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I. INTRODUCTION

Unifund, CCR, LLC (“Unifund”) filed this case in September 2013 against Amy Elyse in King County District Court (“District Court”) to recover on an alleged credit card account debt for \$1,910.11, which had allegedly been assigned to it. In the District Court, Unifund did not offer into evidence the card agreement allegedly in effect when all of Ms. Elyse’s account activity allegedly occurred, and Unifund offered no other evidence of the terms of the agreement. In addition, Unifund did not offer into evidence all of the monthly statements for the time the alleged account activity was occurring, and provided no explanation or basis for nearly one-quarter of the alleged charges it sought to recover. What evidence Unifund did offer concerning the account was not offered in the manner required by the Uniform Business Records as Evidence statute, RCW 5.45.020. Unifund alleged that the last activity on the account occurred in November 2009, nearly four years before the lawsuit was filed.

The District Court determined on summary judgment that because Unifund had not presented any evidence that a written contract existed between Unifund and Ms. Elyse, the three-year statute of limitations for oral contracts under RCW 4.16.080(3) applied to the action; because the

lawsuit had been commenced more than three years after Ms. Elyse's alleged breach, the District Court dismissed Unifund's Complaint.

However, on appeal to the King County Superior Court ("Superior Court"), the Superior Court, despite Unifund's failure to offer into evidence the card agreement allegedly in effect when all account activity allegedly occurred or any evidence of the terms of the agreement, despite Unifund's failure to properly offer into evidence the documents that purportedly supported its claims, and despite the discrepancies in the account statements that Unifund did offer into evidence, reversed the District Court Order dismissing Unifund's Complaint, and entered summary judgment and a money judgment in favor of Unifund against Ms. Elyse.

This Court should (1) reverse the Superior Court's orders, (2) vacate the money judgment entered against Ms. Elyse, (3) reinstate the District Court Order dismissing Unifund's Complaint against Ms. Elyse, and (4) award Ms. Elyse her reasonable attorney's fees incurred both in this appeal and in Unifund's appeal to the Superior Court.

II. ASSIGNMENTS OF ERROR

1. The Superior Court committed error when it reversed the District Court Order dismissing Unifund's Complaint against Ms. Elyse.

2. The Superior Court committed error when it reversed the District Court Order denying Unifund's motion for summary judgment, and entered an Order granting Unifund summary judgment on its claim against Ms. Elyse.

3. The Superior Court committed error when it entered a money judgment for \$2,009.11 in favor of Unifund against Ms. Elyse.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a debt buyer sues on a credit card account but does not submit a copy of the original card agreement into evidence or provide other proof of its terms, does the three-year statute of limitations of RCW 4.16.080(3) for oral agreements apply to the action?

2. When a debt buyer attempts to submit into evidence documents it received from the original alleged creditor through its own records custodian, who does not demonstrate personal knowledge concerning the documents and who does not comply with the requirements of the Uniform Business Records as Evidence Act, RCW Chapter 5.45, should the documents be excluded from consideration on the parties' cross-motions for summary judgment?

3. When a debt buyer seeks to recover on an assigned credit card debt but provides no proof of the terms governing the account at the time the account activity allegedly occurred, provides incomplete documentation of account activity and payments as proof of the amount

due on the account, and fails to provide proof of the amount it claims is owed on the account, should the debt buyer's claim be rejected because it has failed to prove essential elements of its case?

IV. STATEMENT OF THE CASE

A. Facts Relevant to Appeal, and Procedural History.

Unifund filed this case in the District Court seeking to recover \$1,910.11 from Ms. Elyse for an alleged unpaid credit card account balance that had been assigned to it. CP 304-305. Unifund alleged that the original creditor was Citibank, N.A., which assigned Ms. Elyse's account to Pilot Receivables Management, LLC ("Pilot") on March 25, 2013, which in turn allegedly assigned the account to Unifund on July 1, 2013. CP 214, 217, 221.

Unifund alleged that Ms. Elyse's last charge on the account was on July 9, 2008, and that her last payment on the account was posted on November 13, 2009. CP 219, 233-250. Unifund filed its lawsuit against Ms. Elyse on September 3, 2013, more than three years after the dates it alleged the last charge and the last payment were made. CP 300-305.

Unifund filed a motion for summary judgment in the District Court, in which it requested the District Court to enter a money judgment against Ms. Elyse for "the principal sum of \$1,871.11, together with pre-judgment interest, [and]... costs." CP 209-211. In support of the motion,

Unifund filed an affidavit from an alleged Citibank representative, Tina Weedin, who testified that Ms. Elyse opened the credit card account on October 29, 2007; that Ms. Elyse's last payment on the account was made on November 13, 2009; that the account had been assigned to Pilot; and that the amount due on the account when it was assigned was \$1,910.11. CP 219. The Citibank representative did not attach to her declaration any documents pertaining to the alleged credit card account or the balance Unifund claimed was due on it. *Id.*

Also in support of its motion, Unifund filed the declaration of an alleged Unifund custodian of records, Joseph Doup. CP 213-257. Mr. Doup testified that Ms. Elyse opened the account with Citibank, and attached to his declaration copies of the credit card agreement Unifund alleged governed the account (the "Card Agreement") and documents it alleged were statements for the account. CP 214, 223-250, 252-257. The form Card Agreement attached to Mr. Doup's declaration was dated March 2010, long after the last alleged activity by Ms. Elyse on the account, and identified the credit card company as "Citibank (South Dakota), N.A.," not "Citibank, N.A." CP 252. The alleged account statements were incomplete, with a several-month gap between the last statement produced dated May 10, 2010, and the preceding statement produced, dated November 9, 2010. CP 223-250. The alleged balance due

on the account grew from \$1,456.77 on the November 9, 2010 statement, to \$1,871.11 on the May 10, 2010 statement, with no explanation for the additional charges except for interest charges of \$48.53 reflected on the May 10, 2010 statement. CP 248-250.

Unifund's records custodian provided no testimony about the mode of preparation of these documents, or whether they were "made in the regular course" of Citibank's business, "at or near the time of the act, condition of the event." CP 213-215. Ms. Elyse objected to the District Court's consideration of the March 2010 Card Agreement and the account statements, on the grounds that they had not been offered in compliance with the requirements of RCW 5.45.020, the Business Records as Evidence statute. CP 290-291.

Additionally, Unifund did not offer any evidence that credit card statements for the Citibank account were mailed to Ms. Elyse at any time, and failed to provide a complete history of the alleged activity on Ms. Elyse's account.

Unifund agreed that it did not offer into evidence the Card Agreement allegedly existing between Citibank and Ms. Elyse when Ms. Elyse allegedly opened her credit card account in 2007. CP 582 ("We did not provide the credit card agreement that was in effect at the time the account was opened; that is correct."). However, Unifund contended that

the March 2010 Card Agreement, dated two and one-half years after Ms. Elyse had allegedly opened the account and after all alleged account activity had occurred, was the written agreement that applied to the account and to this action. CP 155-157, 597. But that Card Agreement identifies “Citibank (South Dakota), N.A.” as the “account issuer,” not “Citibank, N.A.,”¹ and there was no evidence offered or admitted, or even an allegation, that Ms. Elyse ever opened an account with “Citibank (South Dakota), N.A.” CP 214 (“The books and records of the Plaintiff show that the Defendant, Amy Elyse, opened an account with Citibank, N.A.”). March 2010 was nearly two years after Ms. Elyse’s last alleged account charge, and several months after her last alleged payment. CP 219, 233. The March 2010 Card Agreement stated that an “accompanying Important Information table,” called the “Fact Sheet,” was part of [the] Agreement,” CP 252, but a copy of the “Fact Sheet” was not submitted to the District Court, or to the Superior Court.

Ms. Elyse also moved for summary judgment to dismiss Unifund’s complaint, arguing that because Unifund had not produced or offered into evidence, either in discovery or in support of its motion for summary judgment, a copy of the Card Agreement in effect when she allegedly opened the account or during the time she allegedly incurred the charges

¹ The March 2010 Card Agreement identified and defined “we, us, and our” to mean “Citibank (South Dakota), N.A., the issuer of [the] account.” CP 252.

and made payments on the account, and because Unifund had not produced the “Fact Sheet,” there was no evidence that a written agreement governed the account. CP 130-135. Thus, the three-year statute of limitations of RCW 4.16.080(3) applied to Unifund’s claim, the lawsuit was filed more than three years after the alleged breach of contract, and the action was therefore barred. *Id.*

In her opposition to Unifund’s motion for summary judgment, Ms. Elyse argued that Unifund’s claim was barred by the statute of limitations; that Unifund had not complied with the Business Records as evidence statute, RCW 5.45.020, and there was thus no admissible evidence that Ms. Elyse owed any money, or that she had ever had a credit card account with Citibank; and that even if the Court considered the inadmissible March 2010 Card Agreement and account statements, there was insufficient proof of the amount Ms. Elyse allegedly owed on the account. CP 283-286. Even if the account statements were admissible, they were incomplete, and there was no explanation stated in any of the documents Unifund submitted to justify the assessment of, and the amounts Ms. Elyse was charged for, late fees, transfer fees, overlimit fees, interest, and compound interest. CP 294-295.

Finally, Ms. Elyse argued that Unifund had failed to comply with Washington’s Collection Agency Act, RCW Chapter 19.16, and was

therefore not entitled to recover any interest or late fees on the principal balance it claimed was due, and the principal could not be ascertained.² CP 292-293.

Unifund submitted no evidence for its opposition to Ms. Elyse's motion, other than the evidence it submitted for its own motion.

District Court Judge Eileen Kato denied Unifund's motion; granted Ms. Elyse's motion; and dismissed Unifund's lawsuit. CP 481-484. Judge Kato ruled that because Unifund had failed to submit a copy of a written agreement effective when Ms. Elyse's alleged account activity was occurring, the three-year statute of limitations applied to Unifund's claim, and Unifund filed the lawsuit after the statute of limitations had expired. CP 604-605.

Unifund appealed the District Court's orders to the Superior Court. CP 14-19. On appeal, Superior Court Judge Monica Benton reversed both of Judge Kato's orders. CP 642-645. In addition, Judge Benton granted Unifund's request for summary judgment against Ms. Elyse, and entered a money judgment against Ms. Elyse for \$1,871.11 principal, plus costs of \$138.00, for a total of \$2,009.11. CP 644-645. Judge Benton provided no explanation or reasoning for her rulings or orders. CP 642-645.

² See RCW 19.16.250(8)(c); RCW 19.16.450.

Ms. Elyse timely filed a Notice of Discretionary Review, CP 646-652, and on December 8, 2015, this Court granted Ms. Elyse's motion for discretionary review.

V. ARGUMENT

Superior Court Judge Benton did not specify the basis or bases for her orders reversing the District Court or for entry of the judgment against Ms. Elyse. Whatever the basis was or bases were, she committed error, the orders should be reversed, the judgment vacated, and the District Court's dismissal of Unifund's Complaint against Ms. Elyse reinstated.

A. Standard of Review.

An appellate court's review of a lower court's order on summary judgment is reviewed *de novo*. *Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012). The evidence presented to the trial court is to be reviewed in the light most favorable to the non-moving party, and all reasonable inferences from that evidence must be drawn in the non-moving party's favor. *Id.*³

B. The Superior Court Should Not Have Reversed the District Court's Order Dismissing Unifund's Complaint Against Ms. Elyse.

³ An "inference" is "a process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted." *Dickinson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986) (citations omitted).

Because Unifund failed to present any evidence in the trial court that a written contract governed the alleged relationship between Unifund and Ms. Elyse or the terms of the alleged written agreement, the court was bound to rule that the three-year statute of limitations for oral contracts applied to Unifund's claim. Evidence submitted by Unifund showed that the last activity occurring on Ms. Elyse's alleged account occurred more than three years before the Complaint was filed. Therefore, the District Court's order dismissing Unifund's claim because the lawsuit was barred by the statute of limitations was correct. The Superior Court committed error when it entered its order reversing the District Court dismissal order, and this Court should reverse the Superior Court and reinstate the District Court's Order dismissing Unifund's Complaint.

1. Because Unifund did not offer into evidence the alleged written agreement in force when the alleged activity on Ms. Elyse's account occurred and did not offer into evidence the entire later-dated written agreement that it claimed applied, Unifund's claims were governed by the three-year statute of limitations of RCW 4.16.080(3) applicable to non-written contracts, and the lawsuit was commenced after the expiration of the three-year period.

a. Unifund failed to prove that a written contract applied to its claim against Ms. Elyse.

“The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of mutual intention.” *Bogle & Gates, PLLC v. Holly*

Mountain Resources, 108 Wn. App. 557, 560, 32 P.3d 1002 (2001) (citation omitted). “The essential elements of a contract are ‘the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration.’” *Id.* Thus, because Unifund contended that a written contract governed the relationship between Citibank and Ms. Elyse and that Ms. Elyse had breached that agreement, it was Unifund’s obligation to submit evidence of all elements of the alleged agreement, and that Ms. Elyse agreed to it.

At no time in this case – not in discovery, not for the summary judgment motions, nor on appeal – has Unifund produced the written agreement it alleged existed between Citibank and Ms. Elyse when the account was opened in 2007, and while the alleged account activity was occurring. While a copy of an incomplete written contract from March 2010 was offered for the summary judgment motions, that date was well after Ms. Elyse’s last alleged charge and alleged last payment. Further, that contract was not one used by Citibank, whom Unifund alleged opened Ms. Elyse’s credit card account in 2007. CP 214. Rather, the March 2010 Card Agreement was a contract used by Citibank (South Dakota), N.A. a separate company that merged with Citibank in 2011. CP 219, 252-257. There is no allegation or evidence that Ms. Elyse ever had a contract and/or credit card relationship with Citibank (South Dakota), N.A.

Nor did Unifund offer any evidence that Ms. Elyse entered into any agreement with Citibank. It made no effort to provide evidence of the terms of the alleged agreement, and submitted nothing into evidence bearing Ms. Elyse's signature or confirming that she assented to the alleged terms of an agreement with Citibank. In short, Unifund offered no evidence in the trial court of the provisions of the contract Unifund contended existed between Citibank and Ms. Elyse, that Ms. Elyse agreed to those provisions, or that she was in breach of them.

Because Unifund failed to produce a copy of the written agreement existing between Citibank and Ms. Elyse when the account was allegedly opened and while Ms. Elyse was allegedly using the account, and failed to provide any evidence whatsoever of the terms governing Citibank's alleged agreement with Ms. Elyse, RCW 4.16.080(3)'s three-year statute of limitations for oral contracts applies to Unifund's claim: "A written contract for purposes of the 6 year statute of limitations must contain all of the essential elements of the contract, and if resort to parol evidence is necessary to establish any essential element, then the contract is partly oral and the 3 year statute of limitations applies." *Bogle & Gates, PLLC*, 108 Wn. App. at 560. Because the last alleged activity on Ms. Elyse's account occurred in November 2009, CP 219, more than three years prior to the

commencement of the lawsuit, the three-year statute of limitations for oral contracts barred the claim. RCW 4.16.080(3).

The moving party on a motion for summary judgment bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 1182 (1989). If the moving party is a defendant, she may meet this burden by showing there is an absence of evidence to support the plaintiff's case. *Id.* at 225 n.1. In her motion for summary judgment, Ms. Elyse pointed out to the District Court that Unifund had provided no admissible evidence of the existence of any written contract between its predecessor, Citibank, and Ms. Elyse, or the terms of the alleged agreement; that Citibank had ever sent Ms. Elyse the 2010 Card Agreement; or that Ms. Elyse had assented to the terms of the Card Agreement. CP 130-135. Thus, there was no evidence to support Unifund's claim that a written contract applied to the alleged account, that a contract existed in the first instance between Citibank and Ms. Elyse, or that Ms. Elyse owed Unifund, as the assignee of the account allegedly first belonging to Citibank, any money.

Once Ms. Elyse showed that there was an absence of evidence to support Unifund's case, the burden shifted to Unifund to show "sufficient facts to establish the existence of every essential case element required at trial." *Young*, 112 Wn.2d at 225. But in its response to Ms. Elyse's

motion, Unifund failed to meet this burden. It did not provide a copy of the alleged written agreement existing when Ms. Elyse allegedly opened the Citibank account in 2007 and during the time Ms. Elyse was allegedly using the account, and failed to offer any other evidence of the terms of the agreement. Accordingly, Unifund failed to raise a genuine issue of material fact as to whether Ms. Elyse was entitled to summary judgment dismissing its claim against her. *Id.* at 226; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548 (1986) (party to a lawsuit is entitled to summary judgment if she can show that there is an absence or insufficiency of evidence supporting an element that is essential to a claim on which the other party has the burden of proof). Accordingly, dismissal of Unifund's claim against Ms. Elyse was appropriate.

Although no Washington courts have addressed this precise issue, courts in other jurisdictions have ruled that in a suit by a debt buyer to recover on an alleged credit card account balance, the debt buyer must submit to the court the card agreement in effect at the time the debtor's alleged charges were incurred.

In *Citibank (South Dakota), N.A. v. Martin*, in which a credit card issuer moved for summary judgment on its claim against a cardholder for an alleged balance due, the card issuer did not present the original card

agreement with its motion papers. The court denied the motion, first noting,

With great frequency, courts are presented with summary judgment motions by credit card issuers seeking a balance due from credit card holders which motions fail to meet essential standards of proof and form in one or more particulars[.]

807 N.Y.S.2d 284, 287 (N.Y. Civ. Ct. 2005). The court ruled that the card issuer was required to offer into evidence, among other things, the original card agreement, and any amendments to it:

As a part of a credit card issuer's presentation of a prima facie case, the motion papers also must include an affidavit sufficient to tender to the court the original agreement, as well as that any revision thereto, and the affidavit must aver that the documents were mailed to the card holder.

Id. at 289.

Similarly, in *Williams v. Unifund CCR Partners*, an assignee of a credit card issuer moved for summary judgment on its claim to recover an alleged balance due from the card holder. The assignee did not submit to the court a copy of the credit agreement signed by the card holder. Nevertheless, the trial court granted the assignee's motion for summary judgment on the claim. On appeal, the judgment was reversed, the appeals court holding that because the assignee had not submitted the original agreement into evidence, the assignee's evidence was "not sufficient to establish the terms of a valid contract as a matter of law." 264 S.W.3d 231,

236 (Tex. App. 2008). *See also Atlantic Credit and Finance Inc. v. Giuliana*, 829 A.2d 340, 345 (Pa. Super. 2003) (failure of assignee of credit card claim to offer original card agreement into evidence was “fatal” to its claim to recover on the account); *Cach, LLC v. Fatima*, 936 N.Y.S.2d 58 (table), 32 Misc.3d 1231(A), 2011 N.Y. Slip. Op. 51510(U), *2 (N.Y. Dist. Ct. 2011) (motion for summary judgment by assignee of credit card debt denied, in part, because the original agreement between the original creditor and the cardholder had been destroyed, or was no longer accessible, and the “‘Cardholder Agreement’ annexed to the moving affidavit of plaintiff’s custodian of records ... [was] undated, incomplete, and lack[ed] a proper business records foundation.”).⁴

To require a card issuer or an assignee of a card issuer to submit the original agreement governing the account into evidence as an essential part of its case in support of its claim only makes sense: without the agreement in effect when charges are incurred, courts are unable to confirm that finance charges, late fees, and other charges assessed by the card issuer are in fact consistent with the parties’ agreement. *Williams*, 264 S.W.3d at 236 (debt buyer’s failure to submit original agreement was

⁴ *Fatima* is an unreported decision. Unreported decisions of New York state courts may be cited for their persuasive value and are entitled to respectful consideration. *Yellow Book of NY L.P. v. Dimilia*, 729 N.Y.S.2d 286, 287, 188 Misc.2d 489 (N.Y. Dist. Ct. 2001).

a failure to prove agreed material terms, including applicable interest rate).

Simply put, because Unifund failed to offer into evidence the Card Agreement in effect when Ms. Elyse was allegedly incurring charges on it, Unifund was not entitled to prevail, and the three-year statute of limitations applies to its claims. As our Supreme Court stated in *Bicknell v. Garrett*, where because the creditor did not submit a written agreement into evidence it determined the three-year statute of limitations for oral agreements applied and not the six-year statute for written agreements,

It is obvious that we cannot find that it is an express liability arising out of a written agreement, unless we can see or know the contents of the agreement. It is equally obvious that we cannot hold that the liability sued upon is an implied liability arising out of a written agreement, unless the agreement relied upon is produced so that we may determine whether its language warrants the implication. The action, therefore, must fail.

1 Wn.2d 564, 573, 96 P.2d 592 (1939).

b. The March 2010 Card Agreement does not apply to Unifund's claim against Ms. Elyse.

Instead of offering any written agreement applicable to the account when Ms. Elyse allegedly opened it and was charging and making payments on the account, Unifund relied solely on the existence of the March 2010 Card Agreement to support its argument that there was a written agreement between Citibank and Ms. Elyse. CP 581-582, 597.

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However, the 2010 Card Agreement could not govern the relationship between Ms. Elyse and Citibank. First, the card issuer identified in that Agreement was not Citibank, but Citibank (South Dakota), N.A., a separate company.⁵ Also, the 2010 Agreement was dated about two and one-half years after Ms. Elyse allegedly opened the account, and long after her last alleged use of the credit card. Finally, even if the 2010 Card Agreement could arguably apply to govern the relationship between Citibank and Ms. Elyse, Unifund presented no evidence that Ms. Elyse ever received a copy of the 2010 Agreement or assented to its terms.

And even if there was such evidence, Ms. Elyse could not be bound by the terms of the 2010 Card Agreement. Unifund does not allege Ms. Elyse used the account while the 2010 Card Agreement was in effect, and Citibank could not make new terms to govern its existing relationship with Ms. Elyse without providing new consideration to her. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 571, 161 P.3d 473 (2007) (contract modification requires meeting of the minds and separate consideration). Unifund presented no evidence that Citibank offered, or that Ms. Elyse obtained consideration in exchange for, the new terms in

⁵ See Citibank's July 1, 2011 SEC Form 8-K, at 1 (available at <http://www.sec.gov/Archives/edgar/data/921864/000152261611000003/cbna-8k.htm>, last accessed February 15, 2016) (identifying Citibank (South Dakota), N.A. as Citibank, N.A.'s "affiliate" prior to their merger).

the 2010 Card Agreement. Therefore, the 2010 Card Agreement could not bind Ms. Elyse.

- c. **Even if the 2010 Card Agreement applies, it did not contain all of the essential terms of the alleged contract, so the three-year statute of limitations applies regardless.**

But even if the 2010 Card Agreement did apply to the relationship between Citibank and Ms. Elyse, that document doesn't contain all of the essential terms of the parties' contract. The 2010 Agreement itself states that an "important Account Information table" called a "Fact Sheet" was "part of the Agreement." CP 252. The information included in the "Fact Sheet" included whether the Adjusted Periodic Rate charged for interest on the account was reviewed and changed "on a billing period, month end, or quarterly basis" (CP 253); whether purchases and cash advances on the account were subject to a monthly periodic interest rate or a daily periodic interest rate (*id.*); if the account was subject to a Transaction Fee for balance transfers or a fee for foreign purchases, to a Late Fee, an Annual Membership Fee, a Returned Payment fee, a Returned Cash Convenience Check Fee, or a Stop Payment on Cash Convenience Check Fee, the amount of those fees (CP 254); the methodology for determining the monthly minimum payment required on the account (CP 255); whether the account was a "secured account" (CP 256); and whether the account was subject to arbitration. *Id.* Unifund never offered the "Fact Sheet" into

evidence. Thus, there was no evidence before the court concerning these important contract terms. Since all of the essential elements of the parties' contract were not stated in the March 2010 Card Agreement, and because Unifund offered no evidence that any written agreement governed the relationship between Citibank and Ms. Elyse prior to March 2010, the three-year statute of limitations for oral contracts applies to Unifund's claim. RCW 4.16.080(3); *Bogle & Gates, PLLC*, 108 Wn. App. 560 (if resort to parol evidence is necessary to establish any essential element of a contract, the three-year statute of limitations applies).

d. Unifund's claims are barred by the three-year statute of limitations.

Unifund alleged that Ms. Elyse breached her account agreement because she had not made any "periodic payments" since November 2009. CP 214, 219. Thus, because Unifund's cause of action for breach of contract accrued more than three years before it filed the lawsuit, Unifund failed to timely commence the action.

The District Court properly and correctly determined that the statute of limitations had expired on Unifund's claim, and dismissed Unifund's lawsuit. The Superior Court completely ignored the established Washington authority supporting this determination when it reversed the District Court dismissal order. This Court should reverse the Superior Court and reinstate the District Court's dismissal order.

2. **Because Unifund did not comply with the requirements of RCW 5.45.020, the Business Records as Evidence statute, the documentary evidence Unifund offered to oppose Ms. Elyse’s motion for summary judgment and in support of its claim was inadmissible. Therefore, Unifund failed to present any evidence sufficient to raise a genuine issue of material fact concerning Ms. Elyse’s right to obtain a dismissal of Unifund’s claims against her, and failed to present sufficient evidence in support of its own motion for summary judgment.**

Summary judgment motions must be supported by admissible evidence. *Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2000). When a party moving for summary judgment or opposing a summary judgment motion relies on affidavits, “the affidavits must conform to what the affiant would be permitted to testify to at trial.” *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 260, 11 P.3d 883 (2000) (citation omitted). Affidavits must be made on personal knowledge and must set forth facts that would be admissible in evidence, and the affiant must show affirmatively that he is competent to testify to the matters stated in the affidavit. *Id.* at 259-60. A court may not consider conclusory statements submitted for a summary judgment motion. *Id.* at 260. Because Unifund failed to comply with the requirements of RCW 5.45.020, the Uniform Business Records as Evidence statute, it failed to produce any relevant evidence to oppose Ms. Elyse’s motion for summary judgment, or in support of its own motion for summary judgment.

To his declaration, Unifund’s custodian of records Joseph Doup attached the March 2010 Citibank (South Dakota), N.A. Card Agreement and Ms. Elyse’s alleged Citibank account statements, as ostensible support for Unifund’s contentions that a written agreement applies to the claim, and that Ms. Elyse incurred charges on the account and failed to pay the account in accordance with its terms. Thus, Unifund submitted the documents for the truth of the matters stated therein – the classic definition of hearsay. ER 801(c). In order for these hearsay documents to be admissible into evidence, there had to be an applicable exception to the general prohibition against hearsay as evidence. ER 802. The only exception conceivably applicable was ER 803(6), “Records of Regularly Conducted Activity.”

In Washington, the Uniform Business Records as Evidence Act, RCW Chapter 5.45, governs the admissibility of business records into evidence. Because the Act limits a party’s opportunity to cross-examine and confront an individual who prepared the record, the statute must be strictly construed. *State v. Finkley*, 6 Wn. App. 278, 280, 492 P.2d 222 (1972).⁶

⁶ The ability to cross-examine witnesses is the cornerstone of the adversarial system of justice and the root of the hearsay rule. *The History of the Hearsay Rule*, John H. Wigmore, 17 Harvard L. Rev. 437, 458 (1904). The rationale for “the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination.” 5 J.H. WIGMORE, *Evidence in Trials at*

RCW 5.45.020 imposes several foundational requirements for a person to introduce evidence through the business records hearsay exception. A records custodian or other qualified witness, in order to submit admissible evidence of “a record of an act, condition, or event,” must provide the following testimony: (1) the identity of the record; (2) the mode of preparation of the record; and (3) that the record was made in the regular course of business, at or near the time of the act, condition or event. RCW 5.45.020. If the party offering the record into evidence provides this testimony, the record is admissible only if, “in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.” *Id.* Thus, the first three criteria must be shown before the Court may even consider whether to admit the record into evidence.

As a general principle, a business that has received documents from another business is not permitted to submit those records into evidence through its own records custodian: “The hearsay exception does not include information received from a third party (as opposed to information generated by, and for the benefit of, the business).” 5D Tegland, Wash. Prac., Handbook Wash. Evid. ER 803 (2014-2015 ed.) at

Common Law, § 1420 at 251 (Chadbourn rev. ed. 1974). Thus, all statements used as testimony should be made only where the person to be affected by them has an opportunity to probe their trustworthiness by cross-examination. Wigmore, 17 Harvard L. Rev. at 458.

§ 803.24. Thus, in *State v. Weeks*, 70 Wn.2d 951, 425 P2d 885 (1967), the Supreme Court affirmed the trial court's refusal to admit as a "business record" of a Washington doctor a record from an Arkansas hospital that was in the Washington doctor's file, because it was not a record made by his office in the regular course of business. *Id.* at 953. In order to be admissible as a "business record" under RCW 5.45.020, the custodian of records of the Arkansas hospital needed to provide the foundational requirement testimony. *Id.* ("The unauthenticated record of the Arkansas hospital was not competent evidence because it did not meet the requirements of the cited statutory provisions. There was no evidence by the custodian of the records of the Arkansas hospital or by any other qualified person that the document was a business record, as that term is defined in the Uniform Business Records as Evidence Act, RCW 5.45.").

In most jurisdictions where this issue has been addressed, courts have ruled that account documents originally created and maintained by a credit card issuer are inadmissible through the testimony of a debt buyer's records custodian.

Pennsylvania's business records as evidence rule is essentially the same as Washington's. *Commonwealth Financial Systems, Inc. v. Smith*, 15 A.3d 492, 496 (Pa. Super. 2011). In *Commonwealth*, the appeals court affirmed the trial court's ruling that a credit card agreement and account

statements were inadmissible, because the plaintiff debt buyer's records custodian who attempted to submit the documents into evidence provided no testimony that he was familiar with how the original card issuer maintained its business records or employed or protected their computers, or whether the account statements applied to the defendant's account. The appeals court confirmed that the debt buyer's failure to submit an admissible card agreement and account statements to the trial court was fatal to its claims. *Id.* at 501.

Missouri's business records rule is also essentially identical to Washington's. *C & W Asset Acquisition, LLC v. Somogyi*, 136 S.W.3d 134, 138 (Mo. Ct. App. 2004). In *Somogyi*, a debt buyer sued a credit card holder on an account allegedly incurred with the original card issuer. The debt buyer attempted to put documents concerning the account into evidence through the affidavit of the "servicer" for the debt buyer. *Id.* at 136. The trial court denied admission of the documents and dismissed the debt buyer's claim. *Id.* at 136. The appeals court affirmed the trial court, holding that the records custodian provided no testimony about where the records came from or who authored them, and "only served as a conduit to the flow of records and could not testify to the mode of preparation." *Id.* at 140. The court noted that "allowing a litigant to be a 'custodian' of another entity's records seems to run contrary to the spirit of [the business

records as evidence rule].” *Id. Accord, Asset Acceptance v. Lodge*, 325 S.W.3d 525, 528 (Mo. App. 2010) (account documents submitted into evidence by testimony of debt buyer’s executive were inadmissible under the business records as evidence rule because they were not created by debt buyer in ordinary course of its business at or near the time of the events they purported to record but “were merely transferred” by the original creditor to the debt buyer); *Cach, LLC v. Askew*, 358 S.W.3d 58, 64-65 (Mo. 2012) (Missouri Supreme Court reversed trial court judgment in favor of debt buyer, ruling that testimony from records custodian of debt buyer’s owner was insufficient to warrant introduction into evidence of account documents obtained by debt buyer from credit card issuer because she did not demonstrate knowledge about when and how the documents were prepared, or the “standard procedures” used by the card issuer).

In *Palisades Collection LLC v. Kalal*, 781 N.W.2d 503 (Wis. Ct. App. 2010), the appeals court reversed a trial court judgment in favor of a debt buyer on a credit card account, where the debt buyer’s representative submitted statements for the account as exhibits to her declaration for the debt buyer’s summary judgment motion. The appeals court concluded that the declaration failed to demonstrate that the witness had personal knowledge of how the statements were prepared and that they were

prepared in the ordinary course of the card issuer's business, and nothing showed that she had personal knowledge of the amount due on the account: "The averment that she, as a representative of [the debt buyer], now has control over the records of [the alleged debtor's] accounts and has 'personally inspected said account and statements regarding the balance due,' does not reasonably imply that she has personal knowledge of how [the original card issuer] prepared the account statements." *Id.* at 510. The appeals court reversed the judgment in favor of the debt buyer. *Id.*

In *Cach LLC v. Fatima*, the court declined to admit into evidence documents from the credit card issuer (including a card agreement and an account statement) submitted by a debt buyer's custodian of records, because the witness did not demonstrate personal knowledge of the card issuer's business and record-keeping practices. 2011 N.Y. Slip. Op. 51510(U), at *2.

These cases all demonstrate that courts in jurisdictions with business records as evidence rules or statutes like Washington's RCW 5.45.020 require a witness attempting to submit credit card account documents into evidence to demonstrate compliance with the statutes or rules: The custodian must first demonstrate that he or she has personal knowledge of the information to which he is testifying; and then he must testify to the identity of the documents, the mode of preparation of the

documents, and that they were created in the regular course of business at or near the time of the act, condition or event depicted in the documents. RCW 5.45.020. Only after the witness has demonstrated compliance with each of those requirements, may the court employ its discretion to admit or deny admission of the documents into evidence. Thus, for the Citibank documents to be considered by the court, Unifund was not permitted to simply attach them as exhibits to the declaration of its own records custodian, without any of the foundational requirement testimony required by RCW 5.45.020. Rather, it was required to submit them through the testimony of the Citibank records custodian. Unifund submitted no such testimony from a Citibank representative.

Unifund's Records Custodian, Joseph Doup, included no testimony in his affidavit to which the March 2010 Card Agreement and account statements were attached concerning the mode of Citibank's preparation of the documents; if they were made by Citibank in the regular course of business, at or near the time of the acts, conditions, or events depicted in them; or that he had personal knowledge of such information. Mr. Doup's testimony therefore did not comply with the requirements of RCW 5.45.020, and the documents attached to it – the March 2010 Citibank (South Dakota), N.A. Card Agreement and Ms. Elyse's alleged account statements – were inadmissible. They should not have been considered by

the Superior Court, either to oppose Ms. Elyse's motion for summary judgment or in support of Unifund's own motion for summary judgment. *Blomster*, 103 Wn. App. at 260 (affidavits submitted for a summary judgment motion must set forth facts admissible into evidence).

Because Unifund submitted no admissible evidence of the terms of a written agreement governing the relationship between Citibank and Ms. Elyse, it failed to produce evidence to raise a genuine issue of material fact on the issues raised in Ms. Elyse's motion for summary judgment. Without any such evidence, Ms. Elyse's motion should have been granted. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006).

Similarly, without any admissible evidence to support its claim that Ms. Elyse had entered into an account agreement with Citibank, had incurred charges on the account, and owed money on the account, Citibank's motion for summary judgment should have been denied, as occurred in the District Court. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988), *citing Graves v. P.J. Taggares Co.*, 94 Wn.2d 288, 302, 616 P.2d 1223 (1980) (if moving party does not sustain its burden to show it is entitled to judgment as a matter of

law, court should deny motion, even if no opposing evidence is submitted).⁷

Although Judge Benton of the Superior Court provided no explanation or reasoning for her reversal of the District Court orders, she must have considered the account documents attached to Mr. Doup's affidavit to be admissible, because the principal judgment amount of \$1,871.11 requested by Unifund and entered by Judge Benton against Ms. Elyse, appears as evidence in the record nowhere else. CP 250. On appeal, the *de novo* standard applies to Judge Benton's rulings on the admissibility of evidence. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Because there was no applicable exception to the hearsay rule to authorize their admission into evidence, the account documents were inadmissible as a matter of law. ER 802. Judge Benton therefore committed error in entering her orders for the appeal of the District Court decisions, because she considered the alleged account documents as admissible evidence without requiring compliance with each of the conditions of RCW 5.45.020. This Court should hold that the account documents attached to Mr. Doup's affidavit are inadmissible, reverse Judge Benton's orders, and reinstate the orders of the District Court.

⁷ See also, *Citibank South Dakota, N.A. v. Ryan*, 160 Wn. App. 286, 292, 247 P.3d 778 (2011) (party opposing motion for summary judgment on alleged credit card balance need not deny using card to defeat motion, if moving party does not meet initial burden to show it is entitled to judgment).

C. Because There Was No Evidence of the Terms of the Alleged Agreement Between Citibank and Ms. Elyse, and Because Unifund Did Not Submit All of Ms. Elyse's Account Statements Into Evidence, the Judgment Entered Against Ms. Elyse Is Not Supported By Sufficient Proof.

While this Court should agree that the documents attached to Mr. Doup's affidavit are inadmissible because they were not properly offered to the court under RCW 5.45.020, even if they are admissible, they do not support the amount that Unifund claims is owed by Ms. Elyse, and for which Judge Benton entered Judgment in favor of Unifund.

In order to prevail on its motion for summary judgment, Unifund was required to prove the amount of its damages suffered as a result of Ms. Elyse's breach of contract. *Norm Adver., Inc. v. Monroe St. Lumber Co.*, 25 Wn.2d 391, 398, 171 P.2d 177 (1946). But the amount Ms. Elyse owes to Unifund, if anything, cannot be determined from the documents Unifund submitted for the summary judgment motions. Unifund thus failed to meet its burden to prove the amount of its damages suffered as a result of the claimed breach, and summary judgment for Unifund was not warranted or proper. *Hash*, 110 Wn.2d at 915 ("If the moving party does not sustain its burden [to show that no genuine issue of material fact exists], summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in support of the motion."); *see also Schaeffer v. Weast*, 546 U.S. 49, 56, 126 S.Ct.

528 (2005) (in every case, “the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims.”).

1. There was insufficient evidence to permit the Superior Court to determine what amount, if any, was due from Ms. Elyse on the account.

First, although not all of the account statements were submitted to the Court, those that were submitted show that late fees of at least \$468 were charged, without any evidence of the contractual authority for such charges. CP 223-250. At least \$68 in Transfer Fees and \$39 in Overlimit Fees were charged, both again without proof of any contractual authority for them. *Id.* Further, the amounts shown each month as the “New Balance” confirm that Citibank was charging compound interest, without any proof that it was entitled to do so.⁸ *Goodwin v. Northwestern Mut. life. Ins. Co.*, 196 Wash. 391, 403, 83 P.2d 231 (1938) (a creditor can charge compound interest only if the parties’ written agreement specifically authorizes it).

Finally, Unifund submitted no account statements or other evidence to justify the increase in the amount Ms. Elyse owed from November 2009, when she allegedly owed \$1,456.77, to May 10, 2010, when she allegedly owed \$1,871.11. CP 248-250.

⁸ For example, the June 9, 2009 statement shows a “Previous Balance” of \$1,287.42, to which was added a \$39 Late Fee and interest of \$31.03, for a “New Balance” due of \$1,357.45. CP 243. The next statement, dated July 9, 2009, shows interest charges of \$33.73 accruing on the “Previous Balance” of \$1,357.45. CP 244. Thus, Citibank was charging compound interest.

2. Unifund was not entitled to recover interest or other charges on the claim because it violated Washington's Collection Agency Act.

In addition, because Unifund failed to comply with the requirements of Washington's Collection Agency Act ("CAA"), if it is entitled to recover at all in this case, it is only entitled to recover an amount that includes no accrued interest or fees. Unifund has failed to prove that amount.

Unifund is a "person directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person" It is therefore a "Collection agency" under the CAA. RCW 19.16.100(4)(a). Because Unifund has a license to do business as a collection agency in Washington,⁹ it is a "licensee" under the CAA. RCW 19.16.100(9).

RCW 19.16.450 directs that if a licensee or an employee of a licensee commits a violation of any of the practices specified in RCW 19.16.250 in the collection of a claim, "neither the licensee, the customer of the licensee, nor any other person who may thereafter legally seek to collect on such claim shall ever be allowed to recover any interest, service charge, attorneys' fees, collection costs, delinquency charge, or any other fees or charges otherwise legally chargeable to the debtor on such claim."

⁹ See CP 489.

RCW 19.16.250(8)(c) requires a collection agency to include with the first notice mailed to the debtor concerning the alleged debt being collected, “an itemization of the claim asserted,” including, in pertinent part:

- (i) Amount owing on the original obligation at the time it was received by the licensee for collection or by assignment;
- (ii) Interest or service charge, collection costs, or late payment charges, if any, added to the original obligation by the original creditor, customer or assignor before it was received by the licensee for collection, if such information is known by the licensee or employee: PROVIDED, That upon written request of the debtor, the licensee shall make a reasonable effort to obtain information on such items and provide this information to the debtor[.]

In this case, the first communication from Unifund to Ms. Elyse came by letter dated July 26, 2013 from Suttell & Hammer, P.S., the attorneys for Unifund. CP 493. Unifund is bound by and liable for Suttell & Hammer, P.S.’s actions. *Demopolis v. Peoples Nat. Bank of Washington*, 59 Wn. App. 105, 118, 796 P.2d 426 (1990) (principal is liable for acts of its attorney committed while attorney is acting within scope of his authority). That first communication to Ms. Elyse did not include any of the information required by RCW 19.16.250(8)(c). Instead, the letter simply stated the amount of the alleged debt: “Balance Due: \$1,910.11.” CP 493. That is a different amount than the amount which

Unifund ultimately claimed was owed, \$1,871.11. CP 209, 250. Thus, the amount of the alleged debt was incorrect, a violation of RCW 19.16.250(8)(c)(i).

Also, no itemization of the amount of interest and fees charged by Citibank was included in the July 26, 2013 letter, a violation of RCW 19.16.250(8)(c)(ii). Therefore, even if Ms. Elyse is determined by the Court to be liable to Unifund, it is not entitled to recover any portion of the alleged debt that includes interest or late fees. RCW 19.16.450.¹⁰

3. Because Unifund failed to prove the amount it claimed was due on the account, Judgment could not be entered on its claim.

It was Unifund's obligation to show the amount of its damages resulting from Ms. Elyse's alleged breach of contract. It failed to do so, and from the account documents that it submitted to the court, it is impossible to make such a calculation. Accordingly, Judge Benton should not have granted summary judgment in favor of Unifund for the principal sum of \$1,871.11 or entered Judgment against Ms. Elyse for that amount, and she committed error by doing so. This Court should reverse Judge

¹⁰ Unifund may argue that it only had to disclose to Ms. Elyse the interest charges, collection costs, and late payment fees added to the balance due by Citibank if they were "known" to Unifund. RCW 19.16.250(8)(c)(ii). However, Unifund offered no evidence that those amounts were not known to it when Suttell & Hammer, P.S. sent Ms. Elyse the collection demand letter. Further, if Unifund doesn't know how much of the claim against Ms. Elyse is comprised of interest charges, collection costs, and late payment fees added to the balance due by Citibank, it has no business suing Ms. Elyse to recover those amounts.

Benton's summary judgment Order in favor of Unifund and vacate the Judgment entered against Ms. Elyse.

D. Ms. Elyse Is Entitled to an Award of Attorney's Fees Incurred for this Appeal, and for the Superior Court Appeal.

Where a statute authorizes an award of attorney's fees to the prevailing party in the trial court, they are also available on appeal. RALJ 11.2(b); *Kyle v. Williams*, 139 Wn. App. 348, 358, 161 P.3d 1036 (2007). Ms. Elyse was the prevailing party in the trial court and was awarded her attorney's fees, CP 656-658, and she is entitled to an attorney's fee award for this appeal and for the appeal proceedings in the Superior Court.

Because the amount Unifund sought to recover in this action was less than \$10,000, CP 293-294, and it will recover nothing, Ms. Elyse is entitled to an award of reasonable attorney fees pursuant to RCW 4.84.250 and .270. Those statutes make an award of reasonable attorney's fees to the defendant mandatory when the amount in controversy is less than \$10,000 and the plaintiff recovers nothing. *LRS Elec. Controls, Inc. v. Hamre Constr., Inc.*, 153 Wn.2d 731, 745, 107 P.3d 721 (2005); *Kingston Lumber Supply Co. v. High Tech Dev. Co.*, 52 Wn. App. 864, 867, 765 P.2d 27 (1988). Ms. Elyse was not required to make a settlement offer or affirmatively put Unifund on notice of her intent to seek an award, as Unifund was deemed to have notice of the prospect of liability for Ms. Elyse's attorney's fees from the amount it sought to recover in its

Complaint. *Target Nat. Bank v. Higgins*, 180 Wn. App. 165, 176, 321 P.3d 1215 (2014); *In re Estate of Tosh*, 83 Wn. App. 158, 165, 920 P.2d 1230 (1996).

As the prevailing party on this appeal, Ms. Elyse is entitled to an award of her reasonable attorney's fees, both for the appeal in this Court, and for the appeal proceedings in the Superior Court. The Court should award her those fees.

VI. CONCLUSION

In *Gray v. Suttell & Associates*, 181 Wn.2d 329, 336, 334 P.3d 14 (2014), the Supreme Court noted, "There is a growing concern that collection practices employed by debt buyers are harmful to consumers." These harmful collection practices include commencing litigation against consumers without proper evidence of the agreement that existed between the original creditors and the consumers, and without complete records supporting the amount claimed to be owed to the debt buyers, just as occurred in this case.¹¹ This is a problem not just in Washington State, but nationwide.¹²

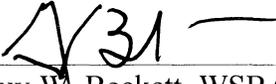
¹¹ See also Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 *Loyola Consumer Review* 179, 233 (2014) ("Too often, debt buyers do not have admissible evidence to prove that a consumer was ever liable to a bank ..., and do not have reliable evidence to prove damages.").

¹² *Id.* at 186-87.

Here, for reasons unknown, the Superior Court ignored the obvious deficiencies in Unifund's proof, and erroneously reversed the orders of the District Court, which had properly denied Unifund's motion for summary judgment and dismissed its Complaint against Ms. Elyse.

Debt buyers are not entitled to a free pass on their obligation to submit proper evidence in support of their claims. The legal and evidentiary standards and requirements of our courts apply equally to all litigants, including debt buyers. This Court has the opportunity to make this clear, and should do so. The Court should reverse the Superior Court orders, reinstate the District Court orders denying Unifund's motion for summary judgment and dismissing its Complaint against Ms. Elyse, vacate the Judgment entered against Ms. Elyse by the Superior Court, and award Ms. Elyse her reasonable attorney's fees incurred for this appeal and for the Superior Court appeal.

DATED February 17, 2016.



Guy W. Beckett, WSBA#14939
Attorneys for Appellant Amy Elyse

DECLARATION OF MAILING

Guy W. Beckett declares:

On February 18, 2016, I mailed by first-class mail, postage prepaid, a copy of the foregoing document to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED THIS 17th day of February, 2016, at Seattle, Washington.



Guy W. Beckett, WSBA #14939

APPENDIX:

1. RCW 4.16.080
2. RCW 5.45.020
3. RCW 19.16.250
4. RCW 19.16.450

RCW 4.16.080

Actions limited to three years.

The following actions shall be commenced within three years:

- (1) An action for waste or trespass upon real property;
- (2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
- (3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;
- (4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
- (5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his or her official capacity and by virtue of his or her office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subsection shall not apply to action for an escape;
- (6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his or her custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation:
PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty, or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability has arisen or shall arise, and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise.

[2011 c 336 § 83; 1989 c 38 § 2; 1937 c 127 § 1; 1923 c 28 § 1; Code 1881 § 28; 1869 p 8 § 28; 1854 p 363 § 4; RRS § 159.]

RCW 5.45.020

Business records as evidence.

A record of an act, condition or event, shall in so far 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.

[1947 c 53 § 2; Rem. Supp. 1947 § 1263-2. Formerly RCW 5.44.110.]

RCW 19.16.250

Prohibited practices.

No licensee or employee of a licensee shall:

(1) Directly or indirectly aid or abet any unlicensed person to engage in business as a collection agency in this state or receive compensation from such unlicensed person: PROVIDED, That nothing in this chapter shall prevent a licensee from accepting, as forwarder, claims for collection from a collection agency or attorney whose place of business is outside the state.

(2) Collect or attempt to collect a claim by the use of any means contrary to the postal laws and regulations of the United States postal department.

(3) Publish or post or cause to be published or posted, any list of debtors commonly known as "bad debt lists" or threaten to do so. For purposes of this chapter, a "bad debt list" means any list of natural persons alleged to fail to honor their lawful debts. However, nothing herein shall be construed to prohibit a licensee from communicating to its customers or clients by means of a coded list, the existence of a check dishonored because of insufficient funds, not sufficient funds or closed account by the financial institution servicing the debtor's checking account: PROVIDED, That the debtor's identity is not readily apparent: PROVIDED FURTHER, That the licensee complies with the requirements of subsection (10)(e) of this section.

(4) Have in his or her possession or make use of any badge, use a uniform of any law enforcement agency or any simulation thereof, or make any statements which might be construed as indicating an official connection with any federal, state, county, or city law enforcement agency, or any other governmental agency, while engaged in collection agency business.

(5) Perform any act or acts, either directly or indirectly, constituting the unauthorized practice of law.

(6) Advertise for sale or threaten to advertise for sale any claim as a means of endeavoring to enforce payment thereof or agreeing to do so for the purpose of soliciting claims, except where the licensee has acquired claims as an assignee for the benefit of creditors or where the licensee is acting under court order.

(7) Use any name while engaged in the making of a demand for any claim other than the name set forth on his or her or its current license issued hereunder.

(8) Give or send to any debtor or cause to be given or sent to any debtor, any notice, letter, message, or form, other than through proper legal action, process, or proceedings, which represents or implies that a claim exists unless it shall indicate in clear and legible type:

(a) The name of the licensee and the city, street, and number at which he or she is licensed to do business;

(b) The name of the original creditor to whom the debtor owed the claim if such name is known to the licensee or employee: PROVIDED, That upon written request of the debtor, the licensee shall provide this name to the debtor or cease efforts to collect on the debt until this information is provided;

(c) If the notice, letter, message, or form is the first notice to the debtor or if the licensee is attempting to collect a different amount than indicated in his or her or its first notice to the debtor, an itemization of the claim asserted must be made including:

- (i) Amount owing on the original obligation at the time it was received by the licensee for collection or by assignment;
- (ii) Interest or service charge, collection costs, or late payment charges, if any, added to the original obligation by the original creditor, customer or assignor before it was received by the licensee for collection, if such information is known by the licensee or employee: PROVIDED, That upon written request of the debtor, the licensee shall make a reasonable effort to obtain information on such items and provide this information to the debtor;
- (iii) Interest or service charge, if any, added by the licensee or customer or assignor after the obligation was received by the licensee for collection;
- (iv) Collection costs, if any, that the licensee is attempting to collect;
- (v) Attorneys' fees, if any, that the licensee is attempting to collect on his or her or its behalf or on the behalf of a customer or assignor; and
- (vi) Any other charge or fee that the licensee is attempting to collect on his or her or its own behalf or on the behalf of a customer or assignor;
- (d) If the notice, letter, message, or form concerns a judgment obtained against the debtor, no itemization of the amounts contained in the judgment is required, except postjudgment interest, if claimed, and the current account balance;
- (e) If the notice, letter, message, or form is the first notice to the debtor, an itemization of the claim asserted must be made including the following information:
 - (i) The original account number or redacted original account number assigned to the debt, if known to the licensee or employee: PROVIDED, That upon written request of the debtor, the licensee must make a reasonable effort to obtain this information or cease efforts to collect on the debt until this information is provided; and
 - (ii) The date of the last payment to the creditor on the subject debt by the debtor, if known to the licensee or employee: PROVIDED, That upon written request of the debtor, the licensee must make a reasonable effort to obtain this information or cease efforts to collect on the debt until this information is provided.
- (9) Communicate in writing with a debtor concerning a claim through a proper legal action, process, or proceeding, where such communication is the first written communication with the debtor, without providing the information set forth in subsection (8)(c) of this section in the written communication.
- (10) Communicate or threaten to communicate, the existence of a claim to a person other than one who might be reasonably expected to be liable on the claim in any manner other than through proper legal action, process, or proceedings except under the following conditions:
 - (a) A licensee or employee of a licensee may inform a credit reporting bureau of the existence of a claim. If the licensee or employee of a licensee reports a claim to a credit reporting bureau, the licensee shall, upon receipt of written notice from the debtor that any part of the claim is disputed, notify the credit reporting bureau of the dispute by written or electronic means and create a record of the fact of the notification and when the notification was provided;
 - (b) A licensee or employee in collecting or attempting to collect a claim may communicate the existence of a claim to a debtor's employer if the claim has been reduced to a judgment;

(c) A licensee or employee in collecting or attempting to collect a claim that has not been reduced to judgment, may communicate the existence of a claim to a debtor's employer if:

(i) The licensee or employee has notified or attempted to notify the debtor in writing at his or her last known address or place of employment concerning the claim and the debtor after a reasonable time has failed to pay the claim or has failed to agree to make payments on the claim in a manner acceptable to the licensee, and

(ii) The debtor has not in writing to the licensee disputed any part of the claim: PROVIDED, That the licensee or employee may only communicate the existence of a claim which has not been reduced to judgment to the debtor's employer once unless the debtor's employer has agreed to additional communications.

(d) A licensee may for the purpose of locating the debtor or locating assets of the debtor communicate the existence of a claim to any person who might reasonably be expected to have knowledge of the whereabouts of a debtor or the location of assets of the debtor if the claim is reduced to judgment, or if not reduced to judgment, when:

(i) The licensee or employee has notified or attempted to notify the debtor in writing at his or her last known address or last known place of employment concerning the claim and the debtor after a reasonable time has failed to pay the claim or has failed to agree to make payments on the claim in a manner acceptable to the licensee, and

(ii) The debtor has not in writing disputed any part of the claim.

(e) A licensee may communicate the existence of a claim to its customers or clients if the claim is reduced to judgment, or if not reduced to judgment, when:

(i) The licensee has notified or attempted to notify the debtor in writing at his or her last known address or last known place of employment concerning the claim and the debtor after a reasonable time has failed to pay the claim or has failed to agree to make payments on the claim in a manner acceptable to the licensee, and

(ii) The debtor has not in writing disputed any part of the claim.

(11) Threaten the debtor with impairment of his or her credit rating if a claim is not paid: PROVIDED, That advising a debtor that the licensee has reported or intends to report a claim to a credit reporting agency is not considered a threat if the licensee actually has reported or intends to report the claim to a credit reporting agency.

(12) Communicate with the debtor after notification in writing from an attorney representing such debtor that all further communications relative to a claim should be addressed to the attorney: PROVIDED, That if a licensee requests in writing information from an attorney regarding such claim and the attorney does not respond within a reasonable time, the licensee may communicate directly with the debtor until he or she or it again receives notification in writing that an attorney is representing the debtor.

(13) Communicate with a debtor or anyone else in such a manner as to harass, intimidate, threaten, or embarrass a debtor, including but not limited to communication at an unreasonable hour, with unreasonable frequency, by threats of force or violence, by threats of criminal prosecution, and by use of offensive language. A communication shall be presumed to have been made for the purposes of harassment if:

(a) It is made with a debtor or spouse in any form, manner, or place, more than three times in a single week, unless the licensee is responding to a communication from the debtor or spouse;

(b) It is made with a debtor at his or her place of employment more than one time in a single week, unless the licensee is responding to a communication from the debtor;

(c) It is made with the debtor or spouse at his or her place of residence between the hours of 9:00 p.m. and 7:30 a.m. A call to a telephone is presumed to be received in the local time zone to which the area code of the number called is assigned for landline numbers, unless the licensee reasonably believes the telephone is located in a different time zone. If the area code is not assigned to landlines in any specific geographic area, such as with toll-free telephone numbers, a call to a telephone is presumed to be received in the local time zone of the debtor's last known place of residence, unless the licensee reasonably believes the telephone is located in a different time zone.

(14) Communicate with the debtor through use of forms or instruments that simulate the form or appearance of judicial process, the form or appearance of government documents, or the simulation of a form or appearance of a telegraphic or emergency message.

(15) Communicate with the debtor and represent or imply that the existing obligation of the debtor may be or has been increased by the addition of attorney fees, investigation fees, service fees, or any other fees or charges when in fact such fees or charges may not legally be added to the existing obligation of such debtor.

(16) Threaten to take any action against the debtor which the licensee cannot legally take at the time the threat is made.

(17) Send any telegram or make any telephone calls to a debtor or concerning a debt or for the purpose of demanding payment of a claim or seeking information about a debtor, for which the charges are payable by the addressee or by the person to whom the call is made: PROVIDED, That:

(a) This subsection does not prohibit a licensee from attempting to communicate by way of a cellular telephone or other wireless device: PROVIDED, That a licensee cannot cause charges to be incurred to the recipient of the attempted communication more than three times in any calendar week when the licensee knows or reasonably should know that the number belongs to a cellular telephone or other wireless device, unless the licensee is responding to a communication from the debtor or the person to whom the call is made.

(b) The licensee is not in violation of (a) of this subsection if the licensee at least monthly updates its records with information provided by a commercial provider of cellular telephone lists that the licensee in good faith believes provides reasonably current and comprehensive data identifying cellular telephone numbers, calls a number not appearing in the most recent list provided by the commercial provider, and does not otherwise know or reasonably should know that the number belongs to a cellular telephone.

(c) This subsection may not be construed to increase the number of communications permitted pursuant to subsection (13)(a) of this section.

(18) Call, or send a text message or other electronic communication to, a cellular telephone or other wireless device more than twice in any day when the licensee knows or reasonably should know that the number belongs to a cellular telephone or other wireless device, unless the licensee is responding to a communication from the debtor or the person to whom the call, text message, or other electronic communication is made. The licensee is not in violation of this subsection if the licensee at least monthly updates

its records with information provided by a commercial provider of cellular telephone lists that the licensee in good faith believes provides reasonably current and comprehensive data identifying cellular telephone numbers, calls a number not appearing in the most recent list provided by the commercial provider, and does not otherwise know or reasonably should know that the number belongs to a cellular telephone. Nothing in this subsection may be construed to increase the number of communications permitted pursuant to subsection (13)(a) of this section.

(19) Intentionally block its telephone number from displaying on a debtor's telephone.

(20) In any manner convey the impression that the licensee is vouched for, bonded to or by, or is an instrumentality of the state of Washington or any agency or department thereof.

(21) Collect or attempt to collect in addition to the principal amount of a claim any sum other than allowable interest, collection costs or handling fees expressly authorized by statute, and, in the case of suit, attorney's fees and taxable court costs. A licensee may collect or attempt to collect collection costs and fees, including contingent collection fees, as authorized by a written agreement or contract, between the licensee's client and the debtor, in the collection of a commercial claim. The amount charged to the debtor for collection services shall not exceed thirty-five percent of the commercial claim.

(22) Procure from a debtor or collect or attempt to collect on any written note, contract, stipulation, promise or acknowledgment under which a debtor may be required to pay any sum other than principal, allowable interest, except as noted in subsection (21) of this section, and, in the case of suit, attorney's fees and taxable court costs.

(23) Bring an action or initiate an arbitration proceeding on a claim when the licensee knows, or reasonably should know, that such suit or arbitration is barred by the applicable statute of limitations.

(24) Upon notification by a debtor that the debtor disputes all debts arising from a series of dishonored checks, automated clearinghouse transactions on a demand deposit account, or other preprinted written instruments, initiate oral contact with a debtor more than one time in an attempt to collect from the debtor debts arising from the identified series of dishonored checks, automated clearinghouse transactions on a demand deposit account, or other preprinted written instruments when: (a) Within the previous one hundred eighty days, in response to the licensee's attempt to collect the initial debt assigned to the licensee and arising from the identified series of dishonored checks, automated clearinghouse transactions on a demand deposit account, or other preprinted written instruments, the debtor in writing notified the licensee that the debtor's checkbook or other series of preprinted written instruments was stolen or fraudulently created; (b) the licensee has received from the debtor a certified copy of a police report referencing the theft or fraudulent creation of the checkbook, automated clearinghouse transactions on a demand deposit account, or series of preprinted written instruments; (c) in the written notification to the licensee or in the police report, the debtor identified the financial institution where the account was maintained, the account number, the magnetic ink character recognition number, the full bank routing and transit number, and the check numbers of the stolen checks, automated clearinghouse transactions on a demand deposit account, or other preprinted written instruments, which check numbers included the number of the check that is the subject of the licensee's collection efforts; (d) the debtor provides, or within the previous one hundred eighty days provided, to the licensee a

legible copy of a government-issued photo identification, which contains the debtor's signature and which was issued prior to the date of the theft or fraud identified in the police report; and (e) the debtor advised the licensee that the subject debt is disputed because the identified check, automated clearinghouse transaction on a demand deposit account, or other preprinted written instrument underlying the debt is a stolen or fraudulently created check or instrument.

The licensee is not in violation of this subsection if the licensee initiates oral contact with the debtor more than one time in an attempt to collect debts arising from the identified series of dishonored checks, automated clearinghouse transactions on a demand deposit account, or other preprinted written instruments when: (i) The licensee acted in good faith and relied on their established practices and procedures for batching, recording, or packeting debtor accounts, and the licensee inadvertently initiates oral contact with the debtor in an attempt to collect debts in the identified series subsequent to the initial debt assigned to the licensee; (ii) the licensee is following up on collection of a debt assigned to the licensee, and the debtor has previously requested more information from the licensee regarding the subject debt; (iii) the debtor has notified the licensee that the debtor disputes only some, but not all the debts arising from the identified series of dishonored checks, automated clearinghouse transactions on a demand deposit account, or other preprinted written instruments, in which case the licensee shall be allowed to initiate oral contact with the debtor one time for each debt arising from the series of identified checks, automated clearinghouse transactions on a demand deposit account, or written instruments and initiate additional oral contact for those debts that the debtor acknowledges do not arise from stolen or fraudulently created checks or written instruments; (iv) the oral contact is in the context of a judicial, administrative, arbitration, mediation, or similar proceeding; or (v) the oral contact is made for the purpose of investigating, confirming, or authenticating the information received from the debtor, to provide additional information to the debtor, or to request additional information from the debtor needed by the licensee to accurately record the debtor's information in the licensee's records.

(25) Submit an affidavit or other request pursuant to chapter 6.32 RCW asking a superior or district court to transfer a bond posted by a debtor subject to a money judgment to the licensee, when the debtor has appeared as required.

[2013 c 148 § 2; 2011 1st sp.s. c 29 § 2. Prior: 2011 c 162 § 1; 2011 c 57 § 1; prior: 2001 c 217 § 5; 2001 c 47 § 2; (2001 c 217 § 4 expired April 1, 2004); 1983 c 107 § 1; 1981 c 254 § 5; 1971 ex.s. c 253 § 16.]

RCW 19.16.450

Violation of RCW 19.16.250—Additional penalty.

If an act or practice in violation of RCW 19.16.250 is committed by a licensee or an employee of a licensee in the collection of a claim, neither the licensee, the customer of the licensee, nor any other person who may thereafter legally seek to collect on such claim shall ever be allowed to recover any interest, service charge, attorneys' fees, collection costs, delinquency charge, or any other fees or charges otherwise legally chargeable to the debtor on such claim: PROVIDED, That any person asserting the claim may nevertheless recover from the debtor the amount of the original claim or obligation.

[1971 ex.s. c 253 § 36.]