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CLERK OF DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**WELLS FARGO BANK, N.A.,** )  
 )  
 *Plaintiff,* )  
 )  
 vs. )  
 )  
 **DONALD M. GIANNINI.** )  
 )  
 *Defendant.* )  
 \_\_\_\_\_ )

Case No. **CV 2009 2642**

**MEMORANDUM DECISION AND  
ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT**

**I. PRODCEDURAL HISTORY AND BACKGROUND.**

Plaintiff Wells Fargo, N.A. (Wells Fargo), is a financial institution which advanced defendant Donald M. Giannini (Giannini) goods and services in the amount of \$25,229.00 on a credit account. Complaint, p. 2, ¶ 6. Wells Fargo complains Giannini has not made payment on the account since September 10, 2008. Affidavit of Leo Holloway in Support of Summary Judgment, p. 2, ¶ 5.

Wells Fargo filed its Complaint in this matter on April 2, 2009. Giannini, *pro se*, filed a "Verified Answer" on June 5, 2009, denying all claims by Wells Fargo. This case is scheduled for a court trial to begin March 22, 2010.

On August 14, 2008, Wells Fargo filed a "Motion for Summary Judgment", a "Memorandum in Support of Motion for Summary Judgment", and an "Affidavit (of Leo Holloway) in Support of Summary Judgment." Oral argument on the Motion for Summary Judgment was scheduled for and held on October 14, 2009. At that hearing, Giannini, still appearing *pro se*, presented the Court with "Defendant's Objection to

Plaintiff's Affidavit and Attachments in Support of Its Motion for Summary Judgment", "Affidavit of Donald Giannini", and "Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment." The Court, over Wells Fargo's objection, allowed Giannini to file his pleadings, even though such late filing violated I.R.C.P. 56(f). The Court allowed Wells Fargo seven days to respond to these pleadings submitted at oral argument on Wells Fargo's summary judgment motion, and rescheduled oral argument for October 28, 2009. The Court allowed Giannini to hire counsel to present oral argument, but the Court forbade Giannini from filing any further pleadings on the summary judgment issue. On October 22, 2009, Wells Fargo filed a "Reply Affidavit (of Leo Holloway) in Support of Summary Judgment", and a "Reply Memorandum in Support of Summary Judgment." At oral argument on October 28, 2009, attorney Kevin Waite appeared on behalf of Giannini.

At the October 28, 2009, hearing, Waite handed the Court a "Response to Plaintiff's Reply Memorandum and Motion for Further Continuance Pursuant to Rule 56, I.R.C.P." and an "Amended Affidavit of Donald M. Giannini." Again, the timing of this affidavit violates I.R.C.P. 56. At the beginning of oral argument the Court took the motion to continue under advisement. At the conclusion of oral argument, the Court denied Giannini's motion to continue.

Wells Fargo seeks summary judgment arguing that Giannini's failure to object to the charges indicated in monthly statements mailed to him resulted in an account stated through acquiescence. Giannini's affidavit merely states two claims: "I do not owe Plaintiff the sums alleged in the Plaintiff's Complaint", and "I have never agreed to any stated account or final balance of any monies allegedly owed to plaintiff." Affidavit of Donald Giannini, p. 1. Giannini raised the affirmative defenses of Wells Fargo's lack of

standing, estoppel, and failure to mitigate in his Answer.

## **II. STANDARD OF REVIEW.**

Idaho Rule of Civil Procedure 56 states summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2002). In a case such as this, where the action will be tried before a court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Riverside Development Co., v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982).

## **III. ANALYSIS.**

### **A. Giannini's Objection to the Affidavit of Leo Holloway and Attachments.**

Giannini objects to the Affidavit of Leo Holloway (Holloway) and attachments to that affidavit, on the grounds: (1) Holloway is only familiar with how Wells Fargo's records are maintained and has no personal knowledge of the matters asserted; (2) no sworn certified

copies of the matters referred to in Holloway's affidavit were attached or served; (3) the statements attached to the affidavit were from Wells Fargo Card Services, not a party to the instant action; (4) Holloway is not a custodian of Wells Fargo Card Services and has not claimed to have personal knowledge of that entity's practices or payments received from Giannini; (5) Holloway has no personal knowledge of interactions between Wells Fargo Card Services and Giannini; (6) Holloway's statements are hearsay and not best evidence; (7) Holloway's statements are conclusory; and (8) the account statements attached to Holloway's affidavit are opinion and hearsay because no custodian from Wells Fargo Credit Services verified them. Defendant's Objection to Plaintiff's Affidavit and Attachments, pp. 1-2. In response, Wells Fargo argues Holloway's affidavit is admissible pursuant to I.R.E. 803(6) and 902(11) because Holloway has personal knowledge of Plaintiff's record-keeping as their Custodian of records. Reply Memorandum in Support of Summary Judgment, pp. 1-2.

Trial courts have broad discretion to admit hearsay under one of the exceptions provided by the Idaho Rules of Evidence or other rules promulgated by the Idaho Supreme Court, and reviewing courts do not overturn such exercise of discretion absent a clear showing of abuse. *Hurtado v. Land O'Lakes, Inc.*, 147 Idaho 813, 815, 215 P.3d 533, 535 (2009) quoting *State v. Mubita*, 145 Idaho 925, 937, 188 P.3d 867, 879 (2008). The general requirements for admission of business records are that the documents are "produced in the ordinary course of business, at or near the time of occurrence and not in anticipation of trial." *Beco Corp. v. Roberts & Sons Constr. Co.*, 114 Idaho 704, 711, 760 P.2d 1120, 1127 (1988); I.R.E. 803(6). Where these foundational requirements are met, they "supply the degree of trustworthiness necessary to justify an exception to the rule against hearsay." *Id.* Circumstances underlying the creation of business records must

“impl[y] a high degree of veracity.” *Christensen v. Rice*, 114 Idaho 929, 934, 763 P.2d 302, 307 (Ct.App. 1988). Idaho Rule of Evidence 803(6) states:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Idaho Rule of Evidence 902(11) provides for the self-authentication of certified records of regularly conducted activity where:

The original or a duplicate of a record of regularly conducted activity, within the scope of Rule 803(6), which the custodian thereof or another qualified individual certifies (i) was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters, (ii) is kept in the course of the regularly conducted activity and (iii) was made by the regularly conducted activity as a regular practice, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness...

Here, Holloway stated in his affidavit he is the Custodian of Records for Wells Fargo and is authorized to make the affidavit as he is familiar with the manner and method by which Wells Fargo maintains its books and records because of the scope of his job responsibilities. Affidavit in Support of Motion for Summary Judgment, p. 1. Holloway’s knowledge of Plaintiff’s maintenance of business books and records includes computer records of defaulted accounts. *Id.*

All of Giannini’s arguments are misplaced. Holloway’s role as Custodian not only places his testimony on the statements being made in the ordinary course of business, at or near the time of occurrence and not in anticipation of trial within a hearsay exception, but also provides for self-authentication of the statements. See I.R.E. 803(6) and 902(11). Further, Giannini has provided no support for his contention that plaintiff Wells Fargo Bank,

N.A. is an entity separate and distinct from Wells Fargo Card Services. While it *appears* that Wells Fargo Card Services is a part of the larger Wells Fargo Bank, N.A., plaintiff Wells Fargo does not address this contention by Giannini in its reply. At oral argument, counsel for Wells Fargo pointed out that Giannini's contract is with Wells Fargo, and the name used (Wells Fargo Card Services) on Giannini's account statement is of no import. Finally, Giannini's best evidence argument is also misplaced. Idaho Code § 9-411 (Secondary Evidence of Writings- When Admissible) states, absent an applicable exception, there can be no evidence of the contents of a writing other than the writing itself. The very statements by Holloway in his affidavit (that Giannini owes an amount of \$25,229.00 to Wells Fargo and has not made payment on that debt) are based on the attachments to his affidavit, which, in turn, are the best evidence of the status of the account. All of Giannini's objections are overruled.

**B. Sufficiency of Giannini's Proof.**

On June 5, 2009, Giannini, *pro se*, filed a "Verified Answer", denying all claims by Wells Fargo. The "Verification" at the end of the "Verified Answer", contains Giannini's signature, dated June 5, 2009, and states:

DONALD M. GIANNINI certifies that he has read the pleadings and affirmative defenses set forth herein, and that to the best of his knowledge, information and belief, formed after reasonable inquiry, believes that they are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that they are not imposed for any improper purpose such as unnecessary delay or to harass or needlessly increase the cost of litigation.

Verified Answer, p. 4. Idaho Rule of Civil Procedure 11(c) sets forth the requirements of a "verification". A verification shall be "...sworn to or affirmed before an officer authorized to take depositions by Rule 28..." I.R.C.P. 11(c). An officer authorized to take depositions is a person authorized by the laws of the State of Idaho to administer oaths. I.R.C.P. 28(a).

Giannini's "Verification" on his Verified Answer does not bear the signature of anyone other than Giannini, let alone the signature of an officer authorized to take depositions by Rule 28 (a person authorized by the laws of this state to administer oaths). Whenever a verified answer is required, an unverified one tenders no issue. *Craven v. Bos*, 38 Idaho 722, 255 P. 136 (1924). However, Wells Fargo has not objected to the sufficiency of the verification. In a motion for summary judgment supported by a verified complaint under this rule, the nonmoving party must timely object to a nonconforming verified complaint or its nonconformity is waived. *Camp v. Jiminez*, 107 Idaho 878, 881, 693 P.2d 1080, 1083 (Ct.App. 1984). First of all, Wells Fargo is the moving party, not the nonmoving party, so a question remains under *Camp* whether Wells Fargo needs to object. Second, and most importantly, the "nonconforming" issue in *Camp* was simply and solely the lack of an express recitation of personal knowledge. *Id.* The Idaho Court of Appeals in *Camp* specifically found the claims made "plainly were within the creditor's personal knowledge", thus, there was "substantial compliance" with I.R.C.P. 56(e). 107 Idaho 878, 882, 693 P.2d 1080, 1084. In the present case, there is no "substantial compliance" as there is no signature at all before a notary or anyone else. Thus, Wells Fargo's failure to object to the consideration of any evidence contained in Giannini's Verified Answer is of no import.

Giannini's "Defendant's Objection to Plaintiff's Affidavit and Attachments in Support of its Motion for Summary Judgment", makes many claims, but does not meet the requirement of I.R.C.P. 56(e). Giannini's "Affidavit of Donald Giannini" does meet the technical requirements of I.R.C.P. 56(e), but only makes two claims: "I do not owe Plaintiff the sums alleged in the Plaintiff's Complaint", and "I have never agreed to any stated account or final balance of any monies allegedly owed to plaintiff." Affidavit of Donald Giannini, p. 1. The first contention is conclusory, and not supported by any admissible

facts. The second contention is permissible. Where an affidavit failed to specify factually what representations were made or when such statements were made and merely stated a conclusion that an affiant relied upon the advice of the agent, such supporting affidavit was inadmissible to show the absence of a genuine issue of material fact. *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 600 P.2d 1387 (1979).

Again, at the October 28, 2009, hearing, Giannini's counsel handed the Court an "Amended Affidavit of Donald M. Giannini." While the timing of this affidavit violates I.R.C.P. 56, nothing in the affidavit creates an issue of relevant fact. In that affidavit, (which, other than the timing meets the requirements of an affidavit), Giannini now *admits*:

I did obtain from Wells Fargo Bank a credit card and have used that card. Although I admit that a balance is owed on the card, I do not know whether the Plaintiff, Wells Fargo Bank, N.A., is the owner of the claim against me and I do not know the proper balance.

Amended Affidavit of Donald M. Giannini, p. 1, ¶ 2. Giannini also claims:

I have been sued by "Wells Fargo Bank, N.A." However, the name listed on billing statements sent to me is "Wells Fargo Card Services." I do not know whether wells Fargo Card Services is a separate legal entity or what relationship may exist between it and Wells Fargo Bank, N.A., that permits one of them to sue me on a claim that may belong to the other or to some third party.

*Id.*, p. 1, ¶ 3.

Thus, what Giannini has placed at issue is extremely limited.

### **C. Account Stated.**

An account stated is a document exhibiting the state of account between two parties and the balance owed by one to another, and when assented to, either expressly or impliedly, it becomes the new contract. *Needs v. Hebener*, 118 Idaho 438, 442, 797 P.2d 146, 150 (Ct.App. 1990). "To constitute an account stated the transaction must be

understood by the parties as a final adjustment of the respective demands between them and the amount due.” *O’Harrow v. Salmon River Uranium Dev., Inc.*, 84 Idaho 427, 430-31, 373 P.2d 336, 338 (1962). An account stated requires two things to be present: (1) a mutual examination of the claims of each other by the parties and (2) an agreement to settle the respective claims with the final statement intending to be an adjustment of the whole account and the demands on both sides. *O’Harrow*, 84 Idaho 427, 431, 373 P.2d 336, 338. “Both parties must have a known bona fide dispute as to the amount owed for the theory of account stated to apply.” *Grover v. Wadsworth*, 147 Idaho 60, 64, 205 P.3d 1196, 1200 (2009).

Wells Fargo argues a monthly statement indicating the amount due and owing was mailed to Giannini and “[a]s a result of the Defendant’s failure to object to the charges, the Defendant has assented to such amount due and owing.” Memorandum in Support of Motion for Summary Judgment, p. 4. It is unclear whether a genuine issue of material fact exists regarding whether there was a bona fide dispute and whether the monthly statement mailed to Giannini was intended to be a final adjustment of the claim. Based on his Answer, it appears Giannini is disputing the amount claimed to be due and owing, as Giannini states Wells Fargo was served with his valid disputes and Wells Fargo’s failure to respond should estop them from bringing the instant action. Answer, p. 2, ¶ 11. Giannini argues, as to Wells Fargo’s breach of contract claim, there was no meeting of the minds regarding the essential terms of the credit card agreement. Defendant’s Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, pp. 2-3. Giannini goes on to argue none of the account statements indicate a final balance for purposes of Wells Fargo’s account stated theory. *Id.*, at 3. Giannini’s final argument appears to be that Wells Fargo presented no evidence that Giannini ever actually received any of the account statements.

*Id.*, at 4.

The question remaining for this Court is whether the monthly statement mailed to Giannini was intended and understood by both parties to be a final adjustment of the respective demands between them and the amount due. Giannini attempts to raise genuine issues of material fact with respect to the amount due and owing, as he claims Wells Fargo received consideration from the sale of the debt to a collection agency and from an insurance policy on the account at issue. Answer, pp. 2-3, ¶¶ 14 and 15. Giannini argues these amounts were not properly deducted from the balance Plaintiff now seeks to recover. *Id.* However, as shown above, Giannini has provided no admissible facts to support these claims. As set forth above, this Court has found that the only admissible item of evidence by Giannini is his statement: "I have never agreed to any stated account or final balance of any monies allegedly owed to plaintiff." Affidavit of Donald Giannini, p. 1. However, that doesn't create an issue of fact under Wells Fargo's account stated theory.

In *Barnes v. Huck*, 97 Idaho 173, 540 P.2d 1352 (1975), the Idaho Supreme Court determined that an action was properly brought on the original account where the record did not support the claim that an account stated was created because the parties had not reached a mutual agreement constituting a final adjustment of the account setting forth a new balance. 97 Idaho 173, 179, 540 P.2d 1352, 1358. In evaluating assent given, the Court of Appeals has stated an objection to an account rendered must be "more than a mental operation on the part of the person receiving the account, and must be made to the party rendering the account or its duly authorized agent, or at least to one whom the debtor believes to be such." *Argonaut Ins. Co. v. Tri-West Const. Co.*, 107 Idaho 643, 646, 691 P.2d 1258, 1261 (Ct.App. 1984). In the present case, that is all we have at present, a

“mental operation” of Giannini via his claim: “I have never agreed to any stated account or final balance of any monies allegedly owed to plaintiff.” Affidavit of Donald Giannini, p. 1. Assent sufficient to transform an account rendered into an account stated may be express or implied, with assent being implied from a failure to object to a billing within a reasonable period of time, raising a rebuttable presumption of assent. *Id.*, citing *Tri-County Insurance, Inc v. Marsh*, 608 P.2d 190 (Or.Ct.App. 1980).

To give an account rendered the force of an account stated because of silence on the part of the one receiving the account, the circumstances must be such as to support an inference of agreement as to the correctness of the account. Such an inference may be rebutted.

*Id.*, quoting *Old West Enterprises, Inc. v. Reno Escrow Co.*, 86 Nev. 727, 476 P.2d 1, 3 (1970).

Summary judgment demands that the Court examine the facts and inferences in the light most favorable to the non-moving party. Here, whether Giannini timely and expressly disputed the amounts has not been placed in dispute. Nor has Giannini placed in dispute whether or not there was an agreement between the parties as to the correctness of the amounts claimed due and owing in the monthly statements, given the implication of assent under *Argonaut*. Giannini has not rebutted the presumption that his failure to object to the billing in a reasonable time amounted to assent. Giannini has not provided the Court with evidence that he did, in fact, object within a reasonable time to Wells Fargo or its agent.

#### **D. Breach of Contract.**

Formation of a valid contract requires a meeting of the minds evidenced by manifestation of mutual intent to contract. *Inland Title Co. v. Comstock*, 116 Idaho 701, 703, 779 P.2d 15, 17 (1989). Wells Fargo cites to and has provided the Court with a copy of an unreported Second District case, *Capps v. FIA Card Services, N.A.*, CV 2007 38202

(Second Judicial District), in which District Court Judge Bradbury held summary judgment in favor of FIA was appropriate, finding evidence demonstrating the existence of a contract by virtue of Capps having received an offer of credit and thereafter making transactions. Reply Memorandum in Support of Motion for Summary Judgment, pp. 3-4.

An Oregon case cited in the *Capps* decision is instructive. In *Citibank South Dakota N.A. v. Santoro*, 210 Or.App. 344, 150 P.3d 429 (Or.App. 2006), the Oregon Court of Appeals discussed the issue of when credit card agreements become binding. 210 Or.App. 344, 349, 150 P.3d 429, 432. The Court noted that Santoro, who Citibank alleged was in default and against whom Citibank sought to collect a balance owed on the account, did not dispute he had received a credit card at his request, he had not cancelled the credit card account, or that he had used the credit card. *Id.* The Oregon court cited a Georgia Court of Appeals case in which the defendant appealed a grant of summary judgment in favor of the credit card company, arguing the credit card company had failed to produce a signed credit card application as evidence. *Id.*, citing *Davis v. Discover Bank*, 277 Ga.App. 864, 627 S.E.2d 819 (2006). The Georgia Court affirmed summary judgment determining the card itself became a formal, binding contract once the defendant failed to reject the credit offer by returning the card or by its non-use; the Oregon court similarly found Santoro's "using the card constituted mutual assent to the terms of the credit card agreement." *Id.*

In the present case, Wells Fargo has presented the Court with evidence of Giannini's opening of a credit account, evidence of transactions having been made, evidence of Giannini's having made some payments on the account, and evidence that there remains an amount due and owing. Reply Memorandum in Support of Motion for Summary Judgment, p. 4; Exhibit A to Affidavit in Support of Summary Judgment; Exhibit

D to Reply Affidavit in Support of Motion for Summary Judgment. Giannini now *admits*:

I did obtain from Wells Fargo Bank a credit card and have used that card. Although I admit that a balance is owed on the card, I do not know whether the Plaintiff, Wells Fargo Bank, N.A., is the owner of the claim against me and I do not know the proper balance.

Amended Affidavit of Donald M. Giannini, p. 1, ¶ 2. Giannini's not knowing the proper balance does not place the balance asserted by Wells Fargo at issue. Giannini has done nothing to place the account balance legitimately in dispute. As such, Wells Fargo has established there are no genuine issues of material fact regarding the formation of the contract or Giannini's subsequent breach of the contract he has with Wells Fargo.

#### **E. New Issues Raised By Giannini.**

At oral argument, counsel for Giannini focused on two new issues: 1) the fact that the billing statements to Giannini were under the heading "Wells Fargo Card Services" and not Wells Fargo Bank, N.A.", and 2) the fact that the court docket identifies the plaintiff in this case as Peterson Enterprises, Inc. Giannini claims in his amended affidavit:

I have been sued by "Wells Fargo Bank, N.A." However, the name listed on billing statements sent to me is "Wells Fargo Card Services." I do not know whether Wells Fargo Card Services is a separate legal entity or what relationship may exist between it and Wells Fargo Bank, N.A., that permits one of them to sue me on a claim that may belong to the other or to some third party.

Amended Affidavit of Donald M. Giannini, p. 1, ¶ 2. Giannini also claims: "I have today noticed that on the court docket for this case the Plaintiff is indentified as "Peterson Enterprises, Inc." rather than as Wells Fargo Bank, N.A. *Id.*, p. 3, ¶ 6.

Neither of these new issues present a material issue on summary judgment.

As to the issue of Wells Fargo, N.A. versus Wells Fargo Card Services, counsel for Wells Fargo correctly pointed out that all the admitted evidence submitted by Wells Fargo shows Giannini's contractual agreement is with Wells Fargo, N.A. Counsel for

Giannini has presented the Court with no factual argument nor any legal argument as to why the monthly statement by Wells Fargo, N.A. cannot bear the heading of Wells Fargo Card Services. Leo Holloway's affidavit states: "I am the Custodian of Records for the Plaintiff." Reply Affidavit (of Leo Holloway) in Support of Summary Judgment, p. 1, ¶ 1. Holloway's affidavit then goes on to explain he is familiar with the records of defaulted accounts, that plaintiff sent monthly account statements to Giannini, and those copies are attached to his affidavit. *Id.*, pp. 1-2, ¶¶ 1-4. Holloway's affidavit doesn't state: "I am the Custodian of Records for the plaintiff Wells Fargo, N.A., and not the custodian of record for Wells Fargo Bank Services", which, since Giannini has submitted no *proof* on this issue, is what Giannini would need to have Holloway's affidavit state.

As to Peterson Enterprises, Inc., counsel for Giannini submitted Exhibit A and B, respectively, copies of a printout of the Idaho Repository for this case, and a Hearings Report for this case. Both documents show this case to be captioned: "Peterson Enterprises Inc v. Giannini." The Court neglected to state on the record at oral argument on October 28, 2009, whether these exhibits were admitted, but now admits Exhibit A and B. However, at oral argument on October 28, 2009, the Court stated on the record that its review of the Court file shows not one single document with the name "Peterson Enterprises Inc" as the plaintiff, nor is there any reference in any document in the file to "Peterson Enterprises Inc". Giannini is asking this Court to make a clerical error by a court clerk at some point along the way an issue of material fact to avoid summary judgment. This the Court cannot allow.

Nothing in either of these arguments raises an issue on summary judgment under either the account stated theory or the breach of contract theory.

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**IV. CONCLUSION AND ORDER.**

For the reasons stated above, the Motion for Summary Judgment brought by plaintiff Wells Fargo, N.A. must be granted as to both plaintiff's claim of account stated and plaintiff's claim of breach of contract.

IT IS HEREBY ORDERED the Motion for Summary Judgment brought by plaintiff Wells Fargo, N.A. is GRANTED in favor of Wells Fargo, N.A. and against Giannini as to both plaintiff's claim of account stated and plaintiff's claim of breach of contract.

Entered this 9<sup>th</sup> day of November, 2009.

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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of November, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

**Lawyer**  
Alec T. Pechota

**Fax #**  
208-384-0442

| **Lawyer**  
Kevin Waite

**Fax #**  
667-8360

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Jeanne Clausen, Deputy Clerk