COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

FSS, INC.	:	
Plaintiff	:	**CASE NO. 2015 CVH 00516**
vs.	:	**Judge McBride**
BOBBY YADEN,	:	**DECISION/ENTRY**
Defendant	:	

Thomas R. Kendall, attorney for the plaintiff FSS, Inc., 525 Vine Street, Suite 800, Cincinnati, Ohio 45202

James R. Garvin, attorney for the defendant Bobby Yaden, 30 Garfield Place, Suite 640, Cincinnati, Ohio 45202

This cause is before the court for consideration of the plaintiff's motion for summary judgment filed on June 23, 2015. The court established a briefing/hearing schedule, and after the time for requesting oral argument under the order had passed without any request being made, the court took the issues raised by the motion under advisement.

Upon consideration of the motion for summary judgment, the evidence presented for the court's consideration, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The defendant Bobby Yaden and a third party, Scott Yaden, entered into a "Personal Loan Agreement" (hereinafter referred to as "Loan") with Huntington National Bank (hereinafter referred to as "Huntington").[1] The Loan was executed on December 20, 2005 for a principal amount of $17,357.08.[2] The Loan provided for 60 payments of $360.35 per month at an annual interest rate of 9.95%.[3] The Loan was secured by the truck that the Loan was used to purchase.[4]

The defendant failed to make all the scheduled payments, and on February 15, 2007 he was notified that the truck would be sold at a public sale.[5] On May 11, 2007 Huntington mailed the defendant a post-sale notice, informing him that the collateral had been sold and that the remaining deficiency balance owed to Huntington was $10,865.81.[6] The last payment made on the Loan was on May 13, 2010, in the amount of $483.09. At that time, the remaining balance was $8,595.32.[7]

Huntington is not a party to this action because on February 14, 2012, it assigned the receivable arising from the Loan to the plaintiff FFS, Inc.[8]

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[1] Aff. Ex. A.
[2] Aff. Ex. A.
[3] Aff. Ex. A.
[4] Aff. Ex. A.
[5] Aff. Ex. C., Post Sale Notice in Pls. Produc. to Def.
[6] Post Sale Notice in Pls. Produc. to Def.
[7] Loan Transaction History in Pls. Produc. to Def.
[8] Aff. Ex. B.

The plaintiff alleges that "the evidence designated by Plaintiff establishes that Defendant is indebted under the Personal Loan Agreement in the amount of $9,462.32, plus accrued interest through June 10, 2015 in the amount of $7,699.66, plus interest thereafter at the rate of 9.95% per annum * * *"[9] In his answer, the defendant denies that he is in default of the Loan or that he is indebted to the plaintiff.[10]

The plaintiff moved for summary judgment on June 23, 2015. The defendant responded on July 28th, and the plaintiff filed its reply on August 6th.

STANDARD OF REVIEW

The court must grant summary judgment, as requested by a moving party when:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."[11]

The court must view the evidence in a light most favorable to the nonmoving party.[12] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits,

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[9] Pls. Mem. to Mot. for Summ. J. at pg. 1.
[10] Defs. Answer at pg. 1.
[11] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).
[12] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

depositions, etc.[13] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[14]

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[15] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[16]

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[17] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[18] To satisfy this burden, Civ.R. 56 requires the movant to do more than make "a conclusory assertion that the nonmoving party has no evidence to prove its case."[19] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[20]

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his

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[13] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998) citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).
[14] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).
[15] Id. at 251-52.
[16] Id. at 250.
[17] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).
[18] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[19] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).
[20] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

pleadings, demonstrating that a "triable issue of fact" remains.[21] The duty of the nonmoving party is more than that of resisting the motion's allegations.[22] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[23] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[24] It may not rely on the pleadings or unsupported allegations.[25]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."[26] The trial court maintains the sound discretion to admit or exclude relevant evidence.[27] When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[28]

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that

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[21] *Burt*, 75 Ohio St.3d at 293.
[22] *Wells Fargo*, 2013-Ohio-855at ¶ 25.
[23] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).
[24] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Shaw v. J. Pollock & Co.*, 82 Ohio App.3d 656, 659, 612 N.E.2d 1295 (9th Dist.1992) citing Civ.R. 56(E) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[25] Id.
[26] *See Wells Fargo*, 2013-Ohio-855at ¶ 15 citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[27] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18 quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.
[28] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

the affiant is competent to testify on the matters in the affidavit.[29] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[30] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[31] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[32]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[33] Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[34]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."[35] If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[36]

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[29] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).
[30] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[31] Id. citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[32] Id.
[33] Id. quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.
[34] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).
[35] *Wells Fargo*, 2013-Ohio-855 at ¶ 17 citing Civ.R. 56(E).
[36] Id. at ¶ 16 citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[37] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[38]

LEGAL ANALYSIS

The plaintiff has moved for summary judgment to collect the balance allegedly due to it under the terms of its assigned Loan with the defendant. The construction of contracts is a matter of law.[39]

When confronted with an issue of contract interpretation, courts give effect to the parties' intent.[40] Generally courts presume that the parties' intent resides in the language they chose to employ in the contract.[41] The court's primary objective when construing a contract is "to ascertain and give effect to the intent of the parties * * *"[42] In

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[37] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[38] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[39] *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146, 7 O.O.3d 403, paragraph one of the syllabus (1978).
[40] *Pierce Point Cinema 10, L.L.C. v. Perin-Tyler Family Foundation*, 12th Dist. Clermont No. CA2012-02-014, 2012-Ohio-5008, ¶ 11, citing *Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶37.
[41] *Perin-Tyler Family Foundation*, 2012-Ohio-5008 at ¶ 11, citing *Shifrin v. Forest City Ets., Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992).
[42] *Lopez v. Citizens Auto Fin.*, 8th Dist. Cuyahoga No. 91184, 2009-Ohio-1082, ¶ 15, citing *Alternatives Unlimited-Special, Inc. v. Ohio Dep't of Edn.*, 168 Ohio App. 3d 592, 2006-Ohio-4779, 861 N.E.2d 163, ¶ 20.

addition, in an action on an account, the assignee must prove that it is the real party in interest by presenting evidence of a valid assignment agreement.[43]

The defendant in the instant case argues that summary judgment is not proper because the plaintiff's supporting business records are either hearsay or are unsupported by personal knowledge. Hearsay statements are "not admissible evidence in a summary judgment context unless an exception to the hearsay rule applies."[44] For a business record to be admissible, it "must be authenticated by evidence sufficient to support a finding that the matter in question is what its proponent claims."[45] Moreover, under Evid.R. 901(B)(10), the "authentication of business records is governed by Evid.R. 803(6)," which is the hearsay exception for business records.[46]

In the plaintiff's supporting affidavit, the loan documents the affiant relied on were created by Huntington, the assignor. The defendant argues that the affiant, who is an officer at plaintiff FSS, Inc., not Huntington, has no personal knowledge of what documents Huntington keeps in the ordinary course of business, and therefore the affidavit is inadmissible hearsay.[47] However, the court need not address this question because, as a threshold matter, the plaintiff's supporting affidavit suffers from a

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[43] *Midland Funding, L.L.C. v. Snedeker*, 5th Dist. Licking No 12-Ca-56, 2014-Ohio-887, ¶ 15, citing *Worldwide Asset Purchasing L.L.C. v. Sandoval*, 5th Dist. Stark No. 2007-CA-00159, 2008-Ohio-6343, ¶ 26.

[44] (Citation omitted.) *Wenninger*, 2011-Ohio-3904 at ¶ 8.

[45] *Roberts*, 2013-Ohio-5362 at ¶ 28 citing Evid.R. 901.

[46] *Roberts*, 2013-Ohio-5362 at ¶ 28, citing *Cent. Mtge. Co. v. Bonner*, 12th Dist. Butler No. CA2012-10-204, 2013-Ohio-3876, ¶ 14.

[47] Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the time of hearing, offered in evidence to prove the truth of the matter asserted" therein. Under Evid.R. 801(C), a business record is not hearsay and is authenticated when it manifests "four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the custodian of the record or by some other qualified witness." *Roberts*, 2013-Ohio-5362 at ¶ 28 citing *Bonner*, 2013-Ohio-3876, ¶ 13.

separate defect that is dispositive of the motion for summary judgment, irrespective of the hearsay issue.

As the movant, if the plaintiff fails to satisfy its initial burden of showing that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law, the motion for summary judgment must be denied.[48] The only evidence which the court may consider is pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact.[49] Other documents outside this rule may be introduced by incorporating them by reference in an affidavit.[50]

In the instant case, the plaintiff filed an affidavit from an FFS, Inc. officer to support its motion for summary judgment. The affidavit has multiple documents attached as supporting exhibits. The affiant maintains that his statements are made based on his personal knowledge or based on the records related to the plaintiff's Loan with the defendant.[51]

The affiant's personal knowledge regarding the defendant's loan transactions is based exclusively on his review of the loan documents. In response to the defendant's interrogatory asking how the affiant knows that the defendant is in default, the plaintiff answered that the affiant's "knowledge is founded upon the business records which were supplied to Plaintiff by the Huntington National Bank, and which were incorporated into the records of Plaintiff and relied upon by Plaintiff in its efforts to collect the balance

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[48] *Burt*, 75 Ohio St.3d at 293. *See Williams*, 2014-Ohio-3778, ¶ 8.
[49] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15 citing *Wenninger*, 2011-Ohio-3904 at ¶ 7.
[50] *Martin*, 70 Ohio App.3d at 89., *Biskupich*, 33 Ohio App.3d at 222.
[51] Aff. at ¶ 2.

due from Defendant."[52] Thus, the affiant's personal knowledge derives from the documents he reviewed.

Throughout his affidavit, the affiant relies upon three documents. Exhibit A is the Personal Loan Agreement the defendant signed with Huntington.[53] Exhibit B is described as "[c]opies of the pre- and post-sale notices."[54] The attached Exhibit B is actually the Assignment document that assigned Huntington's Loan to the plaintiff. Exhibit C is described as "a copy of the Assignment and excerpt of the accompanying Asset Schedule, collectively."[55] However, the attached Exhibit C is a Presale Notice. In addition, the plaintiff's motion references an additional affidavit exhibit, Exhibit D. Exhibit D is not attached, but is also described as the post-sale notice detailing "the calculation of the deficiency and balance due."[56] None of the attached exhibits contain the Post-Sale Notice or excerpts of the Asset Schedule the affiant relied on.

Under Civ.R. 56(E), sworn or certified copies of all papers referred to in the affidavit must be attached to the affidavit.[57] As discussed above, when an affiant relies on documents in the affidavit but fails to attach those documents, the court must strike the portions of the affidavit that rely on those documents.[58] In the instant case, the defendant's knowledge is exclusively founded on Loan documents, which is not a problem in and of itself. However, the defendant failed to attach the Post-Sale Notice and the Asset Schedule, which he claims to have relied on.

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[52] Answer to Interrog. No. 15.
[53] Aff. at ¶ 2.
[54] Aff. at ¶ 6.
[55] Aff. at ¶ 8.
[56] Pls. Mem. to Mot. for Summ. J. at pg. 1.
[57] *Williams*, 2014-Ohio-3778 at ¶ 15, citing *Seminatore*, 66 Ohio St.2d 459.
[58] *Wells Fargo*, 2013-Ohio-855 at ¶ 16, citing *Farno*, 2012-Ohio-5245 at ¶ 10. *See Wenninger*, 2011-Ohio-3904.

A similar issue was present in *Third Federal S. & L. Assn. of Cleveland v. Famo*, 12th Dist. Warren No. CA2012-04-028, 2012-Ohio-5245, ¶ 2, which involved a defendant who defaulted on a note securing her mortgage. The plaintiff brought a complaint in foreclosure and moved for summary judgment.[59] In support of its motion for summary judgment, the plaintiff attached an affidavit from one of its legal analysts.[60] Similar to the averments at issue in the case at bar, the *Famo* affiant claimed that the defendant was in default of payment because she had not made any payments since June 2011. The affiant further stated that the plaintiff was due the principal balance of $77,955.60, plus interest at the rate of 6.75% per annum from May 1, 2011 until paid * * *" The affiant claimed that he or she had reviewed documents pertaining to the loan history and evidence of default, but those documents were not attached or served with the affidavit.[61]

Due to the lack of documentation that Civ.R. 56(E) requires for an affidavit, the court struck the portions of the affidavit that made claims about the defendant's default and the alleged debt owed to the plaintiff.[62] The court clarified that the plaintiff did not need to submit every document in its file on the defendant's case, but it was required to at least attach documents material to the "default in payment and applicable portions of the payment history."[63] The court concluded that the plaintiff had not met its initial

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[59] *Famo, 2012-Ohio-5245 at* ¶¶ 2-3.
[60] Id. at ¶ 3.
[61] Id. at ¶ 9.
[62] Id. at ¶ 11.
[63] Id. *See Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 40 (finding in a foreclosure action that the bank's affiant did not need to attach an entire payment history to show that a debt was due to the bank when the affidavit had a payoff statement for the loan attached instead).

burden for summary judgment because the plaintiff had not submitted adequate evidence of the defendant's default and the debt owed to the plaintiff.[64]

As in *Farno*, the plaintiff in the instant case neglected to attach the documents that formed the foundation for the affiant's knowledge that (1) "The last payment made to the subject account was received on May 13, 2010, in the amount of $483.09," and (2) "After all payments and credits are applied, there remains due the principal balance of $9,462.32, plus accrued interest from May 7, 2007 through November 19, 2014 in the amount of $7,176.04, plus interest thereafter on the principal balance at the contract rate of 9.95% per annum."[65] The motion for summary judgment similarly alleges that "evidence designated by Plaintiff establishes that Defendant is indebted under the Personal Loan Agreement in the amount of $9,462.32, plus accrued interest through June 10, 2015 in the amount of $7,699.66 * * *"

However, none of the documents that the plaintiff attached as exhibits contain facts stating that a principal balance and interest remain due under the Loan. Without the Post Sale Notice that the affiant relied on, or any other attached Loan transaction or payment history to support the affiant's averments, the court must strike paragraphs seven and nine in the affidavit. Those paragraphs state when the last payment was made on the loan and the amount the defendant owes the plaintiff.[66] Based on the remaining affidavit and its exhibits, there is insufficient evidence to conclude that the defendant still owes money to the plaintiff. The court must conclude that the plaintiff

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[64] Id. at ¶¶ 12-13.
[65] Aff. at ¶¶ 7, 9.
[66] Paragraph seven states: "The last payment made to the subject account was received on May 13, 2010, in the amount of $483.09." Paragraph nine states: "After all payments and credits are applied, there remains due the principal balance of $9,462.32, plus accrued interest from May 7, 2007 through November 19, 2014 in the amount of $7,176.04, plus interest thereafter on the principal balance at the contract rate of 9.95% per annum."[66]

has failed to satisfy its initial burden of demonstrating that the defendant breached the terms of the Loan and that the defendant owes a debt to the plaintiff.

CONCLUSION

For the aforementioned reasons, the plaintiff's motion for summary judgment is not well-taken and is hereby denied.

A telephone case management conference will be held on February 12, 2016 at 2:15 p.m. Counsel should conference and call (513)732-7104 at that time.

IT IS SO ORDERED.

DATED: 1-13-16

Judge Jerry R. McBride