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No. 72301-4-1  
COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

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American Express Bank, F.S.B.

*Plaintiff and Respondent,*

Vs.

Jerry Hoang,

*Defendant and Appellant.*

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APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON

COUNTY OF KING

No. 13-2-14864-1 KNT

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APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF  
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## **I. INTRODUCTION AND PRELIMINARY STATEMENT**

### **A. INTRODUCTION**

This case presents the court with opportunity to consider whether one corporate entity has standing and/or can represent another corporate entity in the court of law while a third and distinct corporate entity allegedly owns the alleged debt. This litigation arises out of the American Express Credit Card Account 3715#####3511004, issued on or about November 22, 1996.

The entities in question are American Express Centurion Bank (“hereinafter “Centurion”), the issuer, which was established September 17, 1985, American Express Master Trust Series 1996-1 Trust (“hereinafter “Amex Trust”), a securitized trust, which was established on or about May of 1996, and American Express Bank, F.S.B. (“hereinafter “Amex Bank”), named Plaintiff, which was established December 1, 2000.

On March 4, 2013, Amex Bank filed its complaint in the King County Superior Court (**Pages 1-4**) alleging “MONIES DUE AND OWING” to Amex Bank. On April 29, 2014, Hoang answered the complaint (**Pages 7-11**) denying that he owes anything to Amex Bank and that he has no contractual relationship with Amex Bank. On February 7, 2014 Hoang filed motion to dismiss (**Pages 53-64**). On March 7, 2014,

motion to dismiss was denied. **(Sub No. 49, Page numbers not available)**. On May 13, 2014, Amex Bank filed Motion for Summary judgment. **(Sub No. 61, Page numbers not available)** and Hoang timely opposed the Motion for Summary judgment, **(Pages 140-172)**. Hoang attempted to obtain discovery from Amex Bank **(Pages 11-18, 21-28, 97-103, 104-110)** but was stonewalled by Amex Bank who refused to provide discovery and on May 19, 2014, Hoang filed motion to compel discovery **(Pages 111-139)**. On June 6, 2014, the court denied the motion to compel discovery. **(Pages 173-175)**. On June 16, 2014, Hoang filed motion for reconsideration to compel discovery **(Pages 176-179)** however the court denied motion for reconsideration to compel discovery **(Pages 180-181)** and on July 8, 2014 the court granted Amex Bank motion for summary judgment. **(Pages 182-183)** The ensuing appeal followed.

#### **B. THE DOCTRINE OF PRECEDENT**

The doctrine of precedent was well established by the time the Framers gathered in Philadelphia. Morton J. Horwitz, *The Transformation of American Law: 1780-1860* 8-9 (1977); J.H. Baker, *An Introduction to English Legal History* 227 (1990); Sir William Holdsworth, *Case Law*, 50 L.Q.R. 180 (1934). See, e.g., 1 Sir William W. Blackstone, *Commentaries on the Laws of England* (1765) ("it is an established rule to abide by former precedents").

Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. Marbury v. Madison, 1 Cranch 137, 177-78 (1803).

This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544 (1991); Cohens v. Virginia, 6 Wheat. 264, 399 (1821).

These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded.

The judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the "best and most authoritative" guides of what the law is, the judicial power is limited by them.

The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power.

The statements of the Framers indicate an understanding and acceptance of these principles. The obvious conclusion therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts. Anastasoff v. United States, 223 F.3d 898 (8th Cir.

2000). As such Jerry Hoang (“Hoang”) invokes Full Faith and Credit of the United States.

Hoang is proceeding without the benefit of legal counsel. Additionally, Hoang is not practicing attorney nor have been trained in the complex study of law. As such the appeal should be construed liberally and the Court should consider the pleadings by "less stringent standards," *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); the Court should work to assure that any ignorance of law or procedure does not result in an unjust decision; and should not penalize good-faith errors.

Implicit in the right of self-representation is an obligation on the part of any Court to make reasonable allowances to protect *unrepresented* litigants from inadvertent forfeiture of important rights because of any lack of formal legal training. See *Traguth v. Zuck*, 710 F.2d 90, 95 (2<sup>nd</sup> Cir. 1983); *Hoffman v. U.S.*, 244 F.2d 378, 379 (9<sup>th</sup> Cir. 1957); *Darr v. Burford*, 339 U.S. 200 (1950). Unrepresented litigant should be given a reasonable opportunity to remedy defects in his [or her] pleadings if the factual allegations are close to stating a claim for relief. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10<sup>th</sup> Cir. 1991). Appellant invokes Full Faith and Credit of the United States and request that the court considers and adheres to relevant decisions made by other Federal and State courts.

**C. MANDATORY JUDICIAL NOTICE IN ACCORDANCE  
WITH WASHINGTON RULES OF EVIDENCE**

The court is respectfully requested to TAKE NOTICE, in the interest of preserving judicial resources of this Court and to facilitate a more expeditious disposition of the matters herein, the undersigned, in accordance with Washington Rules of Evidence (Rule 201 and Rule 401 and other rules), and in conjunction with the Supremacy clause of the Constitution for the United States of America, the **Full Faith and Credit Clause** (*Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof*) and the Privileges and Immunities Clause (The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states) of the Constitution for the United States of America (see, Article IV, Sections I & II, respectively) and any other applicable authority unknown to the undersigned, hereby moves the court to take Judicial Notice in connection with this matter, and provides this court would notice of the following applicable and irrefutable facts and law.

The undersigned hereby invokes Judicial Notice that this court accord the public statutes of the United States and all of every state and

jurisdiction of the United States and judicial judgments/decisions of the United States and of various states and jurisdictions of the United States cited herein the full faith and credit that Article IV, Section I of the United States Constitution commands; that the undersigned claims the due process and equal protection under the favorable statutes and judicial decisions enjoyed by American Citizens outside of the State of Washington.

An attorney's affirmation or testimony generally cannot advance substantive proof and any statements made to in an effort to authenticate hearsay affidavit is inadmissible hearsay. Moreover, counsel for American Express Bank, F.S.B. ("Amex Bank") cannot authenticate any document in this case since counsel has no personal knowledge of any alleged transaction in this matter.

An attorney in Washington cannot maintain dual roles as advocate and witness in the same manner before the same tribunal. Among the multitude of rationales for the rule, that "a lawyer who intermingles the functions of advocate and witness diminishes his effectiveness in both cases." *Williams v. Dist. Court*, 700 P.2d 549, 553 (Colo. 1985). See e.g. *Annotated Model Rules of Prof'l Conduct*, R.3.7 cmt. 1, at 381 (5<sup>th</sup> ed. 2003); see also, e.g. *Key Bank of Me. V. Lisi* 225 AD2d 669, 669 92d Deot. M996) ("affirmation of. . . attorney who had no personal knowledge

of the facts. . . did not constitute proof in admissible form and it [is] without evidentiary value”); *Porter v Porter*, 274 N.W.2d 235, n.1(N.D., 1979) (“we do not approve of the practice of an attorney filing an affidavit on behalf of his client asserting the status of the client. Not only does the affidavit become hearsay but it places the attorney in a position of a witness, thus compromising his role as an advocate”).

This Court must ignore any alleged “facts” advanced by counsel that is supported by a “hearsay” affidavit or other so called “authenticated” document(s) from Amex Bank or by Amex Bank corporate representative that is *not* competent fact witness with personal knowledge of the claims, facts and documents (to authenticate) employed by Amex Bank in this matter. In Washington, a witness may not testify about a matter of which he lacks personal knowledge. See *Rios v. Selsky*, 819 NYS2d 622, 623 (3<sup>rd</sup> Dept. 2006); *Ray Proof Corp. v. Contractors Glass Co.*, 81 NYS2d 480, 480 (1<sup>st</sup> Dept. 1948); *Saldan Const.Co. v. Kasenetz*, 232 NYS 378, 378-79 (2nd Dept. 1929); *Fried v. Coppins Transfer Co.*, 174 NYS 675, 675-76 (1<sup>st</sup> Dept. 1919).

If a lawyer becomes a witness, said lawyer is disqualified from acting as a lawyer in the case. See, e.g., *International Woodworkers v. Chesapeake Bay Plywood Corp.* 659 F.2d 1259, 1273 (4<sup>th</sup> Cir. 1981).

Hoang hereby issues as he did before continual objection to any purported evidence proffered by counsel for Amex Bank, whether in writing or in open court, that does not compromise valid document/evidence authenticated by a competent fact witness with personal knowledge of an event, document or other evidence.

Hoang hereby claims all of the rights at all times in wave none of them at any time for any cause or reason. Hoang specifically disallows old waivers of any rights that are not made upon previous actual notice in the matters at hand. That any un-rebutted affidavit or verified declaration made by the undersigned under oath/affirmation is admissible into the *evidence record in this matter and shall only be refuted by a rebuttal affidavit or by testimony in court under oath/affirmation by Plaintiff or its representative with personal knowledge of the matter.*

Hoang hereby claims and invokes the powers, protections and benefits of the Statute of Frauds, especially where it speaks to the fact that in order to sue a claim MUST BE PROVEN. The only way to prove the existence of a debt is by evidence, in open court on the record, *through the testimony, under oath, of a competent fact witness with firsthand knowledge and subject to cross examination.*

The undersigned hereby objects to any alleged/perceived claim of jurisdiction of the lower court, and the undersigned dispels and disavows

any and all adverse *presumptions* in this matter. The undersigned does not waive any rights. All rights are Reserved/Retained without Prejudice, known and unknown.

Hoang hereby claims that his Due Process was violated to the right to have Findings of Fact and Conclusion of Law included and in support of the Order of this Court granting Amex Bank motion for Summary judgment. The United States Supreme Court in *Federal Maritime Commission v. South Carolina State Sports Authority*, 535 U.S. 743 (2002) has held, “The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record” (citing *Butz v. Economou*, 438 U.S. 478 [1978]).

## II. ASSIGNMENTS OF ERRORS

Hoang assigns error to the trial court's:

1. Order granting Amex Bank's motion for summary judgment.
2. Order denying motion to compel discovery.

### *Issues Pertaining to Assignments of Error*

3. Whether or not substantial issues of material of fact exist concerning the Amex Bank as a real party in interest.
4. Whether or not the trial court was required as a matter of law to deny Amex Bank's motion for summary judgment.

5. Whether or not the trial court was required as a matter of law to demand that Amex Bank establish jurisdiction when lack of Amex Bank's jurisdiction and as a result the lack of court's subject matter jurisdiction over this matter was raised by Hoang, a material fact in dispute.
6. Whether or not the trial court was required as a matter of law to demand that Amex Bank establish standing and prove its Real Party in Interest when it was raised by Hoang pursuant to Superior Court Civil Rule 17(a), a material fact in dispute.
7. Whether or not the trial court was required as a matter of law to demand Amex Bank produce the contractual agreement with Hoang dated November 22, 1996 pursuant to Rule 1002, a material fact in dispute.
8. Whether or not the trial court was required as a matter of law to consider all facts and make all reasonable factual inferences in the light most favorable to the nonmoving party, pursuant to *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996).
9. Whether or not the trial court was required as a matter of law to exclude from considering and basing its decision on Linda Salas "hearsay" affidavit. E. Rule 802 and 803.

10. Whether or not the trial court was required, as a matter of law to pursuant to Rule of Evidence 201 to take Judicial Notice that opposing counsel cannot testify for Amex Bank. E. Rule 602.

### **III. STATEMENT OF THE CASE**

1. Hoang denies that he became indebted to Amex Bank on a consumer credit account and specifically denies that there is past due balance of \$19,109.62 to Amex Bank.

2. The subject American Express Centurion Bank Credit Card Account 3715#####3511004 has been issued on **November 22, 1996** and securitized into an American Express Master Trust Series 1996-1 Trust. See McCaffrey Affidavit. (**Pages 82-85**).

3. According to FDIC, Plaintiff, American Express Bank, F.S.B. was established on **December 1, 2000**. FDIC Certificate # 35328. This creates an issue of material fact in dispute. (**Page 83**)

4. The alleged Credit Card account was securitized as an industry standard. As such it was sold to the securitization Trust. This creates an issue of material fact in dispute

5. The alleged account is currently held with American Express Master Trust Series 1996-1 Trust. This creates an issue of material fact in dispute.

6. In discovery Hoang requested that evidence of the sale of the account to Amex Bank be provided but Amex Bank refused.

7. As a result of the above Amex Bank is not a party in interest.

8. Discovery has not been completed and Amex Bank refused to provide requested documents and answer interrogatories. Defendant filed Motion to Compel Discovery, which was denied.

9. Motion for Summary Judgment was granted strictly based on attorney testimony and a single hearsay affidavit, Hoang's affidavits and pleadings were ignored, the court order was written up by the trial court prior to the oral arguments taking place, this is evidenced by the order naming the attorney present on the motion Donna Smith, when in fact another attorney Matthew Anderson was present. The appearance of the trial court being biased is unmistakable.

10. An Employee of Amex Bank Linda Salas filed a hearsay affidavit initially for the purpose of arbitration together and then again the same affidavit with the motion for summary judgment. **(Sub No. 61, Page numbers not available)** Hoang objected to Linda Salas "affidavit" and filed his own affidavit disputing the so-called "personal knowledge" made by Salas. **(Pages 65-72)**

11. In New York in a very well known and publicized case American Express Bank v. Tancreto, CV-24043-11/KI, where at trial, the Amex

Bank called Linda Salas, who testified the plaintiff, had employed her for 25 years. Salas was shown a series of documents, and Salas testified that they were defendant's account statements. New York judge, Judge Dear then took judicial notice of the fact that Salas had given testimony in other cases before him, on behalf of other American Express companies, such as American Express Centurion, that are separate and distinct legal entities. Salas gave nearly identical testimony in each instance. Judge Dear also noted that here, "Salas claimed she had worked for American Express for 25 years, yet according to its governmental filings, the plaintiff company American Express Bank, F.S.B. has existed for only 12 years."

12. For these reasons, the court concluded Salas' testimony was "robotestimony"- she gave the same testimony in every case, regardless of the documents about which she was testifying - and *thus lacked credibility*. Judge Dear dismissed the case with prejudice. Hoang asks this court to give Judicial Notice to American Express Bank v. Tancreto pursuant to Full Faith and Credit, as that case directly impacts on the credibility of an affiant Linda Salas in the instant case.

13. Judge Dear concluded that Linda Salas lied under oath, and thus was not credible witness, as in this case Hoang raised the issue of Linda Salas credibility just looking at her affidavit, which was allegedly signed in front of a Notary located in Massachusetts and Linda Salas residing in

New York. Trial court prevented Hoang from conducting discovery and deposing Linda Salas to question her regarding her affidavit, which was submitted short time prior to the ruling on summary judgment.

14. Hoang asked the trial court to review the pertinent case documents which would clearly establish substantial material facts in dispute and would impeach robo-testifier perjurer Linda Salas, but the court refused.

#### **IV. ARGUMENT**

##### **1. Summary Judgment**

Hoang believes that Amex Bank's should have been denied, as there are substantial issues of material fact in dispute. The party moving for summary judgment must show that there are no genuine issues of material fact and is then entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182,930 P.2d 307 (1997). A "material fact" is one upon which the outcome of the motion depends. *See Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 144,500 P.2d 88 (1972). Once this burden is met, the nonmoving party must present evidence demonstrating that material facts are in dispute. *Atherton Condo-Apartment Owners Ass'n Bd. O/Directors v. Blume Dev. Co.*, 155 Wn.2d 506,516, 799 P.2d 250 (1990).

##### **2. Scope of Appellate Review.**

Under our statutes, case law and constitution, this evidence must be clear, cogent and convincing and sufficient to withstand both *de novo* review and review under the well established jurisdictional test.

In review of an order on summary judgment this court reviews the record before the trial court *de novo*. As succinctly stated in *Kenney v. Read*, 100 Wn. App. 467, 997 P.2d 455 (2000):

When reviewing an order on summary judgment, this court engages in the same inquiry as the trial court. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690, 974 P.2d 836 (1999). 'Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits, if any, show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.' *Hollis*, 137 Wn.2d at 690; CR 56(c). The facts and all reasonable inferences are considered in the light most favorable to the nonmoving party, and all questions of law are reviewed *de novo*.' *Hollis*, 137 Wn.2d at 690. The moving party has the burden of establishing the absence of an issue of material fact. *SAS Am., Inc. v. Inada*, 71 Wn. App. 261, 263, 857 P.2d 1047 (1993).

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When making this determination, we consider all facts and make all reasonable factual inferences in the light

most favorable to the nonmoving party. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). A material fact precluding summary judgment is a fact that affects the outcome of the litigation. *Eicon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164-65, 273 P.3d 965 (2012).

Amex Bank's motion is deficient in two major regards; first, the "material facts" which purported to support their application, are hearsay. Second, Amex Bank has not demonstrated that it has standing to bring and maintain this lawsuit, and it is respectfully submitted that either failing should have served as a bar to the grant of the motion.

Rule CR 56(c) provides for an entry of summary judgment, however *only* after the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits. The pleadings on the record submitted to the court are insufficient for the court to conclude their sufficiency for the purpose of granting the summary judgment.

Summary judgment is a procedure to avoid unnecessary trials on issues that cannot be factually supported and could not lead to, or result in, a favorable outcome for the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). Summary judgment is appropriate where there are no genuine issues of material fact in dispute. A material fact in a summary judgment proceeding is "one upon which the outcome of the

litigation depends." *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P .2d 1207 (1992).

### **3. Securitization**

In performing his own discovery Hoang found that the alleged debt was securitized/sold off to American Express Master Trust Series 1996-1 Trust as is an industry standard. The subject American Express Credit Card Account Debt 3715#####3511004 has been securitized which is the process of aggregating a large number of Debts in a pool and then selling security interests in that pool to investors thus fractionalizing possession of the Debt over many different investors. The debt is currently held in an American Express Master Trust Series 1996-1 Trust. The American Express Credit Account Master Trust was formed pursuant to a Pooling and Servicing Agreement dated as of May 16, 1996 between American Express Centurion Bank ("Centurion") and American Express Receivable Financing Corporation II, the co-originators as transferors, American Express Travel Related Services Company ("TRS") as Servicer, and the Bank of New York as trustee.

American Express Receivables Financing Corporation II, in turn, acting as *Transferor*, sold its interest in the income stream and the debts to a securitization trust pursuant to a Pooling and Servicing Agreement ("PSA") for each Transaction. The trust then issued various classes of

securities that would be paid down from the cash flow of principal and interest payments due on the pooled revolving credit accounts. The securities were marketed privately to investors by means of a Private Placement Memorandum, American Express Travel Related Services Company ("TRS") acts as a Servicer and Bank of New York acting as Trustee for the Transaction. This alone creates an issue of material fact in dispute and a question of the instant Plaintiff being Real party in Interest.

**4. AMERICAN EXPRESS BANK, FSB**

Pursuant to FDIC American Express Bank, FSB was created on December 1, 2000 under the name American Express Personal Trust Services, F.S.B. FDIC Certificate number 35328. On January 29, 2004, American Express Personal Trust Services, F.S.B. changed its name to American Express Bank, FSB and continues to operate under same FDIC Certificate number. This undisputed fact alone creates audible silence by Amex Bank and an issue of material fact in dispute which would not allow the granting of the motion for summary judgment.

**5. Amex Bank Lacks The Privity Required To Enforce The Alleged Missing Contract**

Privity of Contract is established between Hoang and the Investors. The Indenture Agreement (PSA) states that Certificate holders [i.e.

investors] own the beneficial interest in these instruments. This *Persons Deemed Owners* clause appears in every *pass-through securities* offering. This pass-through feature enabled the Trust to be tax exempt, since it owns nothing. Via discovery Hoang requested that Plaintiff produce the names of these investors, however Plaintiff refused to provide this information.

Holders of asset-backed securities owning a fractional share of Hoang's Debt/revolving credit account and are entitled to these payments. Under grantor trust rules of the IRS for pass-through securities, money generated by assets held in this Trust can only be paid to these owners; and this arrangement cannot be altered, only investors can initiate an enforcement action.

Because of their fractional ownership interests in Hoang's Debt/revolving credit account income stream, privity of contract is established between these Certificate holders [i.e. investors] and Hoang. This new alignment is permanent it cannot be disturbed. Certificate holders hold the only financial stake in Hoang's account. They are the only parties benefited or injured by the outcome.

Washington Courts have adopted a rule that "covenantees may only enforce restrictive covenants if they have a justiciable interest in enforcement, *generally an ownership interest in the benefitted property.*"

*Lakewood Raquet Club, Inc., v. Jensen*, 156 Wn. App. 215, 228, 232 P.3d 1147 (2010). A "justiciable interest" has been defined as "the stake that a covenantee must have in order to ask a court to legally enforce a covenant." *Id.*, at 224 fn. 11. Even though the term covenant is used with respect to promises in conveyances or other instruments relating to real estate, "In its broadest usage, [covenant] means any agreement or contract." See Black's law Dictionary 6<sup>th</sup> Ed. Page 363.

Thus, in this case the original covenantee was not permitted to enforce a covenant where that covenantee no longer retains an ownership interest in the Hoang's account due to securitization of such, that party is not entitled to seek an enforcement action or transfer an interest it no longer holds or owns.

#### **6. Hearsay Affidavit**

American Express Bank, FSB (Amex Bank) was created on December 1, 2000. Linda Salas claims to work for Amex Bank. Any statement made by Salas referring to Hoang's account would have to reflect and rely on the opening date of the account which is November 22, 1996 and would be inadmissible hearsay within hearsay i.e. double hearsay since Amex Bank did not exist at that time, coupled with Salas's lack of credibility as the Robo-testified for multiple American Express companies in in one New York court had to be excluded from trial's

court's consideration and reliance upon it to render its decision granting motion for summary judgment.

A host of courts that have stated, "[a] hearsay affidavit is a nullity on a motion for summary judgment," *Schwimmer v Sony Corp. of Am.*, 637 F.2d 41, 45 n.9 (2d Cir. 1980). This phrase, originally coined in *Schwimmer*, has been highly influential in shaping judicial attitudes toward summary judgment and continues to be quoted widely. See, e.g., *Caldwell v American Basketball Ass'n*, 825 F Supp. 558, 571 (S.D.N.Y. 1993), *aff'd*, 66 F.3d 523 (2d Cir. 1995); *Maritime Ventures Int'l, Inc. v Caribbean Trading & Fidelity, Ltd.*, 722 F Supp. 1032, 1037 (S.D.N.Y. 1989); *SEC v Blavm*, 557 F Supp. 1304, 1314 (E.D. Mich. 1983), *aff'd*, 760 F.2d 706 (6th Cir. 1985); see also *Sellers v M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988) (condemning "a hearsay affidavit" as inadequate to defeat summary judgment motion).

Hoang objected to Salas affidavit pursuant to Rule 56(e) as non-conforming evidence of robo-testifier and a perjurer Linda Salas. The court ignored Hoang's pleadings. Furthermore, the only witness present at the time of the hearing on motion for summary judgment was the opposing counsel; no witness from Amex Bank was present to testify.

In addition, "[a]ffidavits composed of hearsay do not satisfy Rule 56(e) and must be disregarded," *Dole v Elliott Travel & Tours, Inc.*, 942 F.2d

962, 968 (6th Cir. 1991) (quoting *State Mut. Life Assurance Co. v Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979)) and that "[h]earsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment." *Garside v Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990); *Accord Financial Timing Publications, Inc. v Compugraphic Corp.*, 893 F.2d 936, 942 n.6 (8th Cir. 1990) "[H]earsay evidence alone may not defeat a summary judgment motion."; *Walker v Wayne County, Iowa*, 850 F.2d 433, 435 (8th Cir. 1988) ("Thus, without a showing of admissibility, a party may not rely on hearsay evidence to support or oppose the motion."), *cert. denied*, 488 U.S. 1008 (1989). Likewise, although Rule 56(c) allows a judge to consider depositions on a summary judgment motion, the Supreme Court has held that Rule 56(e) forbids the consideration of sworn statements given at a deposition if those statements are inadmissible hearsay. *See Adickes v S.H. Kress & Co.*, 398 U.S. 144, 159 n.19 (1970).

#### **7. Attorney Hearsay**

The pleadings are insufficient on their face and come from Donna J. Smith of Zwicker & Associates, P.C. a party interested in the outcome of the litigation. The pleadings are hearsay. Federal Court has addressed this issue in *Trinsey v. Pagliaro* and Hoang invokes this case.

Hoang is respectfully requests that this court take Judicial Notice that counsel cannot testify for Amex Bank nor can counsel authenticate any document in this case regarding the alleged mortgage loan transaction since counsel has no personal knowledge of any alleged transaction in this matter.

Federal court stated on page two of its decision "Statements of counsel in their briefs or argument while enlightening to the Court are not sufficient for purposes of granting a motion to dismiss or summary judgment." Trinsey v Pagliaro, 229 F. Supp. 647; 1964 U.S. Dist. LEXIS 7073.

"Hearsay," as "... A statement, other than one made by the declarant while testifying at the trial or hearing, offered this evidence to prove the truth of the matter asserted." This rule also defines a "statement" as "...an oral or written assertion." By these definitions, plaintiff's counsel certification is hearsay. Specifically, it is a "... written assertion," and therefore a "statement;" it is "... Offered in evidence to prove the truth of the matter asserted," since it is the vehicle by which Amex Bank attempts to offer the specifics surrounding default, in evidence.

It is clear that in accordance with this rule of law, the Donna J. Smith "Statement of Facts" are hearsay and are not based on firsthand knowledge, but on review of someone else's documents. Clearly, Smith

has no "... firsthand knowledge concerning the exhibits and facts contained therein..." Rather, her certification is based on the "...review of the computerized records ..." and the source of her knowledge is "...what she has read or...what another has told her..." Therefore, Smith certification is hearsay, and may not be utilized to "...show that there is no genuine issue as to any material fact challenge." It is respectfully requested that plaintiff's motions for summary judgment be denied.

#### **8. Standing**

In addition to constituting hearsay, Amex Bank does not describe how the Amex Bank obtained the right to enforce the alleged debt in question. Specifically, it is nearly axiomatic that, in order to enforce the debt Amex Bank needs to show lawful ownership of that debt or other evidence of that. In a motion for summary judgment, the facts are to be construed in a light most favorable to the non-moving party.

There are clearly numerous genuine issues of substantial material fact in dispute and Hoang made a sufficient showing that was based on the evidence, affidavit and exhibits presented. "Substantial" means "[h]aving substance; Not imaginary, unreal, or apparent only; True, solid, real," *The Compact Oxford English Dictionary* 1947 (2d ed. 1993), or, "having real existence, not imaginary [;] Firmly based, a substantial argument." The New Lexicon Webster's Dictionary of the English Language 987 (1987).

## 9. Subject Matter Jurisdiction Over This Instant Matter

Amex Bank and the lower court had to establish subject matter jurisdiction over this instant matter. Hoang denies that such jurisdiction exists and as such the State court lacks plenary jurisdiction. "*Subject matter jurisdiction can never be waived and can be raised at any time, even after trial*". *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 494 F. Supp. 1161 (D.C. Pa., 1980). In the opinion of the Supreme Court on this subject, the language used in *Elliott v. Peirsol*, 1 Pet. 340, is quoted with approval:

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void." "DOOLAN V. CARR, 125 U. S. 618 (1887)

"Once jurisdiction is challenged, the court cannot proceed when it clearly appears that the court lacks jurisdiction, the court has no authority to reach merits, but, rather, should dismiss the action." *Melo v. US*, 505 F2d 1026.

"Where there is no jurisdiction over the subject matter, there is no discretion to ignore that lack of jurisdiction..." *Joyce v. US*, 474 F2d 215.

"Generally, a plaintiff's allegations of jurisdiction are sufficient, but when they are questioned, as in this case, the burden is on the plaintiff to prove jurisdiction..." Rosemond v. Lambert, 469 F2d 416.

"However late this objection has been made, or may be made in any cause, in an inferior or appellate court of the United States, it must be considered and decided, before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction." Rhode Island v. Massachusetts, 37 U.S. 657, 718, 9 L.Ed. 1233 (1838)

"Judgment rendered by court which did not have jurisdiction to hear cause is void ab initio." In Re Application of Wyatt, 300 P. 132; Re Cavitt, 118 P2d 846. "It is elementary that the first question which must be determined by the trial court in every case is that of jurisdiction. Clary v. Hoagland, 6 Cal.685; Dillon v. Dillon, 45 Cal. App. 191,187P. 27.

"A departure by a court from those recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure, which has the effect of depriving one of a constitutional right, is as much an "excess of jurisdiction" as where there exists an inceptive lack of power. Wuest v. Wuest, 53 Cal. App. 2d 339,127P.2d 934. "Once jurisdiction is challenged it must be proven." Hagins vs Levine 415 US 533 note 3 (1974).

#### **10. Inadequate Record On Motion**

No discovery. Discovery was never completed or provided in this case in violation LCR 37. Hoang propounded discovery onto Amex Bank, Amex Bank failed to respond in good faith. Then in an underhanded sleight of hand maneuver Amex Bank made an untimely motion for summary judgment and refused to provide discovery. Hoang filed a motion to compel discovery and which was scheduled to be heard on June 6, 2014. The trial court should have held but failed to do that, under Washington's context rule for interpreting written agreements, a summary judgment motion is premature under CR 56(f) because there remain genuine issues of material fact that can be resolved only through discovery. Hoang is/was entitled to discovery pursuant to LCR 37. See Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990).

**11. One corporate entity cannot represent another corporate entity in a court of law.**

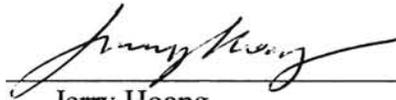
No authority exists in law that allows one corporate entity to represent another in the court of law. Amex Bank in this case to represent Centurion or the Securitization Trust in a court of law to in an attempt to collect an alleged debt that is allegedly owed to investors of American Express Master Trust Series 1996-1 Trust an investor Trust.

**V. CONCLUSION**

For these reasons, this Court should reverse the trial court because Amex Bank lack jurisdiction, the court lack subject matter jurisdiction over this instant matter, there are genuine issues of material fact in dispute, Amex Bank is Third Party interloper and cannot represent another corporation in a court of law and Amex Bank is not entitled to judgment as a matter of law.

DATE: November 14, 2014

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jerry Hoang", is written over a horizontal line.

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**PROOF OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of November 2014, I have caused to be mailed via certified first class # 7011 1150 0001 9926 2391 postage fully pre-paid Mail by United States Postal Service, the foregoing corrected Appellate Brief to the following participants at the address listed below:

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