin's*, 883 S.W.2d 525, 530 (Mo. App. E.D. 1994); *Medicine Shoppe Int'l v. Mehra*, 882 S.W.2d 709, 713 (Mo. App. E.D. 1994) (which in turn cites *Rossomanno v. Laclede Cab Co.*, 328 S.W.2d 677, 683 (Mo. 1959)).

Cab Co.,[26] this court also found that an employee employed in a Doctor's office for one month was qualified to testify as to the identity and the mode of preparation of the office's business records. The case at hand then begs the question: What is the difference between a new employee of the business making the record and an outside person with knowledge of the business's record keeping practices?

It is entirely possible that the outside person may be better acquainted with the record keeping practices of a particular business than a new employee of the business would be. An outside person may have many years of experience in the industry, working for similar businesses, and have a deeper understanding of that industry's and its constituent business's practices. The outside person may also have more personal knowledge of the specific practices of a business entity from which records are sought to be admitted, either through experience gained by interacting with the business entity or even through training provided by that entity; whereas a new employee may have little to no familiarity with the industry and their specific employer's policies and practices.

The only true difference between the new employee and an outside person with knowledge of a business's recording keeping practices is the mere status as an "employee." This status does not necessarily impart any special knowledge or skill. While one could argue that it is more likely that employees of businesses

[26] *Rossomanno*, 328 S.W.2d 677, 681-684 (Mo. 1959).

may be more familiar with their employer's record keeping practices, this conclusion is not exclusionary. It does not necessarily follow that non-employees would or could not be as or more familiar with those same record keeping practices.

The Eastern District Missouri Court of Appeals found in their opinion regarding the case at hand that "it is not a strict requirement of the business records exception that a document be created by the entity sponsoring it."[27] In so doing, the court implicitly recognized that a draconian rule requiring a sponsoring witness to be an employee of the business creating the record was not a rational requirement as it serves no real purpose under the business record exception. Instead, employee status with the business creating the record is more properly considered as a factor in the weight given the testimony of the sponsor (just as the length of time employed, or specialized experience and training with the business would be) rather than as a threshold requirement for admittance.

In short, this court should follow the majority of other courts that have delved into what a "qualified witness" is when sponsoring business records. "The phrase 'other qualified witness' is broadly interpreted to require only that the

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[27] *CACH, LLC v. Askew*, 2011 Mo. App. LEXIS 429 (Mo. App. E.D. 2011) (the case currently under review by this court) (citing *State v. Carruth*, 166 S.W.3d 589, 591 (Mo. App. W.D. 2005).

witness understand the record-keeping system."[28] This is a reading of the rule that makes sense in light of the purpose behind the business records exception, Missouri precedent, and the reasoning of other courts that have addressed this same issue.

Adoptive Business Records Doctrine – Adoption of, and Reliance on, the Accuracy of the Records

The Adoptive Business Records Doctrine[29] ("ABRD") simply states that "a record created by a third party and integrated into another entity's records is admissible as the record of the custodian entity, so long as the custodian entity relied upon the accuracy of the record and the other requirements of Rule 803(6) are satisfied."[30] Courts have stated that "the adoptive business records

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[28] *United States v. Childs*, 5 F.3d 1328, 1334 (9th Cir. 1993) (quoting *United States v. Ray*, 930 F.2d 1368, 1370 (9th Cir. 1990)).

[29] Also known as the "Rule of Incorporation"

[30] *Brawner v. Allstate Indem. Co.*, 591 F.3d 984, 987 (8th Cir. 2010). Fed. R. Evid. 803(6), although more verbose, is indistinguishable in every practical way from the Missouri business records exception; it states, "[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

doctrine comports perfectly with the spirit motivating the business records exception to the hearsay rule: that satisfaction of Rule 803(6)'s requirements confers 'a presumption of accuracy, accorded because the information is part of a regularly conducted activity . . . and because of the accuracy demanded in the conduct of the nation's business.'"[31]

"While the Federal Rules of Evidence are not binding on Missouri courts, they are suggestive."[32] In addition, the ABRD is not restricted to application in federal courts alone. As an example, Texas courts have also adopted this doctrine. *Simien v. Unifund CCR Ptnrs* describes the requirements of the ABRD as it has been implemented in Texas, "[a] document authored or created by a third party may be admissible as business records of a different business if: (a) the document is incorporated and kept in the course of the testifying witness's business; (b) that

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

[31] *United States v. Irvin*, 656 F.3d 1151 (10th Cir. 2011) (quoting *United States v. Snyder*, 787 F.2d 1429, 1433-34 (10th Cir. 1986)).

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

business typically relies upon the accuracy of the contents of the document; and (c) the circumstances otherwise indicate the trustworthiness of the document."[33]

The above test, as laid out in *Simien* and *Bell*,[34] has been adopted in a number of courts. Hawaii adopted this test in *State v. Fitzwater*.[35] A Vermont court followed the *Bell* test in *Unifund CCR Ptnrs v. Bonfigli*.[36] However, the *Bell* test was based on the ABRD as discussed in *Air Land Forwarders, Inc. v. United States*,[37] so in order to understand the extent of this doctrine and how it has been applied in federal and state courts one must follow a diverse chain or tree of case cites.

Luckily, *United States v. Adefehinti* has done some of this work by listing several of the circuits that have adopted the ABRD.[38] That case shows that the

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[33] 321 S.W.3d 235, 240-241 (Tex. App. 2010) (citing *Bell v. State*, 176 S.W.3d 90, 92 (Tex. App. 2004).

[34] 176 S.W.3d at 92.

[35] 227 P.3d 520 (Haw. 2010).

[36] 2010 LEXIS 24 (Vt. Super. May 5, 2010).

[37] 172 F.3d 1338, 1342 (Fed. Cir. 1999) (citing *United States v. Childs*, 5 F.3d 1328, 1333 (9th Cir. 1993).

[38] 510 F.3d 319, 326 (D.C. Cir. 2007).

Second, Fifth, Ninth, Tenth and D.C. circuits have adopted the doctrine.[39] *Childs*, the Ninth Circuit case relied on by *Adefehinti*, based its ruling in part on First and Eleventh Circuit cases both of which uphold a basic application of the ABRD.[40] The Third Circuit followed the ABRD in *United States v. Sokolow*.[41] The Eighth Circuit endorsed the doctrine in *Brawner*.[42] Subsequently, two district courts within the Seventh Circuit have followed *Brawner* in applying the ABRD as well.[43]

As can be seen above, the vast majority of federal courts have adopted the ABRD. Many state courts have also found the reasoning for the doctrine sound

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[39] Respectfully: *In re Ollag Constr. Equipment Corp.*, 665 F.2d 43, 46 (2d Cir. 1981); *United States v. Duncan*, 919 F.2d 981, 986 (5th Cir. 1990); *United States v. Childs,* 5 F.3d 1328, 1333 (9th Cir. 1993); *United States v.* Carranco, 551 F.2d 1197, 1200 (10th Cir. 1977).

[40] *Childs,* 5 F.3d at 1333 (citing *United States v. Doe*, 960 F.2d 221, 223 (1st Cir. 1992); and *United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984)).

[41] 91 F.3d 396, 403-04 (3rd Cir. 1996).

[42] 591 F.3d 984.

[43] *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 735 F. Supp. 2d 856, 867 (N.D. Ill. 2010); *BP Amoco Chem. Co. v. Flint Hills Res., LLC*, 697 F. Supp. 2d 1001, 1021 (N.D. Ill. 2010).

and in turn taken it up themselves. The Supreme Court of North Dakota cited *Brawner* in applying the ABRD in *Pizza Corner, Inc. v. C.F.L. Transp., Inc.*[44] In addition, the following are a few more examples from other state courts that have adopted the doctrine: Colorado Supreme Court in *Schmutz v. Bolles*;[45] Florida appellate in *WAMCO XXVIII, Ltd. v. Integrated Elec. Env'ts, Inc.*;[46] Kentucky appellate in *Price v. Commonwealth*;[47] Louisiana appellate in *Burdette v. Drushell*;[48] Maine Supreme Court in *Northeast Bank & Trust Co. v. Soley*;[49] Maryland appellate in *Beach v. State*;[50] Massachusetts Supreme Court in *Beal Bank, SSB v. Eurich*;[51] and New York appellate (intermediate level) in *People v. Markowitz*.[52]

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[44] 2010 ND 243, P16 (N.D. 2010).

[45] 800 P.2d 1307, 1314 (Colo. 1990).

[46] 903 So. 2d 230, 232-233 (Fla. App. 2005).

[47] 2003 Ky. App. Unpub. LEXIS 723 (Ky. Ct. App. 2003).

[48] 837 So. 2d 54, 62 (La. App. 2002).

[49] 481 A.2d 1123, 1127 (Me. 1984).

[50] 75 Md. App. 431, 439 (Md. App. 1988).

[51] 444 Mass. 813, 818 (Mass. 2005).

[52] 187 Misc. 2d 266, 270-271 (N.Y. Sup. Ct. 2001).

If this court were to apply the ABRD to the case at hand, it is clear under the *Bell* formulation of that test that exhibits 2, 7, 9 and 11 would be admissible. That test again was: "(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."[53]

Step (a): the document is incorporated and kept in the course of the testifying witness's business. The account statements, bills of sale, account sheet, and credit card agreement are all incorporated into and kept in the ordinary course of CACH's business. Clearly these documents and the information they contain are key to CACH's business operations. They must necessarily be incorporated into and maintained as CACH's own records as they are heavily relied upon thereafter.

Step (b): the business typically relies upon the accuracy of the content of the records. Courts have often commented that this requirement is key to the admissibility of the records because it is the "actual reliance by the business that is indicative of trustworthiness."[54] CACH's business is the purchase and collection

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[53] *Simien*, 321 S.W.3d at 240-241.

[54] *In re Denh Nhiet Chu*, 2008 Bankr. LEXIS 4736 (B.A.P. 9th Cir. 2008) (citing *Childs*, 5 F.3d at 1334).

of distressed debt and thus CACH's business model relies entirely on the accuracy of the records concerning those debts that it receives and incorporates. Put simply, CACH's business fails if the debts it purchases are not accurately tracked and accounted for. The account statements which show what has been paid and what is still owed, the bills of sale which show a clear chain of title to CACH, the account sheet which shows what accounts are transferred with each bill of sale and important details concerning those accounts, and last, but certainly not least, the credit card agreement which is the core contract upon which the obligation to repay the amounts loaned rests; all of these are vitally important to CACH's business and CACH relies completely on their accuracy.

Step (c): the circumstances otherwise indicate the trustworthiness of the document. The Substitute Brief of Plaintiff/Respondent CACH (and other amicus briefs) covers in detail many of the other circumstances that demonstrate the trustworthiness of the exhibits in question. Therefore, instead of reiterating all of those points here we will summarize: Askew admitted that he had a Providian account;[55] Voluntary payments were made on the debts illustrated therein;[56]

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[55] T.Tr. at p. 4, In. 15-17; T.Tr. at p. 93, In. 14-16.

[56] T.Tr. at p. 9, In. 22 - p. 11, In. 1; T.Tr. at p. 50, In. 18 - p. 52, In. 4; T.Tr at p. 54, In. 5-8; T.Tr. at p. 54, In. 19 - p.55, In. 6; T.Tr. at p. 65, In. 16 - p. 66, In.1; T.Tr. at p.102, In.107.

Askew admitted to his signature, correct address and social security number on the card application,[57] which is another related and integral exhibit; The account statements had correct names and addresses on them;[58] and, CACH's custodian also testified to having been to training with the banks that created the records and thus had personal knowledge of their record keeping practices.[59] The circumstances confirm the trustworthiness of the records in question. In addition, Askew put on no evidence to contradict the trustworthiness of these records and thus, for all of the above reasons, their admittance was proper and would be clearly allowed under the ABRD.

Verification of the Accuracy of Records by the Receiving Business

Simien presents another way in which business records may become the records of a receiving business when the "second business 'determines the accuracy of the information generated by the first business.'"[60] *Simien* explains that in *Duncan*, "[t]he Texas supreme court held that the invoices were admissible as

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[57] Exhibit 1; T.Tr. at p.7, In.20 – p. 8, In. 11.

[58] T.Tr. at p. 7, In. 20 - p. 8, In. 11.

[59] T.Tr. at p. 48, In. 21-22.

[60] 321 S.W.3d at 242-243 (quoting *Martinez v. Midland Credit Mgmt., Inc.*, 250 S.W.3d 481, 485 (Tex. App. 2008)) (also citing *Duncan Dev., Inc., v. Haney*, 634 S.W.2d 811, 812-13 (Tex. 1982).

Duncan's records because 'Duncan utilized a reliable method of confirming the accuracy of the submitted invoices through its site supervisors who had personal knowledge of activities at its construction sites.' *Id.* at 813."[61] *Simien* then goes on to explain the difference between the *Bell* (ABRD) test and this method of admitting business records created by third parties: "[a]s noted above, *Bell* requires reliance on the accuracy of the document, which is a slightly different standard than proof that someone actually verified the accuracy of [the] document."[62]

The facts of the present case do not lend themselves to an analysis under the "verification" method for admitting the business records of a third party. However, the test itself stands as another example of how the purpose of the business records exception to the hearsay rule can be faithfully observed (ensuring trustworthiness) without the need for the custodian of the originating business to testify as to that business's record keeping practices.

The Potential Harm to Missouri Businesses and Citizens

In the recent and continuing hard economic times many businesses have failed, including many banks. The Federal Deposit Insurance Corporation

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[61] *Id.* at 243.

[62] *Id.*

maintains a list of banks that have failed since 2000.[63] As can be seen from this list, in 2000 only two banks failed, in 2005 and 2006 none failed; however, so far in 2011 eighty five have, in 2010 one hundred and sixty one failed, and in 2009 one hundred and forty failed. Some of these banks were very large with billions of dollars in assets, such as Washington Mutual, Inc. At least eleven of these banks were Missouri institutions.

Each and every one of these banks and other businesses that have dissolved held debt assets and kept business records that support the claims that those institutions and now their creditors, successors and assigns hold. The purchasers of these assets (whether through receivership, dissolution, prior to the dissolution or otherwise) are put in a particularly difficult situation if required to produce a custodian from the now non-existent entity that created the records. It may be impossible or at the very least economically impractical to locate and procure the testimony of the former custodians from these businesses.

The business world is a circular one. The harder it is to collect valid debts the harder it becomes to get good credit. This may equate to Missouri residents and small businesses being unable to get credit when they need it, to higher interest

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[63] Federal Deposit Insurance Corporation, *Failed Bank List*, http://www.fdic.gov/bank/individual/failed/banklist.html (accessed November 1, 2011).

rates to cover the increased risk that the creditors will not be repaid, or likely both. This effect is not limited to situations in which there is a voluntary extension of credit after careful review, nor are the circular business world responses limited to the two listed above.

As another example, hospitals must often resort to court action to collect medical debts. Hospitals, like other businesses, may also benefit from the economies and partial recovery to be found in selling their debt assets. However, unlike banks and other lending institutions, hospitals extend medical services. They are often required under law to do so without the practical ability to make an inquiry into a person's ability to repay; nor do they have the ability to make decisions based upon it. The only recourse a hospital has then is to raise medical care costs for everyone to cover the losses from those patients that do not pay. In short, the ability of a hospital to recover the debts it is owed in the most economic way that it can directly affects the costs of those services to everyone.

Additionally, there is a positive deterrent effect to consider. When valid contract obligations can reasonably be enforced through the courts, parties to those contracts are much more likely to voluntarily honor those obligations. Narrowing the focus to the context of the current case, parties to credit lending contracts are more likely to voluntarily pay their debts and collections lawsuits, at least for those

that can pay, will actually decline. For those that cannot pay, the bankruptcy courts are the appropriate avenue of relief.

In the case at hand, there is a valid debt and the proof of that debt lies in the trustworthy business records that the trial court admitted. What Askew seeks in this case is not to be free of a debt he does not owe, but a windfall in his favor based on a technical requirement that the sponsor of a business record be from the business that created the record; which would be a rule without a rational purpose and not in accord with the spirit and intent behind the business records exception.

Argument Conclusion

To establish a draconian requirement that the sponsoring witness must be an employee of the business that generated the record serves no logical purpose in light of the reasoning behind the business records exception. It would work great harm to legitimate Missouri business interests and may, inadvertently, deprive those businesses of any meaningful value of the assets that they have purchased from other businesses.

Amicus Curiae NCLC argues in their amicus brief that debt purchasers often file suit with very little in the way of records to support their cases, and yet in the same brief they argue that the sufficient and trustworthy records that have been produced in this case should not be admitted.[64] In essence, they are arguing that

[64] Brief *Amici Curiae* of National Consumer Law Center in Support of Appellant, p. 7-9.

debt purchasers cannot prove their cases or if they can they should not be allowed to.

Missouri's business records exception to the hearsay rule is more than sufficient to protect the interests of parties, including defendant debtors, without reading into the rule a harsh requirement that the sponsor of the record be from the business creating the record. Here trustworthiness is key, and it can be assured without any such requirement. The requirements of the exception can all be met by non-employee sponsors as well as employee sponsors. Trustworthiness can be ensured through satisfying the requirements of the adoptive business records doctrine or through verification of the accuracy by the sponsoring entity.

It is not the intent of the arguments within this brief to address the weight that should be given of the evidence in the present case, but merely to address the unnecessary threshold requirement to business records admissibility that Askew has argued in favor of. Amicus Curiae NARCA is not arguing for a limitation on a trial court's discretion in regards to the admissibility of evidence, which is precisely what Askew would have this court do, but is instead arguing that trial courts retain that discretion, perhaps with further clarity on how it may be applied.

CONCLUSION

WHEREFORE, Amicus Curiae NARCA respectfully requests this Court to affirm the trial court's decision finding that exhibits 2, 7, 9, and 11 were properly admitted within the trial court's sound discretion under the Missouri Uniform Business Records as Evidence Act.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of November, 2011, one (1) copy of the BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS IN SUPPORT OF RESPONDENT CACH, LLC in the form specified by Missouri Supreme Court Rule 84.06(a) were mailed, postage prepaid, and additionally electronically filed and served to all registered users in accordance with Missouri Supreme Court Rule 103.08 to the following counselors of record:

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CERTIFICATE PURSUANT TO SUPREME COURT RULES 84.06 AND 103

The undersigned hereby certifies that this amicus curiae brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 6929 words, excluding the cover, the Certificate of Service, and the this Certificate according to the word processing system used to prepare this amicus curiae brief. The undersigned further certifies that the electronic file filed in accordance with Missouri Supreme Court Rules 84.06 and 103 containing the amicus curiae brief has been scanned for viruses and is virus-free.

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