{YOUR INFO HERE}

{YOUR NAME HERE},
In Pro Per

SUPERIOR COURT OF CALIFORNIA
COUNTY OF *{YOUR COURT}*

{JDB HERE},

Plaintiff,

vs.

{YOUR NAME HERE},

Defendant

Case No.: ***{YOUR CASE NUMBER}***

Defendants Trial Brief

Trial Date: October 17th, 2012

Trial Time: 09:00 AM

Dept: 2

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1. INTRODUCTION

MIDLAND FUNDING, LLC ("Plaintiff") is attempting to collect on a debt alleged to be owed by defendant, ***{YOUR NAME HERE}*** ("***{LAST NAME}***")**.** Plaintiff's claims for accounted stated lacks proof because Plaintiffs Affidavit in Lieu of Testimony ("Affidavit") is hearsay and further, the inapplicable and inadequate documents attached thereto cannot be authenticated as business records by Plaintiff s proffered custodian of records.

2. STATEMENT OF FACTS

Plaintiff is in the business of buying stale defaulted consumer debt and pursuing collection efforts. Plaintiff purportedly purchased a consumer credit account originated by CHASE bank, and brought

this action. However, Plaintiff can offer no admissible evidence to support its Complaint and therefore cannot succeed at trial in this matter.

3. ARGUMENT

A. Because Plaintiff Has Offered No Qualified Custodian of Records, the Documents Offered by Plaintiff Are Hearsay and Do not Fall Under a Hearsay Exception

1. Plaintiff Can Not Show a Business Records Exception

Evidence Code §§ 1270- 1272 states the business records exception to the hearsay rule. Evidence Code § 1271 states as follows:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or even if:
> a) The writing was made in the regular course of a business;
> b) The writing was made at or near the time of the act, condition, or event;
> **c) The custodian or other qualified witness testifies to its identity and the mode of its preparation**; and
> d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

To qualify under the § 1271' s "business records" exception to the hearsay rule, subsection (c) requires the offering party present a qualified witness who can testify from **first-hand knowledge** regarding the origin or mode of preparation of the document offered. Although Plaintiff attempts to offer the Affidavit of Ashley Lashinski as a custodian of records, this employee of Midland Credit Management is not qualified to attest to the origin or mode of creation of documents from Plaintiff's purported assignor, CHASE.

The purpose of subsection (c) is to require foundational testimony showing that a record meets the other § 1271 requirements for the admission of a business record. The question of qualification hinges on a person's suitability to testify on those matters. Since the statute requires a "custodian of record or other qualified witness" it has long been held that the need for a "custodian" (or witness with a specialized recordkeeping role in a business) has been specifically dispensed by the statute. *People v Fowzer*, 127 Cal. App. 2d 742, 747 (Cal. App. 2d Dist. 1954) Because of this, the relevant standard for determining a person's ability to authenticate business records is that of the

"qualified witness." The California Court of Appeals has adopted the *McCormick* view on the requirements of foundational witnesses:

> "The chief foundation of the special reliability of business records is the requirement that they must be based upon the first-hand observation of someone whose job it is to know the facts recorded. But if the evidence in the particular case discloses that the record was not based upon the report of an informant having the business duty to observe and report, then the record is not admissible under this exception, to show the truth of the matter reported to the recorder. *MacLean v. City and County of San Francisco*, 311 P.2d 158, 164 (Cal. App. 1st Dist. 1957) (citing McCormick on Evidence, p. 602, § 286) (emphasis added). This language was also cited by the Law Revision Commission's comment to Evidence Code § 1271.

To allow the admission of business records, the statue requires that the foundational witness presented by the offering party be someone who: (a) **has personal knowledge** of either the facts in the record or the record-keeping system; and (b) has a business duty to observe and report the facts recorded or received the recorded facts from someone with a business duty to observe and report those facts. In *People v. Khaled*, 186 Cal. App. 4th Supp. 1, 8(Cal. App. 3d Dist. 2010) (overruled on other grounds) the Appellate Division for the Superior Court of Orange County stated:

> "These exhibits also do not fall under the business records exception of Evidence Code section 1271 (section 1271). [Footnote omitted.] In order to establish the proper foundation for the admission of a business record, an appropriate witness must be called to lay that foundation. The underlying purpose of section 1271 is to eliminate the necessity of calling all witnesses who were involved in a transaction or event. Generally, the witness who attempts to lay the foundation is a custodian, but any witness with the requisite **firsthand knowledge** of the business's recordkeeping procedures may qualify. The proponent of the admission of the documents has the burden of establishing the requirements for admission and the trustworthiness of the information. And the document cannot be prepared in contemplation of litigation. (Citations omitted, emphasis added)"

2. Plaintiffs Custodian of Records Did Not Prepare or Generate Any of the Documents Contested

A custodian of records of one entity cannot attest with personal knowledge to the facts and practices of an entirely different entity. California courts agree and have generally held that an entity cannot be a "custodian or other qualified witness" and provide an affidavit concerning matters of

another entity. For example, in *Cooley v. The Superior Court of Los Angeles County*, et al., (140 Cal. App. 4th 1039 (Cal. App. 2d Dist. 2006)) the court considered whether a district attorney's ("DA") section 1561 affidavit accompanying documents responsive to a subpoena duces tecum met the requirements of section 1561 when the documents were generated by entities other than the DA. The Court held that the DA was not the custodian of the business records because the DA could not execute the affidavit required by Evidence Code § 1561, as the DA did "not prepare or generate any of the documents contested," could not attest that the records were prepared in the ordinary course of business at or near the time of the event, and could not attest to the various attributes of the records relevant to their authenticity and trustworthiness." (Id. at 1044-45) Here, the only custodian of records offered by Plaintiff is an employee of a company who is the servicer of Plaintiff. Because the witness offered by Plaintiff lacks personal knowledge or a business duty, the witness is not qualified to testify regarding business records originating from CHASE. As such, the documents purportedly from CHASE are inadmissible.

3. Other jurisdictions handling of these evidentiary problems in collections cases.

The Missouri Supreme Court very recently examined this issue in a similar case and held that "a document that is prepared by one business cannot qualify for the business records exception merely based on another business's [sic] records custodian testifying that it appears in the files of the business that did not create the record." (*CACH, LLC v. Askew*, 358 S. W.3d 58, 63 (Mo. 2012) (en banc)) "In CACH, LLC v. Askew, the plaintiff attempted to offer "several exhibits purported to be documents regarding the credit card account"(Id. at 2), as Plaintiff has done here. *CACH, LLC* sought to admit these documents into evidence as business records, as Plaintiff attempts to do here. However, the only custodian of records offered by *CACH, LLC* was an employee of Square Two Financial, which owns *CACH, LLC*. When asked if this custodian had any personal knowledge about the business practices of the original creditor, the custodian responded that she only had general knowledge about "most of the major banks." The court, in deciding whether the custodian of records offered by *CACH, LLC* was a "qualified witness" to lay the foundation for the original creditor's purported documents, held that the witness was not qualified and the records did not meet the hearsay exception, thus the third-party business records were deemed inadmissible. Plaintiff s proffered

witness here is likewise unqualified to attest to the hearsay documents offered by Plaintiff in this matter.

Although the Court was ruling under the Missouri Revised Statutes Title XXXIII CHAPTER 490, MO Rev. Stat. §490.680[1] is substantially similar to California Evidence Code § 1271 in that it allows for business records to be allowed despite being hearsay if: the custodian or other qualified witness testifies to [the record's] 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. This language almost parrots California Evidence Code 1271.

None of the records offered by Plaintiff that were purportedly originated by CHASE should be allowed into evidence and all testimony regarding same must be excluded as hearsay.

4. Plaintiff Has Failed To Show Sources of Information And Method And Time of Preparation Were Such To Indicate as to Its Trustworthiness

California courts have held certain business records inadmissible when the Evidence Code § 1561 affidavits did not provide adequate information as to the preparation and trustworthiness of documents, even when the affiant was the custodian of record for the entity that prepared the documents. See *LVNV Funding, LLC v. Mastaw,* 2012 Tenn. App. LEXIS 282 (Tenn. Ct. App. Apr. 30, 2012) documents "clearly prepared specifically for the instant litigation" which " do not incorporate by reference or otherwise summarize or interpret documents that are prepared in the normal course of regularly conducted business activity" inadmissible under the business records exception).

In *Taggart v. Super Seer Corporation,* 33 Cal. App. 4th 1697 (Cal. App. 4th Dist. 1995) the court found that the custodian of records failed to lay sufficient foundation for the admission of business records in a products liability case because the custodian's declaration contained no evidence of what the reports were, how they were prepared, or what sources of information they were based on. The court determined that there was no evidence showing that the reports were "trustworthy," and excluded the documents.

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1 MO Rev. Stat. §490.80 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. (L. 1949 p. 275 3)

Similarly, in *Remington Investments, Inc. v. Moussa Nikbakht Hamedani*, 55 Cal. App. 4th 1033 (Cal. App. 2d Dist. 1997) the court held that a note ledger was not admissible over a hearsay objection to prove the factual accuracy of the events it recorded because it did not meet the foundation requirements of Evidence Code § 1271 for trustworthiness.

Although the declarant had stated that she was familiar with the records, was the custodian of records, declared that the records were made in the ordinary course of business at or near the time of the events they recorded, and declared that they were made by persons who have a business duty to record such information, it was not enough. The declarant failed to present evidence of recordkeeping practices, evidence of the manner in which the note ledger was prepared, and failed to provide evidence as to the origin of the information it contained. Therefore, the court excluded the documents.

The Documents marked as Plaintiffs (EXHIBIT 3) states at the bottom that the files are electronically stored. The United States Bankruptcy Panel 9th circuit weighs in on computer records evidentiary foundation standards in its decision in *In re Vee Vinhnee,* 336 B.R. 437 (B.A.P. 9th Cir. 2005) The court found the complexity of "ever-developing computer technology" requires careful attention to ensure that the document offered in court is the same record that was originally created on the computer. *In re Vee Vinhnee*, 336 B.R. 437 (B.A.P. 9th Cir. 2005)Id at 445. Other legal scholars have written about this need for the 11 step process cited by the court. In Cooper Offenbecher, Admitting Computer Record Evidence after In Re Vinhnee: A Stricter Standard for the Future? He stated "The Vinhnee court's emphasis on reliability, accuracy, and system knowledge is consistent with urgings by the Manual and some scholars. Though it employs an eleven-step foundation process that has not previously been cited by courts, the key inquiries are into accuracy and reliability. These issues are not new and are the crux of traditional authentication inquiries in all areas of evidence. Imwinkelried's foundation process has been in circulation since 1980 and his Evidentiary Foundations book is a widely employed trial tool."

Citing FRE 901(a), the Court stated: "Authenticating a paperless electronic record, in principle, poses the same issue as for a paper record, the only difference being the format in which the record is maintained: one must demonstrate that the record that has been retrieved from the file, be it paper or electronic, is the same as the record that was originally placed into the file." *In re Vinhnee*, 336 BR at 444. The Court noted that "the focus is not on the circumstances of the creation of the record, but rather on the circumstances of the preservation of the record during the time it is in

the file so as to assure that the document being proffered is the same as the document that originally was created." *Id*.

To ensure continuing accuracy of the records, the Court required additional foundational testimony regarding:

- The proponent's policies and procedures for use of the equipment, database, and programs;
- How access to the pertinent database is controlled and, separately, how access to the specific program is controlled;
- How changes in the database are logged or recorded;
- The structure and implementation of backup systems; and
- Audit procedures for ensuring the continuing integrity of the database. *Id*. At 449.

The proffered documents clearly state on their face that they are stored and/or transmitted in an electronic manner. Only a witness from CHASE can attest as to the format that these records were produced and kept. The Plaintiff however, provided no evidence or witness to testify as to how CHASE maintained these electronic records. Thus the Defendant moves that all documents deemed to be of an electronic nature are inadmissible.

Plaintiff Can Not Show it is the True Assignee of the Account in Question.

Plaintiff must produce admissible evidence that it was assigned SMITH's account by CHASE. This will prove to be an insurmountable obstacle at trial because Plaintiff has only produced a one page "Bill of Sale" between CHASE, and Midland Funding, LLC. Plaintiff presents no evidence showing that the produced "Bill of Sale" document was executed by a person having authority to do so.

In *Bengel v. Kenney*, (126 Cal. App. 735 (Cal. Ct. App. 1932)) a plaintiff claimed title under an assignment of a purported assignee of a corporation. The evidence failed to show that the assignment by the corporation was executed by a person having authority to do so. The Court held that the evidence failed to show title in the plaintiff by reason of such an assignment.

In *Brown v. Ball*, (l23 Cal. App. 758 (Cal. Ct. App. 1932)) the court held an attempted assignment to be void where the recipient of the assignment failed to produce evidence showing that the individual who signed the assigning document had the authority as agent to execute the instrument.

Both *Bengal* and *Brown* are right on point in establishing the deficiencies under which Plaintiff labors in this action.

A proof of assignment is not to be taken lightly:

"The burden of proving an assignment falls upon the party asserting rights there under. In an action by an assignee to enforce an assigned right, the evidence must not only be sufficient to establish the fact of assignment when the fact is in issue, but the measure of sufficiency requires that the evidence of assignment be clear and positive to protect an obligor from any further claim by the primary obligee." (*Cockerell v Title Insurance & Trust Co*., 42 Cal.2d 284, 292 (Cal. 1954) (Internal citations omitted))

Plaintiff cannot produce documents to demonstrate an assignment chain and any purported assignment documents cannot be authenticated and lack foundation. A Custodian of Records from Plaintiff has no **competence** to testify regarding the business practices of CHASE.

Finally, any purported assignment documents offered by Plaintiff are clearly hearsay. All assignment documents offered by Plaintiff are offered for the truth of the matter asserted— that rights in the alleged account, specifically, were transferred to Plaintiff. Any purported assignment documents would therefore be hearsay by definition and excluded. (Evidence Code § 1200)

For the foregoing reasons, Plaintiff will not be able to present evidence to prove a valid assignment chain. Without testimony of a competent custodian of records from CHASE, as required by Evidence Code § 1271, to bring the documents within the business records exception of the hearsay rule, the solitary purported "Bill of Sale" document that Plaintiff has produced in discovery is inadmissible. Thus, Plaintiff cannot meet the burden of showing clear and positive evidence of assignment of the alleged account.

B. Plaintiff Can Not Prevail on its Account Stated Claim

Plaintiff alleges an account stated. "An account stated is a document — a writing — which exhibits the state of account between parties and the balance owing one to the other; and when assented to, either expressly or impliedly, it becomes a new contract." (Biltmore Press, 6 Cal. App. 3d at 901) "[T]he account, in order to constitute a contract, should appear to be something more than a mere memorandum;, it should show upon its face that it was intended to be a final settlement up to date. And this should be expressed with clearness and certainty." (*Coffee v. Williams*, 103 Cal. 550, 556 (Cal. 1894))

> "An account stated is an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing. To be an account stated, it must appear that at the time of the statement an indebtedness from one party to the other existed, that a

> balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing." (*Maggio, Inc. v. Neal*, 196 Cal. App. 3d 745, 752- 53, 241 Cal. Rptr. 883 (1987) (quotation omitted))
>
> In order to constitute an account stated, there must be an "element of finality" to the statement, which is missing when the parties continue transacting business and "statements [a]re sent periodically." (Am. Fruit Growers, Inc. u Jackson, 203 Cal. 748, 751- 52, 265 P. 926 (1928)) "[I]t is clear that a statement rendered cannot be said to be an account stated unless it is intended to be such and expressly or impliedly is assented to as such by the party to whom it is rendered. There is in the case before us no element of finality, as the parties were still transacting business. These statements were sent periodically and business was continued between them as before. There is no ground whatever for the contention that the account was rendered and intended to be an account stated, or that [the charged party], either expressly or impliedly, considered that it was such."

Whether an alleged debt is an account stated is a question of fact. See, *Fogarty v. McGuire*, 170 Cal. App. 2d 405, 409, 338 P.2d 992 (1959) "The action upon an account stated is not upon the original dealings and transactions of the parties. It is upon the new contract by and under which the parties have adjusted their differences and reached an agreement.... [I]f in writing, it should appear to be something more than a mere memorandum and should show with clearness and certainty that it was intended to be a final settlement up to date.

Whether these conditions exist is usually a question to be determined by the trier of fact from all the circumstances of the case, and in reaching that determination reasonable inferences can be drawn in support of the claim of either party if there is any credible evidence warranting such action." (citations omitted).

Plaintiff has failed to produce any writing which indicates that ***{LAST NAME}*** assented to the account between them. Because Plaintiff cannot present evidence showing an account stated other than the hearsay documents discussed above, Plaintiff has no admissible evidence of an account stated. Plaintiff cannot, therefore, meet its burden of showing an account stated.

4. <u>CONCLUSION</u>

Without live testimony from a qualified custodian of records from each entity in the assignment chain, Plaintiff will fail to authenticate the documents from CHASE as "business records" falling under the business records exception to the Hearsay Rule. Because Plaintiff cannot succeed on its claims without these documents, Plaintiff is not entitled to any recovery on its Complaint.

Moreover, Plaintiff completely fails to demonstrate that it has rights to collect and sue on ***{LAST NAME}*** account. For these reasons, defendant respectfully requests that the Court enter judgment in favor of ***{LAST NAME}***.

Respectfully Submitted on this the day of ***{DATE}***.

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{YOUR NAME HERE}
In Pro Per