Plaintiff, CHASE BANK USA, N.A., commenced this action for breach of contract and account stated seeking to recover the balances due on three of defendant's credit card accounts.

The trial of the action took place on March 17, 2010. After considering and weighing the testimony and documentary evidence, and having had the opportunity to assess the credibility and demeanor of the witnesses, the Court makes the following findings of fact and conclusions of law:

UNDERLYING FACTS:

For its first witness, plaintiff called Martin Lavergne, who worked for CHASE BANK USA, N.A.("Chase") in various roles over a period of approximately 17 years. Presently, he holds the title of "custodian of records." While Mr. Lavergne maintained that he had personal knowledge of the practices and procedures that Chase utilized in creating and maintaining consumer credit card account records, he never described these practices and procedures and never testified as to how he acquired personal knowledge of them.

Mr. Lavergne was shown what was purported to the account records for defendant's three credit card accounts with Chase. He maintained that the records were "created in the ordinary course of Chase's business," that it was "the regular course of Chase's business to make" the documents, that the documents were "created contemporaneously or within a reasonable time after the transactions they reflect," and that Chase relied "upon the these [documents] in conducting its business." Mr. Lavergne testified that all of Chase's records of credit card [*2]accounts are stored electronically and that hard copy is not kept. He maintained that he compared the records that were shown to him at trial with the Chase's electronic records and that both were identical.

Notably, some of the records that were shown to Mr. Lavergne were apparently created by Washington Mutual Bank. Mr. Lavergne explained this by stating that at some point in time, Chase had acquired Washington Mutual Bank. No testimony was elicited from Mr. Lavergne that he had worked for Washington Mutual Bank or that he had personal knowledge of the practices and procedures that Washington Mutual Bank employed in creating and maintaining consumer credit card account records.

After eliciting the above testimony from Mr. Lavergne, plaintiff offered the credit card records concerning defendant's three Chase accounts into evidence. Defendant maintained the records constituted "business records" within the meaning of CPLR 4518 and were not hearsay. The Court did not allow the records into evidence on the ground that the proper foundation for their admission was not laid.

Mr. Lavergne maintained that it was the regular course of business for Chase to "automatically" mail out to its customers monthly statements and that ones in question were never returned to Chase as undeliverable. Mr. Lavergne was not asked to describe the mailing practices and procedures that Chase utilized to ensure that items are properly addressed and mailed.

The defendant was the only other witness to testify. He testified that never received numerous statements, which caused many problems. Thus, defendant admitted that he received some statements and by inference that he had some form of contractual relationship with Chase.[FN1]

ANALYSIS:

To establish a cause of action for breach of contract, plaintiff was required to establish, by admissible proof, the existence of a contract, plaintiff's performance pursuant to that contract, the defendant's breach of his obligations under the contract, and damages resulting from that breach (see Elisa Dreier Reporting Corp. v Global Naps Networks, Inc., 921 NYS2d 329, 333 [2d Dept 2011]; JP Morgan Chase v J.H. Elec. of NY, Inc., 69 AD3d 802 [2d Dept 2010] ; Furia v Furia, 116 AD2d 694]2d Dept 1986]). Even assuming plaintiff established the first three of these elements, plaintiff failed to introduce into evidence any admissible proof of damages. Plaintiff's cause of action sounding in breach of contract must therefore be dismissed for the reasons stated below. [*3]

At trial, plaintiff attempted to establish damages by offering into evidence copies of defendant's three credit account statements which set forth the alleged unpaid balances. Through the testimony of Mr. Lavergne, plaintiff attempted to establish that the account statements were "business records" within the meaning of CPLR 4518 and therefore admissible. For the reasons that follow, the Court refused to allow them in evidence.

CPLR 4518[a], in pertinent part, provides:

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record.

The case law interpreting CPLR 4518[a] makes it clear that to establish admissibility under the CPLR 4518[a], it must be demonstrated that the record was made in the regular course of business and reflected a routine, regularly conducted business activity, needed and relied on in the performance of the functions of the business, that it was the regular course of business to make the records, in other words, that they were made pursuant to established procedures for the routine, habitual, systematic making of such a record, and that the claim forms were made at the time of the acts, transactions, occurrences or events described therein, or within a reasonable time thereafter (see People v Cratsley, 86 NY2d 81, 89 [1995]; People v Kennedy, 68 NY2d 569, 579-580 [1986]; Williams v Alexander, 309 NY 283, 286 [1955]). Further, it must be demonstrated that the preparer of the records had actual knowledge of the events recorded therein and recorded them in the regular course of business or that the entrant of the information obtained knowledge of those events from someone with actual knowledge of them and who had a business duty to relay information regarding the events to the preparer (see Capasso v Kleen

All of America, Inc., 43 AD3d 1346 [4th Dept 2007], citing Alexander, Practice Commentaries, McKinney's Cons.Laws of NY, Book 7B, CPLR C4518:1; Matter of Leon RR, 48 NY2d 117, 122-123 [1979]; see also Johnson v Lutz 253 NY 124, 128 [1930]; Toll v State, 32 AD2d 47, 49 [3rd Dept 1969]).

Here, Mr. Lavergne's foundational testimony was essentially a verbatim recitation of the statutory elements set forth in CPLR 4518[a]. He gave absolutely no testimony as to how the electronic records concerning defendant's account statements came into existence nor did he indicate that he even knew how such information was collected. It would appear that credit card statements contain information that is conveyed from multiple entities, from the reporting merchant through various intermediaries, until the information is ultimately incorporated into plaintiff's business records (see Discover Bank v Williamson, 2007 NY Slip Op 50231[U] [App Term, 9th and 10th Jud Dists]). Certainly, Mr. Lavergne did not demonstrate that the person or persons who inputted the electronic data had actual knowledge of the events inputted or that such person or persons obtained knowledge of those events from someone with actual knowledge of them and who had a business duty to relay information regarding the events (see Corsi v Town of [*4]Bedford, 58 AD3d 225, 229 [2d Dept 2008]; Capasso v Kleen All of America, Inc., 43 AD3d at 1347).

Moreover, Mr. Lavergne failed to demonstrate that the credit card statements were routine reflections of day-to-day operations of Chase or that Chases had an obligation to have the statements be truthful and accurate for the purposes of the conduct of the enterprise (see Hochhauser v Electric Ins. Co., 46 AD3d 174, 179 [2d Dept 2007]; Whitfield v City of New York, 48 AD3d 798, 799 [2d Dept 2008]; Kane v Triborough Bridge & Tunnel Authority, 8 AD3d 239, 241 [2d Dept 2004]).

Further, Mr. Lavergne's testimony was highly suspect. As stated above, some of the records that plaintiff sought to introduce into evidence through the testimony of Mr. Lavergne were apparently prepared by Washington Mutual Bank. The foundational testimony given by Mr. Lavergne concerning these records was identical to the foundational testimony he gave concerning the Chase records. It is well settled law that in order for a witness to lay the foundation for the admission of a document as a business record pursuant to CPLR 4518[a], the witness must demonstrate personal knowledge of the business practices and procedures pursuant to which the document was made (see Reiss v Roadhouse Rest., 70 AD3d 1021, 1025 [2d Dept 2010]; Lodato v Greyhawk N. Am., LLC, 39 AD3d 494, 495 [2d Dept 2007]; Vento v City of New York, 25 AD3d 329, 330 [1st Dept 2006]; Dayanim v Unis, 171 AD2d 579 [1st Dept 1991]; Midborough Acupuncture, P.C. v New York Cent. Mut. Fire Ins. Co., 2006 NY Slip Op 51879[U] [App. Term, 2d & 11th Jud Dists]). Because Mr. Lavergne never worked for Washington Mutual Bank, it defies logic that he would have personal knowledge of Washington Mutual Bank's business practices and procedures. For these reasons, the Court gives Mr. Lavergne's "robo-testimony" and plaintiffs' no weight or credit (People v Barrett, 14 AD3d 369 [1st Dept 2005]; see also Washington Mut. Bank v Phillip, 2010 NY Slip Op 52034[U] [Sup Ct, Kings County]).

Regarding the plaintiff's cause of action for account stated, it fails because the evidence was insufficient to establish that the statements were mailed to defendant pursuant to a "standard

office practice or procedure designed to ensure that items are properly addressed and mailed" (Residential Holding Corp. v Scottsdale Ins. Co., 286 AD2d 679, 680; Mid City Const. Co. v Sirius Am. Ins. Co., 70 AD3d 789, 790 [2d Dept 2010]; Simplex Grinnell, LP v Manor, 59 AD3d 610 [2d Dept 2009]; Prince Richardson on Evidence § 3-128 [Farrell 11th Ed.]). Thus, the essential element of an account stated, an agreement with respect to the amount of the balance due (Cameron Engineering & Associates, LLP v JMS Architect & Planner, P.C., 75 AD3d 488, 489 [2d Dept 2010]), was not established because "no account [was] presented," as the statements were not mailed (M & A Const. Corp. v McTague, 21 AD3d 610, 612 [3d Dept 2005]; see also Ross v Sherman, 57 AD3d 758, 759 [2d Dept 2008]; Landa v Blocker, 80 AD3d 570 [2d Dept 2011]; Bercow v Damus, 5 AD3d 711 [2d Dept 2004]; see also Marini v Lombardo, 79 AD3d 932 [2d Dept 2010]).

In sum, the offered "robo-testimony" was insufficient to establish its case by a preponderance of the credible evidence. [*5]

Based on the above, it is hereby

ORDERED that judgment be entered in favor of defendant SHADY A. GERGIS and against plaintiff CHASE BANK USA, N.A. and that plaintiff's complaint be DISMISSED with prejudice on the merits.

The foregoing constitutes the Decision and Order of the Court.

Dated June 15, 2011

Brooklyn, New York

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HON. NOACH DEAR, J.C.C. Footnotes

Footnote 1: However, to the extent defendant's statements may be a judicial admission, he failed to specify the account or account statement to which the admission applied. Therefore, his admission amounted to nothing more than conclusory statements (see e.g. Bais Yoel Ohel Feige v Congregation Yetev Lev D'Satmar of Kiryas Joel, 65 AD3d 1176, 1179 [2d Dept 2009]), and, as plaintiff's counsel demonstrated, were undeserving of any weight or credit because, among other things, the admission was the product of conjecture and surmise (see Nucci ex rel. Nucci v Proper, 270 AD2d 816, 817 [4th Dept 2000] [citations omitted]; see also Prince, Richardson on Evidence § 7-101 [Farrell 11th ed]; see also Haber v Gutmann, 64 AD3d 1106, 1108 [3d Dept 2009]).