

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Richland County
In the Court of Common Pleas

APR 7 2015

G. Thomas Cooper, Jr., Circuit Court Judge

S.C. Supreme Court

Supreme Court Case No.: 2015-000218

CACH, LLC.....Respondent,

v.

Toby Hoffman, Jr., a/k/a
Carl W. Hoffman, Jr.....Petitioner,

RETURN TO AMENDED PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

Respondent CACH, LLC (“CACH”) is a special purpose entity that purchases charged-off receivables. CACH purchased two charged-off “Bank of America”¹ credit card debts incurred by Petitioner Toby Hoffman, Jr. (“Hoffman”). On April 12, 2011, CACH, LLC filed a Complaint against Hoffman alleging that, as assignee of his two debts, it was entitled to a judgment against him for the balances that were due and owing.

Hoffman filed an Answer denying the allegations in the Complaint. However, in his responses to Requests for Admissions Hoffman admitted to having and using Bank of America credit cards with the numbers at issue. He admitted to making payment on the cards, to receiving monthly statements on each of the accounts, and to never raising any disputes on the accounts. Hoffman also admitted to having an outstanding balance on both accounts, although he denied the amounts claimed by CACH.

The case was scheduled for a bench trial in front of the Honorable G. Thomas Cooper, Jr. in the Court of Common Pleas for Richland County on October 9, 2012. After a trial at which Hoffman made a tactical decision not to appear (R. p. 17, line 22-p. 18, line 5) Judge Cooper rendered judgment in favor of CACH in the amount of \$134,600.15 by way of an Order filed October 17, 2012. Hoffman appealed that Order, assigning three points of error. He

¹“Bank of America” credit cards were previously issued by FIA Card Services, N.A., which merged into Bank of America, N.A. on October 1, 2014.

has now abandoned one of those points of error, apparently conceding the correctness of the trial court's ruling.

I. RESPONSE TO QUESTION FOR REVIEW ON CERTIORARI NUMBER I - CACH L.L.C. PROVED THAT IT HAD A VALID ASSIGNMENT IN ORDER TO PURSUE CLAIMS AGAINST MR. HOFFMAN

In a continued misstatement of the facts and record Hoffman repeats his false representation to the Court that his accounts were issued by Bank of America, N.A. There is no evidence in the record to support Hoffman's contention that Bank of America, N.A. ever owned or issued his accounts. Each account statement in the record shows that FIA Card Services, N.A. was the issuer of Hoffman's accounts.² (R. p. 70, 74, 78, 82, 84, 86, 90, 94, 107, 113, 119, 125, 129, 131, 133, 137, 141, 143, 147, 151, 153, 157, 161, 165, 169, 173, 177, 181, 185) ("This account is issued and administered by FIA Card Services, N.A.") Hoffman admitted to the authenticity of those account statements. (R. p. 200) He admitted to having and using the accounts. (R. p. 198) Hoffman admitted to having accounts ending with the same numbers as those on which CACH sued. (R. p. 198) He admitted to making payments on the accounts, to receiving monthly payments on the accounts, and to there being unpaid balances on the accounts. (R. p. 199) He also admitted to the

² To some extent Hoffman's representation became true, as FIA Card Services merged into Bank of America, N.A. on October 1, 2014. *See* <http://research.fdic.gov/bankfind/detail.html?bank=33318&name=FIA+Card+Services%2C+National+Association&tabId=3&searchName=FIA+Card+Services%2C+National+Association>. However, it is clear from the record that FIA Card Services, N.A. was the issuer of Hoffman's card and that Hoffman's representations to the contrary are without basis in fact or law.

authenticity of the account statements at issue. (R. p. 200) The admissions were a part of the evidence at trial. (R. p. 14, line 21-p. 15, line 15)

As a matter of law, any matter admitted in response to a request for admission is conclusively established. See Rule 36(b), SCRCP. Hoffman did not seek leave to withdraw his admissions, and he is therefore bound by them. *Id.*; *Hinson-Barr, Inc. v. Pinckard*, 292 S.C. 267, 270, 356 S.E.2d 115, 117 (S.C. 1987). Thus, the issuance of the accounts by FIA Card Services, N.A. is supported by the record. There is no evidentiary (or other) basis for Hoffman's false assertions that the cards were issued by any other entity, and his admissions bind him.

The record establishes that FIA Card Services, N.A. assigned Hoffman's accounts to CACH. Magic West testified without objection to CACH's purchase and ownership of the two accounts. (R. p. 22, line 25-p. 23, line 5; p. 30, lines 12-15, p. 36, lines 13-19) He authenticated the bills of sale, and he testified without objection to the balance due from Hoffman. (R. p. 23, line 6-p. 24, line 18; p. 27, line 15-p. 28, line 23; p. 30, line 3-p. 31, line 23; p. 33, line 15-p. 35, line 1; p. 36, line 20-p. 37, line 1) The failure to object to the questions posed to Mr. West and to the answers given waived any complaint as to the testimony because the failure to object when evidence is offered constitutes a waiver of the right to have the issue considered on appeal. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 198, 638 S.E.2d 667, 672 (2006); *McCreight v. MacDougall*, 248 S.C. 222, 226, 149 S.E.2d 621, 622 (1966); *see, also Knight v. Sullivan Power Company*, 140 S.C. 296, 138 S.E. 818 (1927). The unobjected-to

testimony of Mr. West proved CACH's entitlement to the judgment granted by the trial court, and the documents of which Hoffman complains are merely cumulative of that testimony, rendering any alleged error harmless.

Furthermore, the assertion that there was a failure to prove chain of title is essentially a claim that CACH lacked standing to sue. However, lack of standing is an affirmative defense. *Truluck v. Snyder*, 362 S.C. 108, 112, 606 S.E.2d 792, 794 (S.C. Ct. App. 2004). Hoffman failed to plead that defense. See Hoffman's Answer, (R. pp. 9-10). Rule 8(c), SCRPC, requires that affirmative defenses be "set forth affirmatively." Hoffman therefore waived any complaint of lack of standing by failing to plead the affirmative defense. See, e.g., *First Service Corp. v. Cape*, 299 S.C. 147, 150, 382 S.E.2d 919, 921 (S.C. 1989).

II. RESPONSE TO QUESTION FOR REVIEW ON CERTIORARI NUMBER II - THE EVIDENCE RELIED UPON BY CACH TO PROVE ITS CASE WAS NOT HEARSAY AND THEREFORE WAS SUFFICIENT TO ESTABLISH ITS CLAIM.

As noted above, at trial the bill of sale and the exhibit thereto (labeled "Loan Schedule") were admitted without objection for both accounts. (R. p. 24, lines 14-20; p. 31, line 24-p. 32, line 7; pp. 60-67; pp. 98-104) The admission of those exhibits render Magic West's testimony merely cumulative of the unobjected-to evidence as the exhibits to the bill of sale contained all of the information necessary to tie the accounts to Hoffman and to show the balance that he owed. As is also noted above, Mr. West testified without objection to CACH's ownership of the accounts and to the balances due. Under such

circumstances, even the bill of sale was cumulative of the unobjected-to oral testimony.

Hoffman's reliance on *CACH, L.L.C v. Askew*, 358 S.W.3d 58 (Mo. 2012) is misplaced, as that case actually supports CACH's position that Magic West was a qualified witness to prove up the exhibits. In *Askew*, the witness (Eakins) testified:

that she had "bank training with most of the major banks" with which CACH worked. She did not testify that she had any bank training with Providian, Washington Mutual, or Worldwide. When asked how records were kept at Providian Bank, Washington Mutual, or Worldwide, Eakins testified, over objection based on hearsay, "in the normal and ordinary course of business." To have laid a proper foundation for the admission of Exhibit 7, she must have been a "qualified witness" as that term is used in § 490.680.

Askew, 358 S.W.3d at 64. The *Askew* court actually distinguished the record before it from other cases in which a witness showed knowledge of another entity's business records.

In stark comparison, in the present case Magic West testified that he was an authorized representative of CACH who had received training from Bank of America (the parent company of the account issuer) as to its policies and procedures in keeping records. (R. p. 20, line 8–p. 22, line 5) Hoffman did not explore or even challenge Mr. West's testimony concerning his training and qualifications to testify as to the record-keeping practices of a Bank of America subsidiary were neither explored nor challenged on cross-examination. West's knowledge is sufficient to attest to the issuer's records. *See United States v. Wein*, 521 Fed. Appx. 138, 2013 U.S. App. LEXIS 7794 (4th Cir. 2013). In fact,

the *Askew* court recognized that a witness with the qualifications attested to by Mr. West is qualified to testify.

In *Carruth*, a records custodian for the Missouri highway patrol laid the business records foundation for fingerprint cards received from the St. Louis police department by testifying about “the standard procedures used by the St. Louis Police Department to collect fingerprints.” 166 S.W.3d at 591. In determining that the witness in *Carruth* was qualified to lay the foundation for the fingerprint cards, the appellate court stated: “The qualifying witness must establish that he or she has knowledge of the standard procedures used by a particular jurisdiction to collect fingerprints from arrestees.” *Id.* *Carruth* is distinguishable from the current case in that Eakins failed to demonstrate that she had any knowledge of the standard procedures used by either Providian, Washington Mutual, or Worldwide. She only testified that she had knowledge of how “most of the major banks” that CACH did business with kept records; she did not testify as to her personal knowledge regarding the procedures used by any of the particular alleged prior owners of Askew’s account.

Askew, 358 S.W.3d at 64-65. Other courts have recognized the validity and admissibility of business records testimony such as that given by Magic West. *See, e.g., Midfirst Bank, SSB v. C.W. Haynes & Co.*, 893 F.Supp. 1304, 1310 (D.S.C. 1994) *aff’d*, 87 F.3d 1308 (4th Cir. 1996); *In re McFadden*, 471 B.R. 136 (Bankr. D.S.C. 2012); *Beal Bank, SSB v. Eurich*, 444 Mass. 813, 831 N.E.2d 909 (Mass. 2005).

In fact, courts in a number of jurisdictions have held that the custodian of records for a litigant can authenticate as part of the litigant’s own business records the records of another company acquired as part of a business transaction. *See, e.g., Air Land Forwarders, Inc. v. U.S.*, 172 F.3d 1338, 1342 (Fed. Cir. 1999) (testimony from witness with first-hand knowledge regarding original preparation of documents not necessary where “an organization

incorporated the records of another entity into its own, relied upon those records in its day-to-day operations, and where there are other strong indicia of reliability”);³ *United States v. Childs*, 5 F.3d 1328, 1334 (9th Cir. 1993) (same principle); *United States v. Jakobetz*, 955 F.2d 786, 801 (2d Cir. 1992) (“Even if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity”); *Cage v. CACH, LLC*, 2014 U.S. Dist. LEXIS 71467, 2014 WL 2170431, *3 (W.D. Wash. 2014) (finding that declaration of a CACH authorized representative with training such as that of Mr. West provided adequate foundation for records showing the assignment of plaintiff’s accounts to defendants, and stating “[a]lthough some of the records were originally created by businesses other than CACH, ‘records a business receives from others are admissible under Federal Rule of Evidence 803(6) when those records are kept in the regular course of business, relied upon by that business, and where that business has a substantial interest in the accuracy of the records’”) (quoting *MRT Construction Inc. v. Hardrives*, 158 F.3d 478, 483 (9th Cir. 1998)).

In the present case Mr. West testified to his knowledge of the bank’s standard record-keeping procedures and to his receipt of that training from the bank. He therefore satisfied the requirements imposed by *Askew*.

At trial, Magic West testified without objection to CACH’s ownership of the accounts and to the balances due. (R. p. 30, lines 3–15; p. 31, lines 12–23)

³ There are certainly strong indicia of reliability here. FIA Card Services, N.A. is a national bank that is regulated by the United States government and required by multiple federal laws to maintain accurate records. In addition, as noted above, Hoffman admitted to receiving monthly statements on his accounts and not disputing any of those statements.

In addition, as noted above, the bill of sale and exhibit for each account were admitted without objection. (R. p. 24, lines 14-20; p. 31, line 24-p. 32, line 7; pp. 60-67; pp. 98-104) The failure to object precludes the argument that Hoffman makes. *Reid v. Kelly*, 274 S.C. 171, 174, 262 S.E.2d 24, 26 (S.C. 1980); *Beck v. Gibson*, 268 S.C. 627, 630, 235 S.E.2d 716, 717-18 (1977).

Finally, there is no evidence in the record of any lack of reliability of the records. The only time reliability was even mentioned was at R. p. 35, lines 4-8:

4 MR. ELLIOTT: Again, I object. These are
5 still hearsay under the business records exception. I
6 won't get into any kind of voir dire. I will save it
7 for cross examination to show that these are not
8 reliable.

That was the end of any evidence or argument regarding reliability. Hoffman did nothing in either cross-examination or closing argument to challenge the reliability of the business records.

Furthermore, Hoffman's argument lacks credibility. He admitted to having accounts ending with the same numbers as those on which CACH sued. (R. p. 198) He admitted to using those accounts. *Id.* He admitted to making payments on the accounts, to receiving monthly payments on the accounts, and to there being unpaid balances on the accounts. (R. p. 199) Hoffman admitted to the authenticity of the account statements at issue. (R. p. 200) Having admitted to the authenticity of the documents and having offered no

evidence as to a lack of reliability of the records, Hoffman has no basis in fact or law for his second ground for rehearing.

III. PETITIONER'S SUPPLEMENTAL AUTHORITY IS INAPPOSITE

Petitioner submitted an amended Petition for Certiorari in which he cited the Court to *CACH, LLC v Fatima*, 32 Misc. 3d 1231(A), 2011 N.Y. Misc. LEXIS 3974 (N.Y. Dist. Ct. 2011). CACH would first note that *Fatima* is a ruling on a motion for summary judgment based on certain documents submitted to the court, not a trial on the merits. Second, this is an unpublished decision from a court of limited jurisdiction, and it is not precedential. Third, it is not persuasive.

The facts of *Fatima* were markedly different. In *Fatima* the bill of sale and accompanying Loan Schedule were not admitted without objection. Also, no monthly credit card statements were submitted for consideration by the court. Unlike Hoffman, *Fatima* did not admit to having and using the credit cards at issue. She did not admit to making payment on the cards, to receiving monthly statements on each of the accounts, and to never raising any disputes on the accounts. Hoffman admitted all of those facts and he further admitted to having an outstanding balance on both accounts.

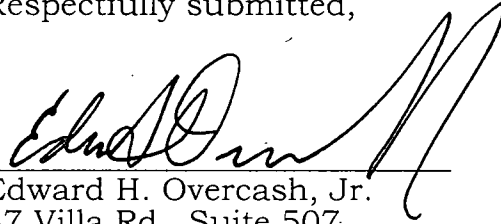
Fatima did not involve testimony by a witness who testified without objection to the elements of CACH's causes of action, and it appears that in *Fatima* the defendant (unlike Mr. Hoffman) may have denied CACH's standing. As noted above, Petitioner failed to plead the affirmative defense of lack of standing, thereby waiving it.

Finally, in *Fatima* the opinion states that “Defendant's account was issued by Bank of America, not FIA Card Services.” In the present case, twenty nine monthly credit card statements were submitted into evidence, each one providing that the subject accounts were “issued and administered by FIA Card Services, N.A.” The bills of sale for these accounts designate FIA Card Services, N.A. as the assignor and CACH, LLC as the assignee. The clear, unequivocal, and uncontroverted (other than by the unsubstantiated and erroneous statements of Petitioner’s counsel) is that FIA Card Services, N.A. issued and administered Hoffman’s accounts. (R. p. 70, 74, 78, 82, 84, 86, 90, 94, 107, 113, 119, 125, 129, 131, 133, 137, 141, 143, 147, 151, 153, 157, 161, 165, 169, 173, 177, 181, 185). Hoffman admitted to the authenticity of the account statements (R. p. 200), each of which clearly disclosed to him the issuer of his account. *Fatima* may have had an account that was issued by Bank of America, N.A., but Hoffman clearly did not.

CONCLUSION

The trial court and Court of Appeals ruled correctly in this case, and their judgments should be affirmed.

Respectfully submitted,



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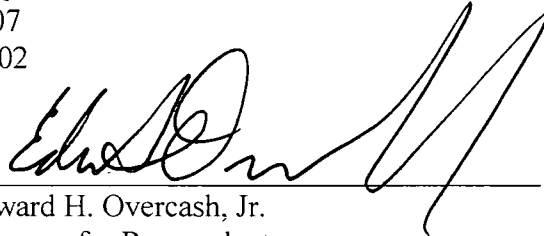
vs.

Toby Hoffman, Jr. a/k/a
Carl W. Hoffman, Jr.,.....Petitioner.

PROOF OF SERVICE


This is to certify that on the 2nd day of April, 2015, the undersigned served a copy of the RETURN TO AMENDED PETITION FOR CERTIORARI by depositing a copy of the same into the United States Mail, postage pre-paid and in the correct amount to the following:

John D. Elliott, Esquire
Post Office Box 607
Columbia, SC 29202



Edward H. Overcash, Jr.
Attorney for Respondent

SWORN to before me this 2nd
day of April, 2015.

 (SEAL)

Notary Public for South Carolina
My Commission Expires: 10/4/20



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April 2, 2015

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S.C. Supreme Court

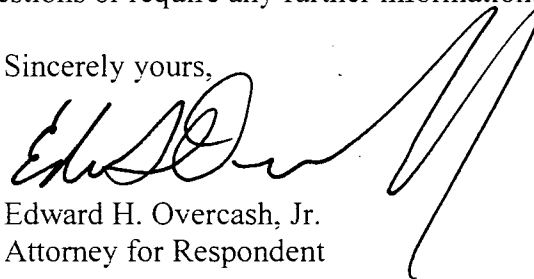
Re: CACH, LLC v. Toby Hoffman, Jr., a/k/a Carl W. Hoffman, Jr.
Supreme Court Case No.: 2015-000218

Dear Mr. Shearouse;

I am enclosing herewith the original and seven (7) copies of the Respondent's Return to Amended Petition for Certiorari and Proof of Service on opposing counsel. Please return one (1) clocked copy in the envelope provided herewith.

Please contact me if you should have any questions or require any further information.

Sincerely yours,



Edward H. Overcash, Jr.
Attorney for Respondent

cc: John D. Elliott, Esquire
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