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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000332-001 DT 10/20/2015

CLERK OF THE COURT
COMMISSIONER MYRA HARRIS J. Eaton
Deputy

MIDLAND FUNDING L L C BARRY BURSEY

v.

JOANNE MCCONNELL (001) JOHN N SKIBA
JAMES MCCONNELL (001)

ARROWHEAD JUSTICE COURT
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Lower Court Case No.CC2014–093604.

Defendants-Appellants Joanne McConnell and James A. McConnell (Defendants) appeal the Arrowhead Justice Court's determination that they owed a credit card debt. Defendants contend the trial court erred. For the reasons stated below, this Court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

On May 29, 2014, Plaintiff-Appellee Midland Funding Inc. (Plaintiff or Midland Funding) filed a Complaint alleging (1) it was the successor-in-interest for a credit card debt originally owned by FIA Card Services, N.A.; and (2) Defendants owed $5,058.40. Plaintiff requested the principal balance minus any payments made as well as costs. Defendants challenged the accuracy of the information in Plaintiff's Complaint; and requested verification of the debt and a copy of the original signed contract. In discovery, Defendants asked for (1) the original credit application or agreement signed by either Defendant; (2) copies of credit card statements showing the charges allegedly incurred on the credit card; (3) any modifications to the terms of the credit card; (4) details as to the charges on the credit card; (5) evidence of payments made by either Defendant; and (6) a copy of the executed contract in Plaintiff's possession showing the terms Defendants allegedly agreed to. Plaintiff objected to the discovery request.

The trial court held trial on March 12, 2015. Emily Walker, a legal specialist with MCM[1] was Plaintiff's only witness. She stated MCM was the account service manager for the debts purchased under the Midland Funding name and she had been trained by the company on "our systems and the credit documents that we look at every day."[2] She added Midland Funding was in the business

[1] MCM is the acronym for Midland Credit Management, the entity that services accounts for Midland Funding.
[2] Video Recording, March 12, 2015, at 10:58:11–10:59:12.

of purchasing distressed or charged off debt.[3] She described the process of purchasing an account through an intermediary and stated the intermediary would purchase the accounts from the original creditor and house the accounts in their system until they were sold or the intermediary collected on them.[4] She added that when Midland Funding purchased accounts the first documents created are a purchase agreement and Bill of Sale which are signed by both parties as a receipt of the sale.[5] She added that once the accounts are transferred into the MCM system, a seller data sheet is printed for each account.[6]

Ms. Walker testified about how Midland Funding obtained information about each account purchased and said it came from an electronic sale file sent to MCM from a secure e-mail site.[7] She added the information contained there was the information Asset Acceptance received from the original creditor and the MCM and Midland Funding employees did not have the ability to change any of the information.[8] She added that "many times" statements may also be received, but whether statements are received or the number received depended on what was stated in the purchase agreement.[9] Ms. Walker explained that when MCM received an electronic sale file, each account in the sale file is given its own MCM account number which is linked to the original creditor number and all of the information for the original creditor number is saved under the MCM account number.[10] She added that a field data sheet is printed for each account with the specific identifying information for that account.[11] Ms. Walker explained MCM sends a validation letter or notice of new ownership letter to the owner of the account after MCM purchases the account which includes "important information" and provides the account holder with instructions as to how the account holder should proceed to inform MCM if the information is incorrect.[12]

Ms. Walker identified the Plaintiff's exhibits. She identified Exhibit 1 as the chain of title information for the transfer of the account[13] and said page 1 was the Bill of Sale from the original creditor to Asset Acceptance dated March 26, 2012.[14] Ms. Walker discussed the next page of the Exhibit as the Bill of Sale from Asset Acceptance to Midland Funding dated November 21, 2013.[15]

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[3] *Id*. at 10:59:12–30.
[4] *Id*. at 10:59:58–11:00:32. Ms. Walker testified the intermediary—Asset Acceptance—is a sister company to Midland Funding and MCM.
[5] Video recording, *id*. at 11:00:32–11:01:02.
[6] *Id*. at 11:01:02–25.
[7] *Id*. at 11:01:36–50.
[8] *Id*. at 11:01:50–11:02:20. Ms. Walker did not explain how she knew Asset received this information from the original creditor.
[9] Video recording, *id*., at 11:02:20–47.
[10] *Id*. at 11:03:42–11:04:14.
[11] *Id*. at 11:04:14–33.
[12] *Id*. at 11:04:51–11:06:03.
[13] *Id*. at 11:06:30–41.
[14] Ms. Walker originally identified page 2 of the exhibit as the Affidavit of Sale from the FIA Card Services Vice President stating they were aware of the sale and assignment of the account on March 26, 2012, to Asset Acceptance. She added the parties stated they were aware of any errors in these accounts relating to the account balance as of the closing date of the sale. At this point Plaintiff's counsel stated the page 2 Ms. Walker referred to did not "make it into the Court" and "your page 2 we do not have" and requested that the trial court disregard the testimony about that page. See Video Recording, 11:06:55–11:08:20.
[15] Video recording, *id*. at 11:08:52–11:09:17.

Ms. Walker said page 3 of Exhibit 1—was the Field Data Sheet which (1) had all of the account identifying information; (2) was an "extraction of the account information from the sale file" and (3) was for account ending in 2081 with the consumer name of Joanne McConnell.[16] Ms. Walker asserted page 1 of the exhibit was created on March 26, 2012; page 2 was created on November 21, 2013; and page 3 was created on November 21, 2013.[17] She did not state how she knew the dates when the documents were created. The Field Data Sheet indicates the data was printed by MCM from electronic records provided by Asset Acceptance LLC pursuant to the Bill of Sale/Assignment of Accounts transferred on 11/21/2013, but does not state on what date the Field Data Sheet was created.

Ms. Walker did not testify about having been present during the transaction between FIA Card Services and Asset Acceptance or identify how she—independently—knew the date for that Bill of Sale. Although Ms. Walker testified all the records (1) were records of regularly conducted activity; (2) were made at or near the time of the activity and transmitted by someone with knowledge; (3) were kept in the course of regularly conducted activity; (4) the making of the records was a regular practice of MCM and Midland Funding; (5) were adopted as business records by MCM and Midland Funding; and (6) were relied on in the day-to-day operations of MCM and Midland Funding; she did not specify how she knew these statements were all true.[18]

Plaintiff moved to have all three pages admitted. Defendants objected to the admission of the Field Data Sheet and argued the Field Data Sheet lacked foundation.[19] Defendants cited to a Tennessee case and Plaintiff's counsel responded *State v. Parker* and *State v. Riggs*—both Arizona cases—supported the admission of the documents, with pages 1 and 2 being admissible under the adoptive business records doctrine while page 3 was created by MCM and was its own business record.[20]

After the documents were admitted, Ms. Walker testified about the contents of the Field Data Sheet, and stated she knew the documents comprising Exhibit 1 related to the Defendants' account because "it was contained in the sale file and the last four of the account number or the account number matches with the MCM number which all this information is saved under."[21] Ms. Walker added a validation letter was sent to the consumer after the purchase of the account and (1) the letter was not returned as undeliverable; and (2) there was no dispute on the account.[22]

Ms. Walker discussed the Bank of America monthly billings statements—Plaintiff's Exhibit 2;—reviewed the information on these statements; and said these statements were included in the sale file from Asset Acceptance.[23] She testified the records were kept in the course of regularly conducted activity; were created at or near the time represented by the records; kept in the course

[16] *Id*. at 11:10:45–11:12:03.
[17] *Id*. at 11:12:07–36.
[18] *Id*. at 11:12:39–11:13:22.
[19] *Id*. at 11:13:22–11:15:32.
[20] *Id*. at 11:15:34–11:17:05.
[21] *Id*. at 11:17:05–11:18:30.
[22] *Id*. at 11:18:30–51.
[23] *Id*. at 11:21:22–11:23:21.

of MCM's business; and regularly relied on.[24] Defendants objected to the statements because they were made by Bank of America, hearsay, not subject to the business record exception, and lacked foundation.[25] Plaintiff's counsel responded Plaintiff satisfied the requirements of Ariz. R. Evid. Rule 803(6) re business record exceptions and was supported by *State v. Parker* and *State v. Riggs*.[26] The Court admitted Exhibit 2.

Ms. Walker identified Exhibit 3 as the Notice of New Ownership and Pre-Legal Review—the first communication MCM sent to the consumer on the account—which was created on November 27, 2013.[27] She added the document was created—using the account information for the consumer—by using a template and service; and a similar document was created for all of the accounts that were part of the sale.[28] She repeated the Rule 803(6) criteria.[29] Ms. Walker testified about the amount owing on the account; and said there (1) was no information about any subsequent payments which would have reduced the balance; (2) there were no disputes about the account; and (3) no correspondence.[30]

On cross-examination, Defendants asked if Ms. Walker had a complete accounting in her records showing the alleged balance and Ms. Walker responded she had no previous statements showing how the balance was determined.[31] Defendants asked if Plaintiff had a contract stating the terms of the contract and how the amount was determined and Ms. Walker said she did not.[32] Defendants asked Ms. Walker about the meaning of the phrase "without recourse" etc. in the Bill of Sale from FIA Card Services and the trial court interrupted to state this was a legal opinion and not for a custodian of records to address.[33] Defendants queried if Ms. Walker was trained in how FIA Card Services or Bank of America produced its card statements or on how Asset Acceptance' records "came into existence" and Ms. Walker said she had no training on this.[34] Defendants asked if Ms. Walker (1) had a complete Loan Schedule; and (2) reviewed the specific accounts on the Loan Schedule that was allegedly attached to the Bill of Sale; and Ms. Walker stated she did not have access to "that part of it" and did not have "a master list of every account that is in there."[35] Ms. Walker explained the Loan Schedule was the name for the electronic spreadsheet and there was no master list.[36] Defendants questioned Ms. Walker about how the accuracy of the accounts was verified in the absence of a master list and Ms. Walker responded the accounts were transferred into "our system" and when she looks up an account, she can see all of the information contained within "our" portfolio.[37] The trial court rephrased the question to ask Ms. Walker how

[24] *Id*. at 11:23:21–59.
[25] *Id*. at 11:24:00–11:25:35.
[26] *Id*. at 11:25:35–11:26:10.
[27] *Id*. at 11:26:30–48.
[28] *Id*. at 11:26:58–11:27:17.
[29] *Id*. at 11:27:17–11:28:33.
[30] *Id*. at 11:28:46–11:29:33.
[31] *Id*. at 11:30:05–11:31:57.
[32] *Id*. at 11:31:57–11:32:42.
[33] *Id*. at 11:32:42–11:33:55.
[34] *Id*. at 11:33:33–11:36:27.
[35] *Id*. at 11:36:27–11:37:13.
[36] *Id*. at 11:37:13–11:38:27.
[37] *Id*. at 11:38:28–11:39:04.

she verified the authenticity of the debt and Ms. Walker stated she verified the authenticity of the debt "by sending out the validation letter and asking the consumer whether this information is correct" and "if they have a problem with any of that information or any of the information is wrong, they need to make that dispute known to us and then we can further investigate the account."[38] Defendants asked if Ms. Walker could verify and prove the use of the credit card, beginning with a zero balance and ending with the balance used for the lawsuit and Ms. Walker said she could not as the only statements "we have" are the two in the exhibits.[39]

On redirect, Ms. Walker stated Midland Funding owned the account ending in 2081 and the account was acquired through Asset Acceptance; Asset Acceptance acquired the account from FIA Card Services/Bank of America; and Defendants had not disputed the account.[40]

Ms. McConnell testified (1) the Bill of Sale did not link the account specifically with the sale; (2) the witness could not verify the credit card was even used; (3) Defendant did not recall ever using the credit card or receiving any notification about any debt; and (4) Defendant wanted the accuracy of the alleged debt to be verified.[41] Defendant referenced the Bill of Sale and commented there was no detail attached to the Bill of Sale and nothing connected her account to this Bill of Sale.[42] Defendant added she did not know if she owed the money or if the balance was accurate from the 2005 credit card since she had "lots of credit cards."[43]

On cross-examination, Plaintiff's counsel asked Defendant her address and how long she lived at the address. Defendant responded she lived at her address in 2010, and has been married for 20–21 years.[44] Defendant said she did not recall what credit cards she had between 2005–2010 but currently had no credit cards.[45] She added she did not recall receiving statements from the credit card company but supposed she did receive some credit card statements during the time.[46] Defendant added she did not recall either the statement or the amount of the alleged debt and there was nothing that showed "this amount is legitimate."[47] Defendant agreed it was possible that she had a Bank of America credit card but maintained she did not recall it.[48] Defendant (1) stated the issue was if Plaintiff owned the account; and (2) argued there was no evidence demonstrating it did.[49]

The trial court signed a Judgment awarding Plaintiff the principal sum of $5,058.40 minus any payments made plus costs of $166.40.

Defendants filed a timely appeal. Plaintiff filed a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

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[38] *Id*. at 11:40:15–41.
[39] *Id*. at 11:41:13–11:42:15.
[40] *Id*. at 11:42:20–57.
[41] *Id*. at 11:43:51–11:45:01.
[42] *Id*. at 11:45:28–40.
[43] *Id*. at 11:48:05–30.
[44] *Id*. at 11:48:42–11:49:12.
[45] *Id*. at 11:49:21–39.
[46] *Id*. at 11:51:01–23.
[47] *Id*. at 11:51:23–44.
[48] *Id*. at 11:51:44–54.
[49] *Id*. at 11:52:16–40.

II. ISSUES:

A. Did The Trial Court Abuse Its Discretion When It Granted Judgment For Plaintiff.

Abuse of Discretion

To determine if the trial court abused its discretion, this Court must consider the standards for an abuse of discretion claim. The Supreme Court of Arizona stated:

> In exercising its discretion, the trial court is not authorized to act arbitrarily or inequitably, nor to make decisions unsupported by facts or sound legal policy. . . . Neither does discretion leave a court free to misapply law or legal principle.

City of Phoenix v. Geyler, 144 Ariz. 323, 328–329, 697 P.2d 1073, 1078–1079 (1985) (citations omitted). Thus, a trial court abuses its discretion if it:

> 1) applied the incorrect substantive law or preliminary injunction standard; 2) based its decision on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction; or 3) applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion.

McCarthy Western Constructors v. Phoenix Resort Corp., 169 Ariz. 520, 523, 821 P.2d 181, 184 (Ct. App. 1991) (citation omitted).

Midland Funding's Attempt To Establish A Valid Debt.

Midland Funding attempted to establish its right to collect on an account originally owned by FIA Card Services, N.A. by presenting several documents including a Bill of Sale and Assignment of Loans dated March 26, 2012, to Asset Acceptance. This document referenced the sale of loans as identified in the "Loan Schedule." Midland Funding did not attach the referenced Loan Schedule and proffered no testimony from any witness who directly reviewed the Loan Schedule. Instead, Plaintiff's witness—Emily Walker—testified the Loan Schedule was an electronic record but she had not reviewed the Loan Schedule and had no access to it.

A similar problem resulted when the alleged loan was transferred from Asset Acceptance to Midland Funding in the November 21, 2013, Bill of Sale. That sale agreement stated the loans were identified in Schedule A. As with the "Loan Schedule" in the earlier transaction, no Schedule A was provided as evidence and Ms. Walker never personally reviewed Schedule A. There was no testimony from anyone who reviewed Schedule A or who could demonstrate the records included on the Schedule A accurately reflected the accounts ostensibly included. When asked how Plaintiff verified the accuracy of the debt, Ms. Walker—Plaintiff's only witness—responded she verified the authenticity of the debt "by sending out the validation letter and asking the consumer whether this information is correct" and "if they have a problem with any of that information or any of the information is wrong, they need to make that dispute known to us and then we can further investigate the account." This is legally insufficient. Midland Funding cannot prove it owns a debt merely because the consumer failed to challenge MCM's letter. Although Ms. Walker asserted the Defendants' failure to dispute the MCM letter about the debt established the validity of the debt, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692g(c), specifically establishes a consumer's failure to dispute a debt is not to be construed by any court as an admission of liability by the consumer. That statute states:

> The **failure of a consumer to dispute the validity of a debt** under this section **may not be construed** by any court **as an admission of liability** by the consumer.

(Emphasis added.) To the extent the trial court relied on Ms. Walker's explanation that the Defendant's failure to dispute the MCM letter—re the Notice of New Ownership and Pre-Legal Review—demonstrated the validity of this debt, the trial court erred. The failure to dispute the MCM letter did not prove the validity of Midland Funding's claim.

Burden of Proof

The Plaintiff has the burden of proof in a contract case. A**s** our Court of Appeals stated:

> In a contract case, the burden of proof rests solely on the plaintiff.

Yeazell v. Copins, 98 Ariz. 109, 116, 402 P.2d 541, 546 (1965); *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 292 P.3d 195 ¶ 16 (Ct. App. 2012). Plaintiff needed to meet this burden by a preponderance of the evidence.[50] Midland Funding failed to meet this burden as it never produced evidence about (1) an underlying contract or credit card agreement between Defendants and FIA Card Services; (2) the terms of any contract; (3) the interest rate agreed to; (4) whether Defendants ever used the FIA credit card or charged any debt on the card (the only statements were summaries of the total amount of alleged debt but failed to include any charges); or (5) if the alleged debt was specifically included in the accounts sold since Ms. Walker did not review either the "Loan Schedule" FIA Card Services sold to Asset Acceptance or the schedule of debt Asset Acceptance included in Schedule A which it, in turn, sold to Midland Funding. Instead of providing any specific information, Ms. Walker testified Midland's records were true and accurate and were appropriate business records because they were ostensibly received from other entities.

The Business Record Exception To The Hearsay Rule

While Ms. Walker parroted the requirements for a Rule 803(6) business exception to the hearsay rule,[51] Ms. Walker never explained how she knew some of the information she testified about. She stated the FIA Card Service records were made at or near the time the events occurred and were made by or from information transmitted by someone with knowledge. Contrariwise, Ms. Walker also stated she had no training on the business records creation and retention policies of Bank of America, FIA Card Services, and Asset Acceptance. Instead, she repeatedly claimed her basis for determining the validity of the debt was Defendants' failure to challenge the debt as described in the MCM Notice of New Ownership letter.

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[50] The phrase "preponderance of the evidence" was defined in *Matter of Appeal in Maricopa County Juvenile Action No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983) (citations omitted) where the Arizona Supreme Court stated:

> "The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its nonexistence." Indeed, this court stated long ago that by a preponderance of the evidence "the ultimate test is, does the evidence convince the trier of fact that one theory of the case is more probable than the other." The United States Supreme Court on several occasions has agreed with this statement of the preponderance of the evidence test. Thus, we disagree with the court of appeals' definition of the preponderance of the evidence standard, and hold that that standard requires simply that the trier of fact find the existence of the contested fact to be more probable than not.

[51] Ariz. R. of Evid., Rule 803(6).

While courts often find ordinary business records "tend to be unusually reliable" and the business record exception was:

> . . . designed to avoid the burdensome process of "producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering and transmitting, and recording information...." *See* Notes of Advisory Committee on Proposed Rule 803.

United States v. Keplinger, 776 F.2d at 693, this Court notes Midland Funding LLC, Midland Management, Asset Acceptance Capital Corp. and their parent company—Encore Capital Group, Inc. (Plaintiff et al.)—were recently sanctioned by the Consumer Financial Protection Bureau (CFPB) in an Administrative Proceeding—File No. 2015–CFPB—0022 filed on September 9, 2015, and found to often be unreliable. In that Consent Order, the CFPB found these entities bought debts that were potentially inaccurate, lacked documentation, and were unenforceable. The CFPB determined these entities violated the Fair Debt Collection Practices Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act in their debt collection practices. The CFBP addressed the affidavits provided by these entities and held (1) their affidavits often contained misleading statements and misrepresented that the affiants had reviewed the original account-level documentation when this had not occurred; and (2) the companies failed to do the due diligence research needed for a legitimate claim. Although several Circuit Courts have held the business record exception does not require the qualified witness to have personally participated in the creation or maintenance of a document—*Keplinger*, at 693-94; *United States v. Console*, 13 F.3d 641, 657 (3rd Cir. 1993); *Saks Int'l, Inc. v. M/V Exp. Champion, id.*, 817 F.2d at 1013; *U.S. v. Lauersen*, 348 F.3d 329, 342 (2nd Cir. 2003)—the CFPB determined Plaintiff and its related companies do not fall within this standard because of Plaintiff et al.'s past conduct and egregious violations. Plaintiff et al. did not challenge this finding and, instead, "executed a 'Stipulation and Consent to the Issuance of a Consent Order,' which is incorporated by reference and is accepted by the Bureau."[52] This makes Ms. Walker's statements suspect where, as here, she failed to review any of the allegedly attached documentation which provided the needed specifics for Defendants' account.[53]

Although Arizona follows the "adoptive business records doctrine" which allows for the admission of documents as business records where the organization—Midland Funding—(1) incorporates the records of another entity into its own; (2) relies on them in its day-to-day operations; and (3) where there are strong indicia of reliability, *State v. Parker*, 231 Ariz. 391, 296 P.2d 54, ¶¶ 31 and 33 (2013), a key question is whether the records "have sufficient reliability to warrant their receipt in evidence." While this is a determination generally left to the sound discretion of the trial judge— *Saks Intern., Inc. id.*, at 817 F.2d at 1013; *United States v. Lavin*, 480 F.2d 657, 662 (2d Cir. 1973)[54]—at the time the trial judge ruled, there was no extant Consent Order or finding by the CFPB. Because of the CFPB Consent Order, Midland Funding is not entitled to any presumption of the reliability of its records.

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[52] File No. 2015–CFPB—0022 ¶ 2. According to Black's Law Dictionary, a consent order is synonymous with a consent decree. A consent decree is defined as "a court decree that all parties agree to." Thus, while Plaintiff et al. did not admit any of the facts or conclusions of law other than those of jurisdiction, Plaintiff et al. did not deny these fact findings.

[53] While Ms. Walker testified Midland owned account 2081, Ms. Walker was parroting the summary documents Midland created without anyone ever authenticating the original source.

[54] The Second Circuit held: "In the final analysis, the determination of whether that reliability exists must be left to the sound discretion of the trial judge."

Although Plaintiff relied on Ms. Walker to prove the business record exception, Ms. Walker did not personally review any of the records supplied by Bank of America, FIA Card Services, or Asset Acceptance. Ms. Walker testified MCM incorporated documents allegedly received from Asset Acceptance. She could not demonstrate the records on Schedule A were the same as the records on the "Loan Schedule" or how she knew the debts included in the Loan Schedule were created at or near the time represented in the records. Instead, Ms. Walker testified she was able to establish the validity of the claim because Defendants' failed to respond to the MCM letter re Notice of New Ownership and Pre-Legal Review to establish the validity of the debt—a statement which flies in the face of § 1692g(c) of the FDCPA.

Midland Funding's Exhibits Do Not Establish This Debt.

A review of the documents Plaintiff produced to establish Defendants (1) had a credit card agreement with FIA Services;[55] and (2) used the credit card and were responsible for debt on the card—which was sold to Asset Acceptance and then to Plaintiff—indicates problems. Although Exhibit 1 included "Exhibit C" re a Bill of Sale and Assignment of Loans from FIA Card Services, N.A., to Asset Acceptance LLC., the Bill of Sale states (1) FIA Card Services sold the accounts "without recourse and without warranties of any type, kind, character or nature"; (2) these "loans" were identified in the "Loan Schedule"; but (3) no loan schedule was attached to the Exhibit. The Bill of Sale from Asset Acceptance LLC to Plaintiff transferring the "purchased accounts [sic.] files [sic.] identified on Schedule A, attached hereto and incorporated by this reference" presents a similar problem. As was the case with the "Loan Schedule" referenced in the Bill of Sale from FIA Card Services, no Schedule A was attached to the Bill of Sale from Asset Acceptance. Instead, the Bill of Sale from Asset Acceptance stated the information contained in the files for the purchased accounts were "true, complete, and accurate." However, the Bill of Sale did not include any statement indicating how the Seller—Asset Acceptance LLC—determined the accounts were true, complete and accurate when FIA Card Services sold the claimed accounts without recourse or warranties of any kind. Plaintiff did not explain how Asset Acceptance made its determination.

Plaintiff faced problems with its other exhibits. The copy of the Bank of America Statement for an account—2081[56]—for the time period between March 13, 2010, and April 13, 2010, did not include charges for any items. Instead, the statement indicated a late fee and a total balance due. The copy of the Bank of America Statement for account 2081[57] for the time period between April 14, 2010, and May 13, 2010, was written in Spanish. Plaintiff did not explain why one monthly statement would have been written in English but a subsequent monthly statement would have been exclusively in Spanish. Plaintiff's final exhibit was a copy of a Notice of New Ownership and Pre-Legal Review addressed to Joanne McConnell and advising the FIA Card Services N.S.

[55] Although Plaintiff claimed to have acquired the account from FIA Card Services, Plaintiff's counsel in Plaintiff's Reply to Response To Motion For Summary Judgment and Response To Cross Motion For Summary Judgment at p. 2, ll. 7–9 filed on October 22, 2014, wrote:

> Here, in Plaintiff's Statement of Facts in an Affidavit affirming under oath as to Plaintiff's acquisition of the subject debt and specifically referencing statements **from Chase** and the Bill of Sale (Exhibit 1 to Plaintiff's SOF).

(Emphasis added). Although the attached Affidavit from Heidi Weber attested that she had access to and reviewed the records pertaining to the account, she never disclosed which records she allegedly reviewed.

[56] All of the account numbers other than the last four digits were redacted.

[57] All of the account numbers other than the last four digits were redacted.

account was sold to Plaintiff on November 21, 2013. Although Ms. Walker testified she used Defendants' failure to respond to this letter as her means of validating the authenticity of the debt, as was stated above, a consumer's failure to respond or challenge such letter does not establish any debt. Consequently, Plaintiff failed to establish Defendants owed it a debt.

Midland Funding Did Not Prove Damages

On appeal, Defendants asserted Midland Funding failed to prove they owed a specific amount or balance. Although Midland Funding asserted Defendants did not challenge the credit card statements Midland Funding produced, Defendants did challenge the summary nature of the two statements. Defendants argued there were no charges on these statements and the statements did not reflect Defendants used the card to charge any items. While the credit card statements reflect a final balance, the statements do not show any charges. Additionally, the statements themselves raised questions about the type of notice Plaintiff provided to Defendants. Plaintiff provided two credit card statements allegedly from Bank of America. The first of these included a New Balance Total of the amount demanded. This statement was for the time period from March 13, 2010–April 13, 2010, and was written in English. The following statement from Bank of America was written entirely in Spanish. It reflected a time period of April 14, 2010–May 13, 2010 and listed a New Balance of 0.00. These were the only statements Plaintiff provided to the trial court and, according to Ms. Walker, the only statements Plaintiff possessed. Plaintiff did not demonstrate the Defendants spoke Spanish. Accordingly, Plaintiff did not show the second statement apprised Defendants about any balance that was allegedly owed to Bank of America when its own Bank Statement listed a New Balance total of 0.00.

B. Are Defendants Entitled To Attorneys' Fees On Appeal.

This action is based on a contract. Reasonable fees may be awarded in a contract action pursuant to A.R.S. § 12–341.01. SCRAP—Civ., Rule 13 allows for an award of attorneys' fees on appeal. Accordingly, Defendants are awarded a reasonable attorneys' fee provided Defendants provide this Court with a China Doll affidavit[58] and fee application on or before **November 12, 2015**. Defendants shall send a copy of this fee application to Plaintiff. If Plaintiff wishes to contest the fee application, Plaintiff shall (must) file its response on or before **December 3, 2015.**

III. CONCLUSION.

Based on the foregoing, this Court concludes the Arrowhead Justice Court erred.

IT IS THEREFORE ORDERED reversing the judgment of the Arrowhead Justice Court.

IT IS FURTHER ORDERED awarding Defendants their reasonable attorneys' fees and costs on appeal provided Defendants submit a China Doll affidavit on or before **November 12, 2015**.

IT IS FURTHER ORDERED Defendants shall mail/deliver a copy of their China Doll affidavit to Plaintiff on the same day Defendants file their China Doll affidavit with the Clerk of the Superior Court of Maricopa County.

[58] *Schweiger v. China Doll Restaurant, Inc.*,138 Ariz. 183, 673 P.2d 927 (Ct. App. 1983).

IT IS FURTHER ORDERED Defendants shall provide this Court with a courtesy copy of their China Doll affidavit.

IT IS FURTHER ORDERED Plaintiff shall file any response to Defendants' attorneys' fee (China Doll) request with the Clerk of the Superior Court of Maricopa County on or before **December 3, 2015**.

IT IS FURTHER ORDERED Plaintiff shall mail/deliver a copy of its response to Defendants' request for attorneys' fees (China Doll) to Defendants on the same day Plaintiff files its response with the Clerk of the Superior Court of Maricopa County.

IT IS FURTHER ORDERED Plaintiff shall provide this Court with a courtesy copy of its response to Defendants' China Doll affidavit.

IT IS FURTHER ORDERED remanding this matter to the Arrowhead Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.