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NO. 73510-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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UNIFUND, CCR., LLC,

Respondent,

v.

AMY ELYSE,

Petitioner,

RESPONDENT'S BRIEF

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ORIGINAL

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I. INTRODUCTION

This is, or at one time was, a small $2,000 case arising from an unpaid credit card account. This Court is the third to undertake review of two questions decided below on summary judgment: ***First,*** is petitioner Amy Elyse in default of her obligation to repay amounts borrowed on a Citi CashReturns MasterCard account ending in x2560 (the "Citi Account")? ***Second***, is an action to collect on the account subject to a six or a three-year statute of limitations?

As to the first question, there is no genuine dispute that Ms. Elyse opened, used and defaulted on the Citi Account. There is sworn testimony that she did so, evidence which is corroborated by a stack of monthly account statements directed to Ms. Elyse at her Seattle address showing detailed activity on the account. The most recent Card Agreement for her Citi Account was admitted as part of the authenticated business records of Unifund. Ms. Elyse denies none of this. Her singular response in the record—that she "does not recall" receiving a written account agreement from a specific Citi entity—does not create a genuine issue as to the fact of her unpaid debt.

As to the second question, Ms. Elyse did not and cannot satisfy her burden of proving that Unifund's claim on the Citi Account was time-barred. As a matter of law, Unifund CCR, LLC ("Unifund") had six years

to bring a claim—under both South Dakota law (the law selected in the Card Agreement) and Washington law that governs accounts receivable and claims arising from written agreements. Unifund's claim was timely, and judgment was properly entered in its favor by the court below.

II. ISSUES PERTAINING TO ASSIGMENTS OF ERROR

Unifund disagrees that the Superior Court erred, but submits that the following are the correct issues pertaining to petitioner's assignments:

A. Is a creditor entitled to summary judgment as to the existence and amount of a debt where there is unrefuted, sworn testimony as to the opening of the defendant's account, the extension of credit, and the balance owing on the account as of a date certain, testimony that is corroborated by detailed account statements showing transactions on the account?

B. Must a custodian or other qualified witness be employed by the entity that created records in order for them to qualify as business records?

C. What is the applicable limitations period on a claim to collect on a credit card account that is governed by an agreement that selects South Dakota law or, in the absence of such an agreement, does a balance on a credit card account otherwise constitute an account receivable under Washington law?

III. STATEMENT OF THE CASE

On October 29, 2007, Amy Elyse opened a Citi CashReturns MasterCard account and immediately transferred $1,600 to Washington Mutual from her new account. CP 219, 223. As documented in a series of monthly account statements, Ms. Elyse made charges and payments on the Citi Account for more than two years, including purchases at Ikea, Mud Bay, Chevron, The Mountain Apple, and in Bangkok, Thailand. CP 225, 226, 230, 233. Payments were regularly posted to the account with payment as recently as November 13, 2009. CP 219. By the summer of 2010, Ms. Elyse was carrying a balance of $1,871.11 on her Citi Account. CP 250.

On March 25, 2013, Citibank[1] sold Ms. Elyse's account (which was then due and payable in the amount of $1,910.11) to Pilot Receivables, LLC ("Pilot"), CP 217, 219, and on July 1, 2013, Pilot sold the account to Unifund. CP 221, 259.

On September 3, 2013, Unifund filed suit in state district court to collect on the Citi Account. CP 304-305. Unifund's Complaint originally

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[1] Among the many hypertechnical arguments asserted by petitioner in an attempt to avoid her debt is an argument that "there is no allegation or evidence that Ms. Elyse ever had a contract and/or credit card relationship with Citibank (South Dakota), N.A.," the counter-party to the applicable 2010 Card Agreement. Pet Brf. at 12. As explained in the Weedin Declaration, ***Citibank (South Dakota), N.A. merged into Citibank, N.A. in 2011***, after the date of the Card Agreement which references the (South Dakota) entity. CP 219 (¶ 1). Ms. Weedin and all of the documentation identify the Citi Account as one ending in 2560 that belongs to Ms. Elyse.

sought payment of the unpaid balance of $1,910.11, which was described as an indebtedness on a "credit account" for "goods, services and monies loaned." CP 305.

Ms. Elyse was served with process on October 13, 2013 (which she believed to be "junk mail"), CP 57, 336, and an Order of Default Judgment was entered against her on December 20, 2013. CP 399-400.

On March 21, 2014, petitioner filed a motion to vacate the default judgment. CP 308-320. With her motion, Ms. Elyse submitted a declaration in which she stated: "I do not recall ever having signed a Credit Card Agreement for a credit card account with Citibank, N.A. I do not remember having used a Citibank credit card since early 2007." CP 336. The district court vacated the default judgment over Unifund's objections. CP 32-33.

On July 17, 2014, Unifund filed a motion for summary judgment that was supported by multiple declarations. These included declarations from Tina Weedin, a Citibank representative who attested to Ms. Elyse's activity on the Citi Account and the balance on the account at the time it was sold, CP 219, and Joseph Doup, a records custodian for Unifund who authenticated her accounts records, including periodic statements on the Citi Account showing activity through late 2009, as well as the most recent Card Agreement for the account. CP 213-264.

Citibank's Tina Weedin stated under oath (CP 219) that:

- She was employed by Citibank, N.A. ("Citibank"), a national bank located in Sioux Falls, South Dakota, and that her job duties included reviewing and obtaining account information related to credit card accounts owned or previously owned by Citibank, including the records of Citibank (South Dakota), N.A. which had merged into Citibank in 2011. (¶ 1).
- She attested to her familiarity with Citibank's business records, and the manner in which they were prepared and maintained. (¶ 2).
- That Amy Elyse, with a Social Security number ending in 0177, had opened an account ending in 2560 on October 29, 2007; that the last payment received by Citibank on the account was posted on November 13, 2009; and that $1,910.11 was due and payable by Ms. Elyse on the account when it was sold to Pilot Receivables. (¶¶ 3-5).

Unifund's Joseph Doup provided an affidavit (CP 213-215) in which he testified:

- That he was Unifund's records custodian and was familiar with its books and records, including how they are prepared and maintained. (¶¶ 1-2).
- That Unifund's records showed that Ms. Elyse opened and used the Citibank account ending in 2560, and that Ms. Elyse was indebted to Unifund in the amount of $1,871.11. (¶¶ 3-4).
- That documents attached to his affidavit were true and correct copies of the transactional documents under which Unifund obtained title to the account. (¶¶ 5-9 and Exs. A-C).
- That a true and correct copy of billing statements on the account were appended to his affidavit. (¶ 10 and Ex. D).
- That a true and correct copy of the most recent Card Agreement for Ms. Elyse's account was attached to his affidavit as Exhibit E. (¶11).

Petitioner opposed Unifund's motion and filed a cross-motion for summary judgment. On September 30, 2014, Ms. Elyse filed a second testimonial declaration in the case. CP 50. With the Citibank and Unifund declarations, account statements, the Card Agreement, and other documentation that had been filed by Unifund months earlier in hand,

Ms. Elyse did not deny any of the factual contentions in the affidavits, that the statements accurately reflected the activity on her account, or that she received the statements on a regular basis. In fact, she failed to respond to the evidence at all. Instead, in a narrow two-paragraph declaration (transparently directed to trying to raise a question of fact as to whether she was party to a "written contract"), Ms. Elyse claimed she had no record and no memory of receiving a "Card Agreement" from "Citibank (South Dakota), N.A." CP 50.

The district court, the Honorable Eileen Kato, considered all of the evidence submitted by the parties and heard oral argument on the cross motions on October 6, 2014. CP 572-607. After indicating that the court would "need further briefing only on the issue of statute of limitations from both sides" (which would be irrelevant if the district court did not believe there was a debt), CP 601, moments later, Judge Kato granted petitioner's motion for summary judgment because the record did not contain the version of the account agreement "at the time the account was opened." CP 605. The orders granting petitioner's motion and denying Unifund's motion both reflected that the district court had considered all of Unifund's filings, including "the Affidavit of Unifund CCR, LLC Custodian of Records," CP 3-6, which included the other affidavits and business records related to Ms. Elyse's Citi Account.

Unifund appealed the summary judgment rulings to the Superior Court. The Honorable Monica Benton heard oral argument on May 8, 2015. After full briefing and oral argument, Judge Benton issued an Order Reversing District Court's Order of Summary Judgment for Respondent, CP 651-52, and entered summary judgment in favor of Unifund. CP 649-650. Petitioner was granted discretionary review by this Court.

IV. ARGUMENT

A. For Purposes of the Parties' Cross-Motions for Summary Judgment, All of the Facts are Construed in Favor of the Non-Movant on Each Motion

This case was decided on summary judgment. The parties filed cross-motions, meaning that each was required to show that there were no genuine issues of material fact with respect to their respective requests for relief. For purposes of each motion, "[a]ll facts and reasonable inferences must be construed in favor of the nonmoving party," *Turngren v. King County*, 104 Wn.2d 293, 312, 705 P.2d 258 (1985), and summary judgment may be "granted in favor of the moving party only if reasonable minds could reach but one conclusion from all the evidence." *Our Lady of Lourdes Hosp. v. Franklin Cy.*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993).

B. There is No Genuine Dispute That Ms. Elyse Had and Defaulted on a Citi MasterCard Account

As the plaintiff seeking to collect on Ms. Elyse's Citi Account, Unifund bore the burden of proving petitioner was in breach of her

obligation to pay amounts owing on the account. Sworn (and uncontradicted) testimony from knowledgeable representatives of both Citibank and Unifund established that on October 29, 2007, Amy Elyse (whose Social Security number ended in 0177) opened a credit card account ending in 2560; that payment was posted to the account on November 13, 2009; the account was sold by Citibank, N.A. (which had merged with Citibank (South Dakota, N.A. in 2011) in March 2013, and subsequently sold to Unifund on July 1, 2013; and that $1,910.11 was due and owing on the account at that time of the sale by Citi. CP 121 (Meents Declaration), 213-215 (Doup Affidavit), 219 (Weedin Affidavit), 259-261 (Halpin Affidavit). This sworn testimony from multiple witnesses is supported by corroborating documentation, including months of account statements showing a series of specific charges and payments by Ms. Elyse. These start with an advance of $1,600 on or about October 30, 2007 to Washington Mutual, and reflect subsequent charges at Ikea, Mud Bay, the Mountain Apple, Chevron, and a purchase in Bangkok, Thailand, and regular payments over a period of two years. CP 223-250.

Despite having direct and personal knowledge of the activity on the account, ***Ms. Elyse submitted nothing to contradict the evidence submitted by Unifund***. She did not deny that the social security number matched hers, that she lived at the address to which the statements were

addressed, that she received the statements, that the identifiable charges and payments on the account were hers, or that the debt stated in the sworn affidavits was correct. Indeed, the ***entirety*** of the ***evidence*** submitted by Ms. Elyse in response to Unifund's motion for summary judgment was a carefully worded, two-paragraph declaration in which she stated that as of September 2014, she had "no records that indicate" and "no memory" that she "ever received" a card agreement from "Citibank (South Dakota), N.A." CP 50.

If anything can be drawn from Ms. Elyse's narrow and nonresponsive statement, it is that she knows the account and the charges made on it are in fact hers, and that she owes the debt. *See Caminetti v. United States,* 242 U.S. 470, 494 (1917) (even ***criminal*** defendant who "voluntarily testifies. . . may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it"). Ms. Elyse is effectively a "missing witness" on the existence and use of the Citi Account. *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008) (where "witness is . . . available" to party but does not testify, permissible inference that testimony would have been unfavorable). Reasonable persons could reach only one conclusion on the

record below: On this record, there is no ***genuine*** dispute that Ms. Elyse opened, used, and defaulted on the Citi MasterCard Account ending in 2560, and summary judgment was—or should have been—properly entered on this point.[2] *American Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 292 P.3d 128 (2012).

C. A Claim on Ms. Elyse's Account is Governed by a Six-Year Statute of Limitations

Faced with uncontroverted evidence that she owed approximately $1,900 to Unifund, Ms. Elyse's case below largely consisted of arguments of counsel that Unifund failed to prove the terms of a "written contract," thereby rendering a claim to collect on the account time-barred by a three-year statute of limitations under RCW 4.16.080(3). To the extent it is possible to discern the district court's rationale for ruling in favor of Ms. Elyse, it appears that the court ruled against Unifund because the version of the account agreement introduced into evidence was not the version of the agreement that was in effect at "the time the account was

[2] Aside from argument of her counsel that there is some question as to the amount of her debt (apparently whether it is the $1,871.11 that was sought and awarded to Unifund, or the ***higher*** amount of $1,910.11 that is stated as the balance at the time the account was sold), Ms. Elyse offers little argument against the finding that the account is hers. There is no requirement that a creditor on a revolving account produce every statement associated with the account or describe every transaction on the account, and the sworn declarations and account statements in the record are more than sufficient to support the judgment entered by the Superior Court.

opened," CP 605, though it is unclear why the court considered this relevant, let alone dispositive.

Apart from Ms. Elyse's erroneous assumption that Unifund bears the burden of disproving her limitations defense, she invokes the wrong limitations period. The period for Citibank (or its successor) to bring a claim on the Citi Account is six years as a matter of both South Dakota and Washington law. The district court's apparent ruling that Unifund's claim was time-barred for want of a version of an account agreement as of the date the account was opened was error that was properly corrected by the Superior Court.

1. The action was timely under South Dakota's six-year limitations period.

As a matter of federal law, the terms of credit card accounts must be in writings that are disclosed to consumers and periodically updated. *See* 12 C.F.R. §§ 226.5, 226.6, 226.9. Unifund submitted, and the district court accepted, evidence of "the most recent Card Agreement" for the Citi Account. CP 215, 252-57. That agreement provides: "**Governing Law.** Federal law and the law of South Dakota, where we are located, govern the terms and enforcement of this Agreement." CP 257. The choice of South Dakota law is appropriate given that Citibank (and before the

merger, Citibank (South Dakota), N.A.) are located in Sioux Falls, South Dakota. CP 219.

Under the law of South Dakota, SOUTH DAKOTA CODIFIED LAWS § 15-2-13(1), the statute of limitations for a contract claim of any type—express or implied, written or oral—is ***six years***. Unifund's claim against petitioner was timely. Although the governing six-year limitations period in South Dakota was asserted as the governing period by Unifund below, CP 36, Ms. Elyse makes no mention of it in her brief to this Court.[3]

In arguing that the Card Agreement is not the version in effect when the Citi Account was "opened," that Ms. Elyse does not "remember" receiving it, and that the document is missing a "Fact Sheet" referenced therein, petitioner misses (or avoids) the point for purposes of choice of law. Credit card agreements become effective in the event an account is not timely closed by the account holder after issuance of the agreement. SOUTH DAKOTA CODIFIED LAWS § 54-11-9 ("The use of an accepted credit card ***or the issuance of a credit card agreement and the expiration of thirty days from the date of issuance without written notice from a card holder to cancel the account creates a binding contract between the card holder and the card issuer with reference to any accepted credit card***,

[3] The limitations period under South Dakota law is the same as the limitations period under Washington law on the facts of this case, and the application of South Dakota law was not reargued to the Superior Court.

and any charges made with the authorization of the primary card holder.") (emphasis added); CP 252 ("This Agreement is binding on you unless you close your account within 30 days after receiving the card and you have not used or authorized use of the card."). The Citi Account remained open until ***at least*** June 2010, three months after the date of the Card Agreement. CP 250.

The sworn and uncontradicted testimony of Joseph Doup is that the Card Agreement is the agreement applicable to Elyse's Citi MasterCard Account. The agreement authenticated by Mr. Doup selects South Dakota law, and that selection is enforceable as a matter of law. *Unifund CCR, LLC v. Sunde*, 163 Wn. App. 473, 479, 260 P.3d 915 (2011). While Unifund disagrees that there is any ambiguity as to the import of the Doup Declaration, at a minimum, the testimony of Mr. Doup and Citibank's Tina Weedin creates a question of fact as to the terms governing the Citi Account when it was closed.

2. The action was timely under Washington's six-year limitations period for claims on accounts receivable.

Even if South Dakota law does not apply, Unifund's suit was still timely as a claim on an ***account receivable*** under Washington law, a claim which is governed by a six-year limitations period.

In *Tingey v. Haisch*, 159 Wn.2d 652, 665, 152 P.3d 1020 (2007), the Washington Supreme Court applied the then-applicable version of RCW 4.16.040(2) to reverse Division Three, holding that a six-year, rather than a three-year, limitations period applied to an attorney's claim for unpaid fees, despite the absence of a written agreement. The court concluded that subsection .040(2) had "creat[ed] an exception to the three-year limitation on oral contracts for actions upon accounts receivable." *Id.* at 658. In the absence of a definition of "account receivable," the court interpreted the term to mean "an amount due a business on account from a customer who has bought merchandise or received services." *Id.* at 659.

On July 22, 2007, the legislature ***expanded*** the definition of "account receivable" in direct response to *Tingey*. 2007 Wash. Legis. Serv. Ch. 124 (H.B. 1145); *see* Final Bill Report, HB 1145 (describing rulings in *Tingey* and noting that dissent had encouraged legislature to "define the term" account receivable). The legislature amended the statute to provide that an account receivable includes "***any obligation for payment incurred in the ordinary course of the claimant's business or profession***, whether arising from one or more transactions and whether or not earned by performance." RCW 4.16.040(2) (emphasis added).[4] A credit card

[4] Notably, Unifund's claim would have been timely even under the Court of Appeals narrow, pre-amendment interpretation of "account receivable" as "[a]n account that is left open for ongoing debit and credit entries by two parties and that has a fluctuating

account is the quintessential account receivable—here, a payment obligation of petitioner that was incurred in the ordinary course of Citibank's business. Ms. Elyse's debt on the Citi Account—even if created entirely through oral communications (which it was not)—is subject to a six-year limitations period, regardless whether the Court applies South Dakota or Washington law. Petitioner utterly failed to meet her burden of proving otherwise. *Fulle v. Boulevard Excavating, Inc.*, 20 Wn. App. 741, 743, 582 P.2d 566 (1978) ("The statute of limitations is an affirmative defense, and its elements must be proved by the party asserting it.").[5]

3. The action was timely under Washington's six-year limitations period for claims on written contracts.

Even if the South Dakota law that is selected in the Card Agreement and the Washington law on receivables that would otherwise

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balance until either party finds it convenient to settle and close." *Tingey v. Haisch*, 129 Wn. App. 109, 117, 117 P.3d 1189 (2005), *rev'd*, 159 Wn.2d 652, 152 P.3d 1020 (2007).

[5] In the district court, Unifund argued that South Dakota law supplied the applicable limitations period, but that if the court applied Washington law, the six-year limitations period for written contracts applied. CP 36, 576. In the Superior Court, Unifund explained that even if the account was not governed by a written agreement (which it was), petitioner's obligation constituted an account receivable under Washington law. CP 566-68. Petitioner argued that the Superior Court should not consider the receivables argument, citing RALJ 2.2(d). CP 620. It was within the Superior Court's discretion to consider alternative arguments that were supported by the record. *Cf. Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 649, 9 P.3d 787 (2000) ("RAP 2.5(a) is permissive in nature and does not automatically preclude the introduction of an issue at the appellate level.") (*rejected on other grounds* in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006)).

apply to the Citi Account did not provide a six-year limitations period for claims on credit card accounts (which both do), Unifund's claim would still be timely as a generic claim arising from a written contract under RCW 4.16.040(1). At a minimum, the evidence in the record—and the inferences drawn therefrom—create an issue of fact that cannot be decided in favor of petitioner as requested in her petition to this Court.

Section 4.16.040(1) of the Revised Code of Washington provides a six-year limitations period for "[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement . . ." Here, the Card Agreement, dated March 2010, provides, "You must pay us for all amounts due on your account." CP 252. This is an action seeking to enforce the liability arising out of that written promise, specifically the amount that was owing on the Citi Account as of March 25, 2013. CP 219 (Weed Declaration).[6]

Ms. Elyse argues that the Card Agreement cannot support a claim because it is not the version that was in effect at the time she opened the account. But there is no requirement that a party submit superseded versions of account agreements that do not govern the account at the time

[6] To avoid immaterial argument, Unifund ultimately sought judgment in the amount of $1,871.11, a lesser amount that is reflected in the June 6, 2010 statement at CP 250. Despite its right to do so, Unifund did not seek to add the interest that accrued during the period between the sale by Citi and the entry of judgment in favor of Unifund.

suit is filed.[7] While petitioner cites a handful of decisions from other jurisdictions that have required proof of the "original" card agreement, there is no rationale for such a requirement when the "current" agreement calls for payment of "all amount due on [the] account," and the amount due is corroborated by both a subsequent account statement and a sworn declaration as to the "amount due on the account." The Card Agreement is the agreement governing the claim that was brought by Unifund.

Petitioner argues that the Card Agreement is of no effect because Unifund did not offer "new consideration" for the 2010 Card Agreement. Pet. Brf. at 19-20. Her assertion is untrue (Ms. Elyse was allowed to keep her account open), but irrelevant for purposes of a credit card agreement. As discussed above, under governing law, consideration is not required to make a credit card agreement effective.

Aside from her objection to consideration of the Card Agreement, petitioner apparently claims that Unifund's is not a claim "arising out of a written agreement," because the "Fact Sheet" referenced in the agreement is not appended to the copy that was filed with the court. Pet. Brf. at 20. As such, she claims that the writing is not sufficient to bring claims arising

[7] To Unifund's knowledge, no court has required a plaintiff to submit every version of an account agreement that applied during the period the account was open; there is no need for the original or interim agreements, even though a debtor may have made charges while earlier version of the agreement were in effect. Unpublished authority rejects petitioner's arguments.

out of the agreement under RCW 4.16.040(1). But written proof of the contractual obligation need not be contained in a single document in order to bring the claim under the six-year limitations period. *Smith v. Skone & Connors Produce, Inc.*, 107 Wn. App. 199, 206, 26 P.3d 981 (2001) ("the contract need not be contained in one document, but may be comprised of several documents, including antecedent correspondence and prior written memorandums") (citing *Boyd v. Davis*, 127 Wn.2d 256, 261, 897 P.2d 1239 (1995) and *St. Paul & Tacoma Lumber Co. v. Fox,* 26 Wn.2d 109, 124, 173 P.2d 194 (1946)); *see also Hunt v. Great Western Savings Bank*, 54 Wn. App. 571, 573, 774 P.2d 554 (1989) (multiple writings, taken together, may satisfy statute of frauds).

Here, the Card Agreement is only part of a written record that shows the manner in which petitioner's debt was calculated, including the manner in which finance charges and late and over credit fees were added to the account. CP 223-250. The writings together satisfy the requirement that Unifund's claim arise out of a written contract; even if statutes in South Dakota and Washington did not apply a six-year limitations period to claims on unpaid accounts receivable, Unifund's claim would still be timely under basic Washington contract law.

D. Petitioner's Objections to the Records Considered by Both of the Lower Courts is Not Well Taken

For the reasons set forth above, Unifund should prevail in this case based solely on the plain, uncontradicted, sworn testimony of the Citibank and Unifund declarants in the case: Ms. Elyse opened a Citi MasterCard account, used it, and defaulted on her obligation to repay the amount owing on the account (which was duly assigned to Unifund). No specific documentation is necessary to prove these dispositive facts.[8] If the debt is not governed by South Dakota law, it constitutes an account receivable; in either case, suit was timely, and judgment was properly entered in favor of Unifund.

Ms. Elyse nevertheless devotes a full ten pages of her opening brief to broad argument that the courts below erred in their evidentiary rulings, and that all of the "documentary evidence" offered by Unifund in connection with the parties' cross-motions for summary judgment was inadmissible, Pet. Brf. at 22-32, an argument that was not accepted by either court below, and that should be rejected here as well:

First, even under petitioner's interpretation of the Uniform Business Records Act, there is no justification for excluding the

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[8] Citing cases from other jurisdictions, Ms. Elyse argues that without documents, Unifund's claim necessarily fails. That is not so. *Bogle & Gates, P.L.L.C. v. Zapel*, 121 Wn. App. 444, 90 P.3d 703 (2004) (claim for receivable in absence of written agreement). By statute, in Washington, consumer credit card agreements are specifically exempted from the statute of frauds. RCW 19.36.120.

documents submitted by Unifund. Some of the documents, such as the documentation of the acquisition of the Citi Account, ***are Unifund documents***. CP 221. But beyond that, contracts and other documents that show the fact of a transaction ***are not hearsay***. As stated by the Ninth Circuit, documents such as the sale and assignment documents, CP 217, 221, and the Card Agreement, CP 252-257, "are operative contractual documents, the hearsay rule is not implicated and it is unnecessary to consider whether they come in under the business records exception." *Remington Investments, Inc. v. Berg Product Design, Inc.*, 172 F.3d 876, 1999 WL 132267 at *1 (9th Cir. 1999) (citing *United States v. Rubier*, 651 F.2d 628, 630 (9th Cir.1981) ("[F]acts of independent legal significance constituting a contract which is at issue are not hearsay.")). Much like "promissory notes," Ms. Elyse's monthly account statements "are not being offered to prove the truth of the matter asserted. . . . Rather, they are offered as evidence of a debt. Accordingly, the promissory notes, like a contract, are not hearsay and are admissible." *U.S. v. Karr*, 928 F.2d 1138, 1991 WL 40296 at *1 (9th Cir. 1991).

Second, even if the records in this case were not admissible as non-hearsay, petitioner's rigid view of who may qualify as a "custodian" is contrary to both the language and intent of the exception to the hearsay rule. Ms. Elyse argues that her account records are inadmissible *per se*

because the Unifund custodian does not work for Citi, the entity that originally created the records. Pet. Brf. at 29 (Unifund "was required to submit them through the testimony of the Citibank records custodian."). But this is not (and for good reason, should not be) the law. *Discover Bank v. Bridges*, 154 Wn. App. 722, 726, 226 P.3d 191 (2010) (affirming trial court's admission of account records based on affidavits of persons who worked for affiliate of creditor-plaintiff); *OneWest Bank, F.S.B. v. Erickson*, __ Wn.2d __, 2016 WL 455940 at *12 (2016) (ruling that trial court properly admitted unauthenticated faxed document of Idaho court that was not prepared by bank as business record based on "sufficient indicia of authenticity").

The test in Washington is not a "narrow" one as petitioner suggests:

> Reviewing courts ***broadly interpret the statutory terms "custodian"*** and "other qualified witness." [*State v. Ben–Neth*, 34 Wash.App. 600, 603 (1983)]. It is not necessary that the person who actually made the record provide the foundation. *Id.* "Testimony by ***one who has custody of the record as a regular part*** of his work or has supervision of its creation ('other qualified witness' under the statute) will suffice." *Id.* (citing *Cantrill v. American Mail Line, Ltd.*, 42 Wash.2d 590, 257 P.2d 179 (1953)).

State v. Quincy, 122 Wn. App. 395, 399, 95 P.3d 353 (2004) (emphasis added); *Barkley v. Greenpoint Mortgage Funding, Inc.*, 190 Wn. App. 58, 67, 358 P.3d 1204 (2015) ("Reviewing courts interpret the statutory terms 'custodian' and 'other qualified witness' broadly."). As stated by this Court:

> The rule is disjunctive, not conjunctive. *Cf. State v. Smith*, 16 Wash.App. 425, 558 P.2d 265 (1976), *review denied*, 88 Wash.2d 1011 (1977) (misinterpreting Cantrill as requiring testimony by both the custodian and supervisor). Admissibility hinges upon the opinion of the trial court that "the sources of information, method and time of preparation were such as to justify its admission." RCW 5.45.020; K. Tegland, 5A. WASH.PRAC. § 372, at 240 (2d ed. 1982). A trial court's ruling admitting or excluding such records is given considerable weight and will not be reversed absent a manifest abuse of discretion. *State v. Kreck*, 86 Wash.2d 112, 542 P.2d 782 (1975); *Cantrill*.

State v. Ben–Neth, 34 Wash.App. 600, 603, 663 P.2d 156 (1983).

Here, not only did a Citibank witness attest to the substance and preparation of the materials that were separately qualified as business records, CP 219, the current custodian of the records, Joseph Doup, attested to the foundation for the records, including the specific criteria for their admission as business records. CP 213-214. Ms. Elyse expresses skepticism as to Mr. Doup's knowledge, but having failed to depose him

or to offer any contrary proof (such as Ms. Elyse's own denial that the account statements are hers and were mailed to her each month at 1423 NW 64th Street), there is no basis to disregard his declaration for purposes of summary judgment, and no reason to strike the records, even if they did not have "legal independent significance" (which they do). *Barkley*, 190 Wn. App. at 67 (rejecting argument "that the testimony [of custodian] is 'conclusory' and does not demonstrate personal knowledge" based failure to "identify any genuine issue of material fact as to the qualifications" or "authenticity of attached documents").

The ultimate test is ***reliability***, and in this case, there is no genuine dispute that the records ***considered by both the courts below*** are in fact business records associated with Ms. Elyse's defaulted Citi MasterCard account. *State v. Ziegler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990) ("business records are presumptively reliable if made in the regular course of business and there was no apparent motive to falsify"). The courts below did not abuse their discretion in considering the records, and this Court should not rule otherwise. *Discover Bank v. Bridges*, 154 Wn. App. at 726 ("We review a trial court's decision to admit or exclude business records for a manifest abuse of discretion."); *Sunbreaker Condominium Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 372, 901 P.2d 1079 (1995) ("The standard of review for trial court evidentiary decisions, including

those made in the course of summary judgment proceedings, is abuse of discretion.").[9]

Beyond the holdings in *OneWest Bank, Barkley* and *Bridges,*[10] courts around the country have similarly rejected petitioner's argument that admissible business records must be created by the entity offering them. In *Simien v. Unifund CCR Partners*, 321 S.W.3d 235 (Tex. Ct. App. 2010), the Texas Court of Appeals affirmed a decision admitting documents similar to those offered in this case, and held that an affidavit from a Unifund employee (like the affidavit Unifund offered in this case) laid a sufficient foundation for admissibility of the third-party records. *Id.* at 245. In *Simien*, Unifund filed a collection action against a debtor to collect on an account opened with Citibank. *Id.* at 239. As in this case, Unifund submitted an affidavit from its employee attaching an assignment from Citibank, Citibank monthly statements, and other documents. *Id.* The court held that Unifund properly laid a foundation to admit Citibank's documents under the business records exception to the hearsay rule. *Id.* at

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[9] Other case law suggests that appellate courts review evidentiary issues related to summary judgment proceedings *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998).

[10] Ms. Elyse cites *State v. Weeks*, 70 Wn.2d 951, 425 P.2d 885 (1967) as the Washington authority for her argument that a record must be made by a declarant's own employer to qualify as a business record. *Weeks* does not stand for this broad proposition. In *Weeks,* the custodian-physician did not attest that the document at issue met the criteria for admission as a business record, only that it was a record received from another hospital that was in his file. *Id.* at 952.

240-245. The court stated, "a record may be 'made' by a business although it was initially authored by a different business." *Id.* at 244. The court concluded that "personal knowledge" of the procedures used in preparing the original documents is not required when the documents are incorporated into the business of the third party, are relied upon by the third party, and there are other indicators of reliability. *Id.* The result should be no different here.

In *United States v. Langford*, 647 F.3d 1309, 1326 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1121 (2012), the court held that records of credit card transactions were properly admitted despite a witness "not hav[ing] personal knowledge of each of the records." The Court recognized that business records of one entity are admissible as business records of another entity if the latter entity relies on those records and keeps them in the ordinary course of business. *Id.* at 402. In *United States v. Adefehinti*, 510 F.3d 319, 324 (D.C. Cir. 2007), a district court admitted into evidence loan documents that the bank relied upon when determining whether to lend money based on certificates from a bank's custodian of records authenticating the documents. In *United States v. Duncan*, 919 F.2d 981, 986 (5th Cir. 1990), *cert. denied*, 500 U.S. 926 (1991), the Fifth Circuit found that there was "no requirement that the [business] records be created by the business having custody of them," so that insurance

company custodians could lay an adequate foundation for admitting records compiled by those companies from the business records of hospitals. *Id.* at 326. Similarly, in *In re Ollag Constr. Equipment Corp.*, 665 F.2d 43, 46 (2d Cir. 1981), the Second Circuit held that "business records are admissible if witnesses testify that the records are integrated into a company's records and relied upon in its day-to-day operations." *Id.*

Indeed, the overwhelming weight of the authority analyzing the business records exception holds that a witness with "personal knowledge" of the making of a record need not testify when the subject record has been incorporated into the business records of the testifying entity.[11] Here, the Doup Declaration includes the requisite foundation.

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[11] *E.g., Teac Corp. of Am. v. Bauer*, 678 P.2d 3 (Col. Ct. App. 1984) (holding that, if records prepared by another source are adopted and integrated in the regular course of established business procedures into the records sought to be introduced, such records are admissible, even if the identity of the person whose firsthand knowledge was the basis of a particular entry is not established); *New England Savings Bank v. Bedford Realty Corp.*, 717 A.2d 713 (Conn. 1998) (holding a witness introducing a record need not have made the entry himself, nor have been employed by the organization during the relevant time period; "[t]here is no requirement in § 52-180 ... that the documents must be prepared by the organization itself to be admissible as that organization's business records"); *Beal Bank, SSB v. Eurich*, 831 N.E.2d 909 (Mass. 2005) ("[S]tatute makes clear that the record is admissible even when the preparer has relied on the statement of others, by providing that 'personal knowledge by the entrant or maker' is a matter affecting the weight (rather than the admissibility) of the record"); *Great Seneca Financial v. Felty*, 869 N.E.2d 30 (Ohio Ct. App. 2006) (holding assignee of credit card debt properly authenticated original creditor's business records through affidavit of assignee's employee); *Alloway v. RT Capital, Inc.*, 193 P.3d 713 (Wyo. 2008) (affirming summary judgment in favor of the collection agency and holding credit card statements which issuer sent to collection agency were admissible summary judgment evidence under business records hearsay exception, where agency's representative identified the documents and explained her relationship with agency); *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338 (Fed. Cir. 1999) (holding testimony of witness with first-hand knowledge as to procedures used in third-party's preparation of records is not

The courts below did not err in considering the documentary evidence submitted by Unifund.

E. Ms. Elyse Has No Claim Under the Washington Collection Agency Act

At pages 34-36 of her brief, Ms. Elyse argues that Unifund violated the Washington Collection Agency Act, RCW Ch. 19.16, claiming that Unifund did not state the "[a]mount owing on the original obligation at the time it was received" and did not "itemize interest and fees charged by Citibank." Ms. Elyse did not prove either claim, and is not entitled to any corresponding relief.

The uncontroverted evidence in the record is that Ms. Elyse owed Citibank $1,910.11 when the account was sold, CP 219 (¶ 5), which is the amount stated in the "first communication" she claims to have received from Unifund's counsel. CP 493. Bringing a claim for $1,871.11—a slightly lesser amount—is not a violation of the Act.[12] As petitioner

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necessary to establish that records were business records of party under exception to hearsay rule, where party incorporated third-party's records into its own, party relied upon those records in its day-to-day operations, and there were other strong indicia of reliability); *Dyno Const. Co. v. McWane, Inc.*, 198 F.3d 567 (6th Cir. 1999) (holding a witness who authenticates a business record does not need to be an employee of the business that creates the records); *United States v. Childs*, 5 F.3d 1328, 1333 (9th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994) (holding witness from automobile dealership could provide foundation for department of motor vehicle record that it relied on and integrated into its business records).

[12] The $1,871.11 figure is the amount in the final account statement submitted to the district court. CP 250. The reason for the $39 increase reflected in the total verified by Citibank is not explained in the record, but the voluminous account statements would suggest that the $39 is a late fee.

concedes, the Washington Collection Agency Act only requires itemization of charges or costs added to the original obligation by the original creditor, ***if known***. RCW 19.16.250(8)(c)(ii). Petitioner suggests that Unifund must ***disprove*** the elements of ***her*** claim, Pet. Brf. at 36 n. 10 ("Unifund offered no evidence [the] amounts were not known . . ."), a position that turns her burden on its head. Unifund did not violate the WCAA, and petitioner's request that she be ordered to pay no more than the "principal" on the Citi Account should be rejected.

F. The Judgment in Favor of Unifund Should be Affirmed, or, In the Alternative, the Case Should be Remanded for an Adjudication of Any Disputed Issues of Material Fact

The supposed dispute as to whether the Citi Account belongs to Ms. Elyse and remains unpaid is not genuine, and there is no serious question that the corroborating documents—including the statements that were mailed to Ms. Elyse on a monthly basis at her residence in Seattle—are genuine and admissible as records of regularly conducted business activities. While Ms. Elyse offered sworn testimony on other matters, she did not deny any of these dispositive facts. Regardless whether or not the documents are admitted, Unifund met its burden of proving petitioner's liability on an account receivable. The Court should affirm the judgment entered in favor of Unifund.

If, however, this Court believes that something more is needed to conclusively adjudicate Unifund's right to relief, the appropriate ruling is to remand the case to the district court for further proceedings. To the extent there is any dispute, the ***inferences that must be drawn in favor of Unifund on petitioner's motion for summary judgment*** are the following:

- That Amy Elyse, whose social security number ends in 0177, opened a Citibank credit card account ending in 2560 on October 29, 2007. CP 219.
- That Ms. Elyse received detailed monthly statements on the account, and that the charges and payments reflected on those statements are hers. CP 223-250.
- That $1,910.11 was due and payable on the account when it was sold to Pilot Receivables Management, LLC on March 25, 2013. CP 217, 219.
- That on July 31, 2013, Pilot Receivables, LLC sold the account to Unifund. CP 214, 221, 259.
- That as of June 27, 2014, Mr. Elyse owed Unifund $1,871.11 on the credit card account. CP 214, 250.
- That the agreement governing Ms. Elyse's credit card account is the March 2010 Card Agreement that selects South Dakota law as the governing law. CP 215, 257.

- That Unifund's claim would either be a claim on an account receivable or an obligation arising from a written contract under Washington law.

To the extent there is a "dispute" as to any of these matters, for purposes of ***petitioner's motion***, the facts are construed in favor of Unifund, and the district court's ruling to the contrary constituted error. Where there is a genuine dispute, the appropriate relief is a remand so that a finder of fact can evaluate the evidence and decide whether the debt is petitioner's and must be repaid.[13]

G. Petitioner's Arguments for Sending a Message to Debt Buyers are Invalid

Petitioner insinuates that debt buyers present the Court with a special "concern," and she suggests that the Court should use her case as an "opportunity" to "make [it] clear" that the laws "apply equally to all litigants, including debt buyers." Pet. Brf. 39. Indeed, were Unifund a business ***other*** than a debt buyer, the proper result here would not even be contested.

Had Amy Elyse ordered a $1,900 television from Best Buy, taken delivery of the television at her home address, and then failed to pay for it,

[13] The Washington cases discussing the sorts of proof that will support summary judgment in favor of the creditor do not stand for the proposition that the creditor's claim is subject to dismissal if the account holder raises an issue of fact. *Citibank South Dakota N.A. v. Ryan*, 160 Wn. App. 286, 247 P.3d 778 (2011).

she would be adjudicated liable for the debt based on a sworn statement as to the debt or a copy of the invoice. The Conditions of Use on Best Buy's website, which provide that Minnesota law governs, would be enforced. To the extent Washington law was applied instead, Ms. Elyse's debt to Best Buy would constitute an account receivable subject to a six-year limitations period under RCW 4.16.040(2). She could not avoid liability by signing a declaration stating that she "did not recall" reading the Conditions of Use, all while failing to deny that she did, in fact, order and receive the television without paying for it. But this is precisely the game that is being played here.

While it is entirely appropriate to require proof of a debt and that plaintiff is the party entitled to collect it, it is ***not*** in the interests of borrowers to multiply the costs of collecting debts that are not genuinely disputed, such as Ms. Elyse's debt in this case. Not only does such make-work ultimately increase the costs of borrowing, the exercise results in substantial and disproportionate fees. Were it not Unifund's general policy to seek only the amount owed at the time a debt is acquired (which it is), Unifund would be entitled to pursue fees against Ms. Elyse under both RCW 4.84.250 and the terms of the governing Card Agreement. CP 257 ("[Y]ou are liable to us for our legal costs if we refer collection of your account to a lawyer who is not our salaried employer."). Instead,

Unifund is before this Court asking nothing more than that it affirm that Unifund is entitled to payment of the $1,871.11 that Amy Elyse has indisputably owed on her Citi CashReturns Mastercard account since June 10, 2010. CP 250.

V. CONCLUSION

Amy Elyse owes Unifund the $1,871.11 that was awarded to it by the court below. There is no genuine dispute that the Citi Account ending in 2560 is hers, and that the balance due and owing on the account remains unpaid. Under both South Dakota and Washington law, Unifund had six years to bring a claim on the account, and it did so in a timely fashion.

RESPECTFULLY SUBMITTED this 22nd day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2016, I caused the foregoing document to be delivered via e-mail and U.S. Mail to the following:

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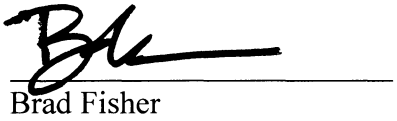
Declared under penalty of perjury under the laws of the state of Washington dated at Seattle, Washington this 22nd day of March, 2016.



Brad Fisher

Appendix

1. **RCWA 4.16.040**
2. **RCWA 19.36.120**
3. **SOUTH DAKOTA CODIFIED LAWS § 54-11-9**
4. **SOUTH DAKOTA CODIFIED LAWS §15-2-13**

West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.16. Limitation of Actions (Refs & Annos)

West's RCWA 4.16.040

4.16.040. Actions limited to six years

Effective: June 7, 2012
Currentness

The following actions shall be commenced within six years:

(1) An action upon a contract in writing, or liability express or implied arising out of a written agreement, except as provided for in RCW 64.04.007(2).

(2) An action upon an account receivable. For purposes of this section, an account receivable is any obligation for payment incurred in the ordinary course of the claimant's business or profession, whether arising from one or more transactions and whether or not earned by performance.

(3) An action for the rents and profits or for the use and occupation of real estate.

Credits
[2012 c 185 § 3, eff. June 7, 2012; 2007 c 124 § 1, eff. July 22, 2007; 1989 c 38 § 1; 1980 c 105 § 2; 1927 c 137 § 1; Code 1881 § 27; 1854 p 363 § 3; RRS § 157.]

Notes of Decisions (290)

West's RCWA 4.16.040, WA ST 4.16.040
Current with all laws from the 2015 Regular and Special Sessions and Laws 2016, chs. 1 and 2

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West's Revised Code of Washington Annotated
Title 19. Business Regulations--Miscellaneous (Refs & Annos)
Chapter 19.36. Contracts and Credit Agreements Requiring Writings (Refs & Annos)

West's RCWA 19.36.120

19.36.120. Exempt agreements

Currentness

RCW 19.36.100 through 19.36.140 and 19.36.900 shall not apply to: (1) A promise, agreement, undertaking, document, or commitment relating to a credit card or charge card; or (2) a loan of money or extension of credit to a natural person that is primarily for personal, family, or household purposes and not primarily for investment, business, agricultural, or commercial purposes.

Credits
[1990 c 211 § 2.]

West's RCWA 19.36.120, WA ST 19.36.120
Current with all laws from the 2015 Regular and Special Sessions and Laws 2016, chs. 1 and 2

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South Dakota Codified Laws
Title 54. Debtor and Creditor (Refs & Annos)
Chapter 54-11. Credit Cards and Revolving Charge Accounts (Refs & Annos)

SDCL § 54-11-9

54-11-9. Creation of contract between card holder and issuer

Currentness

The use of an accepted credit card or the issuance of a credit card agreement and the expiration of thirty days from the date of issuance without written notice from a card holder to cancel the account creates a binding contract between the card holder and the card issuer with reference to any accepted credit card, and any charges made with the authorization of the primary card holder.

Credits
Source: SL 1983, ch 365, § 2.

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S D C L § 54-11-9, SD ST § 54-11-9
Current through the 2015 Regular Session, Exec.Order 15-1, and Supreme Court Rule 15-72

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South Dakota Codified Laws
Title 15. Civil Procedure
Chapter 15-2. Limitation of Actions Generally (Refs & Annos)

SDCL § 15-2-13

15-2-13. Contract obligation or liability--Statutory liability--Trespass--Personal property--Injury to noncontract rights--Fraud--Setting aside corporate instrument

Currentness

Except where, in special cases, a different limitation is prescribed by statute, the following civil actions other than for the recovery of real property can be commenced only within six years after the cause of action shall have accrued:

(1) An action upon a contract, obligation, or liability, express or implied, excepting those mentioned in §§ 15-2-6 to 15-2-8, inclusive, and subdivisions 15-2-15(3) and (4);

(2) An action upon a liability created by statute other than a penalty or forfeiture; excepting those mentioned in subdivisions 15-2-15(3) and (4);

(3) An action for trespass upon real property;

(4) An action for taking, detaining, or injuring any goods or chattels, including actions for specific recovery of personal property;

(5) An action for criminal conversation or for any other injury to the rights of another not arising on contract and not otherwise specifically enumerated in §§ 15-2-6 to 15-2-17, inclusive;

(6) An action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery;

(7) An action to set aside any instrument executed in the name of a corporation on the ground that the corporate charter had expired at the time of the execution of such instrument.

Credits
Source: SDC 1939, § 33.0232 (4); SL 1941, ch 151; SL 1945, ch 144; SL 1945, ch 145, § 1; SL 1947, ch 153, § 2; SL 1953, ch 198, § 1.

Editors' Notes

COMMISSION NOTE

The Code Commission changed "subdivisions 15-2-15(4) and (5)" to "subdivisions 15-2-15(3) and (4)" near the end of subdivisions (1) and (2) of this section. Former subdivision 15-2-15(3) was repealed in 1976, and in 1984 subdivisions 15-2-15(4) and (5) were renumbered as subdivisions 15-2-15(3) and (4). The changes to this section reflect that renumbering.

Notes of Decisions (133)

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S D C L § 15-2-13, SD ST § 15-2-13
Current through the 2015 Regular Session, Exec.Order 15-1, and Supreme Court Rule 15-72

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