

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Richland County  
In the Court of Common Pleas

G. Thomas Cooper, Jr., Presiding Judge

**RECEIVED**

JUL - 6 2015

**S.C. Supreme Court**

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Court of Appeals No. 2015-000218

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C.A.C.H., L.L.C.....Respondent,

v.

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

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**BRIEF OF PETITIONER**

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|   |               |
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| Rule 803(6), South Carolina Rules of Evidence | <i>passim</i> |
|---|---------------|

(ii)

## Other Authority

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**STATEMENT OF THE ISSUE ON APPEAL**

**WAS THE EVIDENCE RELIED UPON BY CACH L.L.C.  
TO PROVE ITS CASE INADMISSABLE HEARSAY?**

## STATEMENT OF THE CASE

On April 12, 2011, CACH, L.L.C., filed an action against Toby Hoffman, Jr. alleging it was the assignee of two debts owed to Bank of America, and seeking judgment against him for the debt. Mr. Hoffman timely served an answer denying the allegations of the complaint. The action was tried before the Hon. G. Thomas Cooper, Jr. in the Court of Common Pleas for Richland County on October 9, 2012 and judgment was rendered against Mr. Hoffman in the total amount of \$134,600.15, in an order filed October 17, 2012. Mr. Hoffman served notice of appeal on November 17, 2012. The court of appeals entered decision on December 3<sup>rd</sup>, 2014. The appellant petitioned for rehearing on December 12<sup>th</sup>, 2014 and the court of appeals denied rehearing in an order entered January 8<sup>th</sup>, 2015. On February 5<sup>th</sup>, 2015, the appellant filed a petition for certiorari with this Supreme Court, and on May 7<sup>th</sup>, 2015 this court granted the writ.

## FACTS

CACH, L.L.C. is a grand-scale national buyer of debt.<sup>1</sup> In this case, it brought an action against Mr. Hoffman asserting it had bought two debts it claimed Mr. Hoffman owed Bank of America, one with a principal balance of \$99,972.21 and a smaller debt of \$12,266.15.<sup>2</sup>

The sole witness testifying for CACH L.L.C. was one “Magic West,” who was not an employee of CACH, but rather an employee of its parent company, Square Two.<sup>3</sup>

Mr. West relied on the affidavits of two bank officers of Bank of America to prove that the defendant, Mr. Hoffman, owed debts to Bank of America. He testified that the affidavits were created by Bank of America “...and provided to us specifically for this account.” [ROA p. 25, l. 15-16; p. 68; p. 105] The affidavits were introduced over objection to prove Mr. Hoffman owed debts on both accounts.

Mr. West also testified that his company – or CACH, more precisely – had ordered account information from Bank of America for the two accounts, and that they had been generated “by a computer.” [ROA p. 43, l. 12-13.]

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<sup>1</sup> For a discussion of this industry and especially its effect on consumers in small claims courts, see generally, Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J.Bus. & Tech. L. 259 (2011)

<sup>2</sup> The assignor of the two debts was FIA Card Services. [ROA p. 60; p. 97.] While FIA Card Services is a wholly-owned subsidiary of Bank of America N.A., it is a separately chartered bank, and is apparently one of the leading issuers of credit cards in the United States, according to the U.S. Office of the Comptroller of the Currency. *Community Reinvestment Act Performance Evaluation of FIA Card Services, N.A.*, <http://www.occ.gov/static/cra/craeval/oct10/22381.pdf>, retrieved June 28, 2015. It is one of two chartered banks owned by Bank of America Corporation, the other being Bank of America N.A. [ROA pp. 15-17; p. 190.] The existence of any contract between the original issuer of the credit accounts and Mr. Hoffman is unclear from the record, since, according to officers of Bank of America N.A. the original has been destroyed or no longer in existence. [ROA p. 68; p. 105.] Nevertheless, the account records under “miscellaneous” assert that “[the] account is issued and administered by FIA Card Services, N.A.,” see, e.g. ROA p. 107; pp. 28-29. Presumably, then, the owner of the accounts was FIA Card Services, N.A.

<sup>3</sup> According to Mr. West, CACH has no employees. [ROA. p. 20, l. 14-15.]

Thus, CACH L.L.C. asserted that it had carried its burden of proof through a witness who relied on affidavits of other witnesses and records obtained from a computer operated by another company, a bank for whom he did not work.

#### ARGUMENT

#### THE EVIDENCE RELIED UPON BY CACH L.L.C. TO PROVE ITS CASE WAS INADMISSABLE HEARSAY.

In his testimony, Mr. West referenced affidavits of the sale of the accounts from Bank of America and their balances, introduced in evidence over objection. [ROA p. 26; p. 32.] Mr. West also introduced credit card statements said to be the records of the two accounts CACH acquired from the bank.

These records were introduced under the business record exception to the rule against hearsay, at rule 803(6) of the S.C. Rules of Evidence. That rule admits in evidence business records or data compilations “made at or near the time” of their making “if kept in the course of a regularly conducted business activity” by “a person with knowledge” of their making. *Id.* Moreover, any such records may only be introduced by the custodian of the records, “or other qualified witness.”

First, the affidavits relied upon by Mr. West and introduced as evidence were clearly inadmissible hearsay. *Lee v. Gulf Insurance Company*, 248 S.C. 296, 149 S.E.2d 639 (1966). Furthermore, the affidavits were clearly prepared in anticipation of this litigation; hence they are self-serving and inadmissible for that reason. *Woodward v. South Carolina Farm Bureau Insurance Co.*, 277 S.C. 29, 282 S.E.2d 599 (1981) holding that the admission of a letter from a treating physician was reversible error due to the self-serving statements contained in it. *See also, LVNV Funding L.L.C. v. Mastaw*, 2012 WL 1534785 (Tenn. App. Apr. 30, 2012, “Documents prepared specifically for the

subject litigation are ‘properly excluded because of motivational concerns arising from the fact that they were generated for litigation purposes,’ as opposed to records generated for business purposes.” Id, at \_\_\_, citing 2 Broun, *McCormick on Evidence* Section 288 (6<sup>th</sup> Ed.1999). See also, *Ortega v. CACH L.L.C.*, 396 S.W.3d 622 (Tex. Ct.App.), holding that precisely these kinds of affidavits offered by CACH L.L.C. and Bank of America employees are inadmissible hearsay.

Moreover, while Mr. West testified that he was generally familiar with all banking records from institutions around the country, he conceded that he was not an employee of the Bank of America nor responsible for overseeing the generation of the records from the Bank of America. [ROA pp. 41-43] He testified that his company – CACH or Square Two – only became the custodians once those records were sent to it, ostensibly by the same affidavits he was relying upon. [ROA p. 42, l. 19-25.] Indeed, he testified that the original records custodian was “a computer,” somewhere in Bank of America. [ROA p. 43, l. 5-6.]

Mr. West is neither the custodian nor a “qualified witness” under the rule and its rationale. He could not testify about the mode of preparing the records. *State v. McFarlane*, 279 S.C. 327, 306 S.E.2d 611 (1983). Merely because he has possession of the records does not qualify him as a custodian nor a person who can attest to their preparation. *Connelly v. Wometco Enterprises, Inc.*, 314 S.C. 188, 442 S.E.2d 204 (Ct.App.1994).

Other courts have ruled this type of evidence in an action to collect a debt on assignment is inadmissible. See, *LVNV Funding L.L.C. v. Mastaw*, *supra*, at \_\_\_\_\_. In *CACH L.L.C. v. Askew*, 358 S.W.3d 58 (Mo. 2012), the Missouri Supreme Court expressly rejected the notion that an employee of CACH was a “qualified witness,” with

“sufficient knowledge of the business operation and methods of keeping records of the business to give the records probity,” citing *Asset Acceptance v. Lodge*, 325 S.W.3d 525, 528 (Mo.App.2010). Mr. West’s training in the policies and procedures in records keeping at various banks, including Bank of America makes him no more qualified than the witness for CACH in *Askew*. Indeed, in *CACH L.L.C. v. Askew*, the Missouri Supreme Court ruled inadmissible under that state’s business records exception precisely the kind of evidence which CACH relies upon here. See, *CACH v. Askew*, No. 94814 (Mo.Ct.App. ED, filed March 29, 2011).

The court of appeals found this testimony sufficient to qualify under Rule 803(6) because they were conveyed by a person “with knowledge” of the records to Mr. West, an “other qualified witness” under the rule, citing *Twelfth RMA Partners, L.P. v. National Safe Corporation*, 335 S.C. 635, 518 S.E.2d 44 (1999), and *Midfirst Bank, SSB v. C.W. Haynes & Co.*, 893 F.Supp. 1304 (D.S.C. 1994)(noting many bank records are generated by computer in this modern age). The witnesses in those cases had much more direct involvement in the collection and management of the information there than Mr. West did here, who simply accumulated records from another entity. His involvement in maintaining the records was much more attenuated than those witnesses and hence unqualified.

Furthermore, merely because the records were generated by a computer does not guarantee their trustworthiness. Certainly Bank of America didn’t when it assigned the debts to CACH. In its declarations assigning its interests, Bank of America transferred the accounts:

“...without recourse and without representations or warranties of any type, kind, character or nature, express or implied...”

Declarations of Debra L. Pellicciaro, Exhibits 1 and 4, p. 60; p. 67.

The transactional relationship between Bank of America and CACH, Inc. and the integrity of the creditor's records underlying those transactions has been sharply criticized. A journal article discussing that relationship reveals that in 2009 and 2010, CACH L.L.C. bought debts with a face value of as much as \$65 million per month for 1.8 cents on the dollar, attesting to the accounts' "questionable quality."<sup>4</sup> That transactional relationship was the subject of an underlying contract, a "forward flow" agreement in which Bank of America promised to sell CACH L.L.C. more charged off accounts each month.

In thousands of cases in state courts, CACH has appended a single page from its purchase agreements with Bank of America attesting to its ownership of delinquent credit card debt. CACH has omitted from many such filings the more than 30 additional pages where Bank of America disclaims the accuracy of its debt records.<sup>5</sup>

Accompanying the article is a graphic comparison of what the agreement between Bank of America and CACH L.L.C. said, and what Bank of America avowed to courts across the country in these lawsuits.

The touchstone of the admissibility of hearsay is trustworthiness, and that is as true of the business records exception to the hearsay rule under Rule 803(6) as any other. *See, e.g. U.S. v. Pelullo*, 964 F.2d 193 (3d Cir.1992), explaining that bank records, despite circumstantial indicia of trustworthiness nevertheless require foundational predicate testimony to attest to their integrity.

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<sup>4</sup> Horwitz, Jeff, "Bank of America Sold Card Debts to Collectors Despite Faulty Records," 177 *American Banker* 62 (March 29, 2012), available at [http://www.americanbanker.com/issues/177\\_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html](http://www.americanbanker.com/issues/177_62/bofa-credit-cards-collections-debts-faulty-records-1047992-1.html).

<sup>5</sup> *Id.*

Mr. West was in no position to testify about the integrity of the records retained by Bank of America on the accounts CACH L.L.C. purchased, how Bank of America assimilated the data on the accounts it transferred to CACH, L.L.C., or even which computer at Bank of America maintained or generated the data. The testimony of Mr. West, and the record evidence he introduced, were inadmissible hearsay under Rule 803(6) of the South Carolina Rules of Evidence.

#### CONCLUSION

CACH, L.L.C. did not meet its burden of proof in presenting its claims for debt against Mr. Hoffman. The judgment should be reversed.

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June 29<sup>th</sup>, 2015

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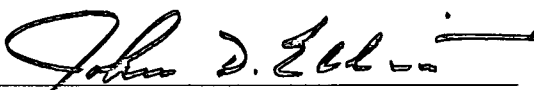
Toby Hoffman, Jr., a/k/a  
Carl W. Hoffman, Jr.....Petitioner,

**CERTIFICATE OF SERVICE**

Counsel certifies he has served the corrected Brief of Petitioner and appendix on all parties by depositing a copy of the same in the United States Mail, postage prepaid, on this 6<sup>th</sup> day of July, 2015:

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