

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
In the Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Supreme Court Case No.: 2015-000218

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S.C. Supreme Court

CACH, LLC..... Respondent,

v.

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

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent CACH, LLC (“CACH”) is a debt buyer. CACH purchased two charged-off delinquent “Bank of America”¹ credit card debts incurred by Petitioner, Toby Hoffman, Jr. (“Hoffman,” the “Accounts”). On or about April 12, 2011, CACH, as assignee of the Accounts, filed a Complaint against Hoffman to recover the combined Account balances totaling in excess of \$100,000. Hoffman filed an Answer denying the allegations in the Complaint.

In Hoffman’s responses to Requests for Admissions, which were admitted at trial without objection, Hoffman admitted to the following: he had and used the Bank of America credit cards corresponding to the Accounts (“Cards”), he made payment on the Cards, he received monthly statements for the Cards, he carried a balance on each Card, over two dozen Card statements dated between September 2008 and June 2010 (the month of the charge-off statement) were authentic, and he never raised any disputes regarding the Card statements he received. (R. pp. 198-200). Each Card statement (“Statement”) listed the current balance and transactions during the billing cycle, including a cash advance, a balance transfer, several charges, and several payments. (R. pp. 69-96 106-187, see e.g. pp. 69, 106, 118, 156.) Each Statement also contained bank contact information for disputes by telephone, and a form for Mr. Hoffman to fill out and return to dispute Account attributes or charges in writing. (R. pp. 69-96, 106-187).

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. Until the latest filing, Petitioner has argued that his card was issued by Bank of America and not FIA, notwithstanding both the account records and his admissions. Hoffman also challenged CACH’s evidence of assignment. Hoffman now appears to have abandoned those meritless assertions, although they appear throughout the record.

At trial, CACH called Magic West (“West”) as a witness. West testified that he was an authorized representative of CACH; that he had testified in that capacity in hundreds of cases throughout the vast majority of the United States; that he was familiar with CACH’s Account records; and that he was aware that CACH ordered documentation regarding purchased accounts. He also testified that he had been trained by the bank and had knowledge of the policies for how Bank of America accounts are created and transferred; how account statements are created; how payments are received; how statements are mailed; how disputes are filed and the practice of FDIC audits. (R. p. 20, line 22-p. 21, line 25; p. 41, line 12-p. 42, line 1.)

Via West’s testimony as a records custodian for CACH, Bills of Sale showing transfer of the accounts and account attributes were entered into evidence. West explained the Bills of Sale for each Account as being evidence of the transfer of the Accounts to CACH, and described their contents. (R. p. 23, line 6-p.24, line 20.) Those contents included, but are not limited to, Hoffman’s name and contact information; the Account balances at the time they were sold to CACH; Hoffman’s social security number; the last date when Hoffman made payments; and the dates the Accounts were opened. (R. pp. 62-67, 99-104.) Hoffman objected to the admission of one, but not the other. (R. p. 23, line 6-p.24, line 20; p. 30, line 16-p. 32, line 16). He offered no explanation for why he thought one was admissible but the other was not, and he offered no evidence to rebut the bills of sale. In his pleadings he never asserted that CACH lacked standing to sue him.

Over Hoffman’s hearsay objection, documents entitled “Affidavit of Sale and Certification of Debt” corresponding to each account (“Affidavits”) were admitted. (R. p.

24, line 21-p. 27, line 20; p. 32, line 18-p. 33, line 14.) West explained that CACH used these tailored affidavits to double-check the account attributes otherwise provided by the selling bank, and testified without objection to the balance due on each account. (R. p. 24, line 21-p. 27 line 20.)

West also testified over objection to the Card Statements. The objections were based on West's lack of "personal knowledge" of the contents of the statements and Bank of America's procedures in issuing statements for all Accounts. (R. p. 27, line 21-p. 30, line 1; p. 33, line 16-p. 35, line 12.)

In the bench trial before the Honorable G. Thomas Cooper, Jr. in the Court of Common Pleas for Richland County, Hoffman made a deliberate, tactical decision not to appear at the trial (R. p. 17, line 22-p. 18, line 5), and Judge Cooper rendered judgment in favor of CACH in the amount of \$134,600.15. Hoffman appealed that Order, and the Court of Appeals affirmed the trial court's Order. Hoffman now seeks certiorari review.

STANDARD OF REVIEW

This Court must affirm the lower court absent an abuse of discretion causing prejudice. "A ruling on the admission of evidence is within the trial judge's discretion and will not be disturbed on absent an abuse thereof and a showing of prejudice." *Manning v. Columbia*, 297 S.C. 451, 455, 377 S.E.2d 335, 337 (1989) (citing *Jenkins v. Waterfront Employers-Internat'l Longshoremen Assoc. Pension Welfare and Vacation Fund*, 260 S.C. 277, 195 S.E.2d 598 (1973)).

ARGUMENT

I. THE BILLS OF SALE, AFFIDAVITS, AND STATEMENTS ARE BUSINESS RECORDS, AND WERE PROPERLY ADMITTED AS SUCH AT TRIAL.

The South Carolina Rules of Evidence permit the admission of business records that would otherwise be inadmissible hearsay, based on the foundational testimony of any qualified witness. South Carolina's business records exception to the hearsay rule states, in pertinent part:

Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, 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**, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness...

South Carolina Rules of Evidence: Rule 803(6), SCRE (emphasis added). South Carolina's business records exception can also be found in South Carolina's Uniform Business Records as Evidence Act:

A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian **or other qualified witness** testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

S.C. Code Ann. § 19-5-510 (1985) (emphasis added). Neither Rule 803(6), SCRE nor S.C. Code Ann. § 19-5-510, by their own language, require an employee of a business that created a record to be the sponsor of that record. Rather, they simply require that the sponsor be the "custodian or other qualified witness." Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510. Since Rule 803(6), SCRE is patterned after the business records

exception found in the Federal Rules of Evidence, citations to authorities discussing that rule and similar state rules are included as appropriate, when this Court has not issued a definitive opinion on an aspect of this case discussed below. *State v. Rice*, 375 S.C. 302, 330-31, 652 S.E.2d 409, 423 (2007) *cert denied*, *State v. Rice*, 2008 S.C. LEXIS 357 (S.C., Dec. 4, 2008) *overruled in part on other grounds in State v. Byers*, 392 S.C. 438, 445-46 (2011).

A. This Court Should Employ the Adoptive Business Records Doctrine, In Accord with Many State and Federal Courts.

Although this Court does not appear to have ruled on the issue, the United States Court of Appeals for the Fourth Circuit, and a number of state and Federal courts have held that business records originally created by another business entity may be admissible as a business records for a party that neither prepared nor created them under the ‘adoptive business records doctrine,’ which provides for the admission of documents as business records when the proponent incorporated the records of another entity into its own, relied upon the accuracy of the records, and where there are other indicia of reliability. *See, e.g., Air Land Forwarders, Inc. v. U.S.*, 172 F.3d 1338, 1343 (Fed. Cir. 1999); *Saks Int’l, Inc. v. M/V “Export Champion,”* 817 F.2d 1011, 1013 (2d Cir. 1987); *United States v. Ullrich*, 580 F.2d 765, 771-72 (5th Cir. 1978). Apart from any other factors, Hoffman’s own admissions that were admitted into evidence at trial provide evidence of the reliability of the records. Hoffman made payments in response to and did not ever dispute the account statements over a period dating back over two years from the date of charge-off.

The adoptive business records doctrine has received widespread support nationwide. Many state courts have adopted the adoptive business records doctrine,² and Federal courts are in accord.³ The Fourth Circuit Court of Appeals affirmed the South Carolina District Court decision in *Midfirst Bank, SSB v. C.W. Haynes & Company*, which applied and discussed the features of the doctrine and the doctrine's widespread adoption as follows:

Business records of an entity are admissible even though another entity made the records, and the rule does not require an employee of the entity that prepared the record to lay the foundation. *United States v. Childs*, 5 F.3d 1328, 1333 (9th Cir. 1993) (“Exhibits can be admitted as business records of an entity, even when that entity was not the maker of those records, so long as the other requirements of Rule 803(6) are met and the circumstances indicate the records are trustworthy.”), cert. denied. U.S. 114 S. Ct. 1385, 128 L. Ed. 2d 60 (1994); *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

² *Schmutz v. Bolles*, 800 P.2d 1307, 1314 (Colo. 1990); *Bank of N.Y. v. Calloway*, 157 So. 3d 1064, 1072-73 (Fla. Dist. Ct. App. 2015); *WAMCO XXVIII, Ltd. v. Integrated Elec. Env'ts, Inc.*, 903 So.2d 230, 232-33 (Fla. Dist. Ct. App. 2005); *State v. Fitzwater*, 227 P.3d 520 (Haw. 2010); *Texas 1845, LLC v. Dvorkin*, No. 2-12-0330, 2013 Ill. App. Unpub. LEXIS 1043 (Ill. App. 2013); *Price v. Commonwealth*, No. 2002-CA-000428, 2003 Ky. App. Unpub. LEXIS 723 (Ky. Ct. App. 2003); *Burdette v. Drushell*, 837 So. 2d 54, 62 (La. Ct. App. 2002); *Beal Bank, SSB v. Eurich*, 831 N.E.2d 909, 913-14 (Mass. 2005); *Beach v. State*, 541 A.2d 1012, 1015 (Md. Ct. App. 1988); *Northeast Bank & Trust Co. v. Soley*, 481 A.2d 1123, 1127 (Me. 1984); *Portfolio Recovery Assoc's v. Lall*, 980 N.Y.S. 2d 278 (N.Y. App. Div. 2013); *People v. Markowitz*, 187 Misc.2d 266, 270-71 (N.Y. Sup. Ct. 2001); *Great Seneca v. Felty*, 869 N.E.2d 30 (Ohio Ct. App. 2006); *Simien v. Unifund CCR Ptrns*, 321 S.W.3d 235, 240-41 (Tex. App. – Houston [1st Dist.] 2010); *Unifund CCR Ptrns v. Bonfigli*, No. S1295-08, 2010 Vt. Super. LEXIS 24 (Vt. Super. Ct. May 5, 2010); *Alloway v. RT Capital, Inc.*, 193 P.3d 713 (Wyo. 2008).

³ *In re Ollag Constr. Equipment Corp.*, 665 F.2d 43, 46 (2d Cir. 1981); *United States v. Jakobetz*, 955 F.2d 786, 801 (2d Cir. 1992); *United States v. Sokolow*, 91 F.3d 396, 403-04 (3rd Cir. 1996); *United States v. Duncan*, 919 F.2d 981, 986 (5th Cir. 1990); *Brawner v. Allstate Indem. Co.*, 591 F.3d 984 (8th Cir. 2010); *United States v. Childs*, 5 F.3d 1328, 1333 (9th Cir. 1993); *United States v. Carranco*, 551 F.2d 1197, 1200 (10th Cir. 1977); *Air Land Forwarders*, U.S. 172 F.3d at 1342; *United States v. Adefehinti*, 510 F.3d 319, 326 (D.C. Cir. 2007); *Hickman v. Alpine Asset Mgmt. Group, LLC*, No. 11-1236, 2012 U.S. Dist. LEXIS 131393, 21-22 (W.D. Mo. Sept. 14, 2012); *Cage v. CACH, LLC*, No. C13-01741, 2014 U.S. Dist. LEXIS 71467 (W.D. Wash. 2014).

incorporated into the business records of the testifying entity.”); *Saks Int’l, Inc. v. M/V “Export Champion”*, 817 F.2d 1011, 1013-14 (2d Cir. 1987) (“Documents may properly be admitted under this Rule as business records even though they are the records of a business entity other than one of the parties, and even though the foundation for their receipt is laid by a witness who is not an employee of the entity that owns and prepared them.” (citations omitted)); *Mississippi River Grain Elevator, Inc. v. Bartlett & Co.*, 659 F.2d 1314, 1319 (5th Cir. 1981) (Rule 803(6) does not require the documents be prepared by the testifying business. (citing *United States v. Veytia-Bravo*, 603 F.2d 1187, 1191-92 (5th Cir. 1979), cert. denied, 444 U.S. 1024, 100 S. Ct. 686, 62 L. Ed. 2d 658 (1980)).

Moreover, Rule 803(6) does not require the testifying witness to have personally participated in the creation of the document or to know who actually recorded the information. *United States v. Keplinger*, 776 F.2d 678, 693 (7th Cir. 1985). “Obviously, such a requirement would eviscerate the business records exception, since no document could be admitted unless the preparer (and possibly others involved in the information-gathering process) personally testified as to its creation.” *Keplinger*, 776 F.2d at 694. Rather, the business records exception requires the witness to be familiar with the record keeping system. *Id.*; see also *United States v. Hathaway*, 798 F.2d 902, 906 (6th Cir. 1986). The phrase “other qualified witness” should be broadly interpreted. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE P 803(6)[2], at 803-196 to -198 (1994).

893 F. Supp. 1304, 1310-11 (D. S.C. 1994), *aff’d C.W. Haynes & Co. v. Midfirst Bank, SSB*, No. 95-2515, No. 95-2016, 1996 U.S. App. LEXIS 12567 (4th Cir. 1996).

The Bills of Sale, Affidavits, and Statements would all be admissible under the adoptive business records doctrine based on the record in this case. West testified that the Bills of Sale, Affidavits, and Statements were all requested by CACH from the bank, and incorporated into and kept in CACH’s records in the ordinary course of CACH’s business-as is the case for CACH accounts generally. (R. p. 24, line 22-p. 26, line 4; p. 27, line 21-p. 28, line 3; p. 29, line 5-p. 29, line 14; p. 33, line 3-p. 33, line 23; p. 34, line 17-p. 35, line 1; p. 42, line 19-p. 43, line 2.) As illustrated by their use in this case, the Bills of Sale, Affidavits, and Statements are all evidence that CACH uses to not only

validate the accounts they purchase but also to attempt collection of the accounts it buys, which must be maintained accurately to prevail in collection cases. Debt buyers are highly regulated and must maintain accurate account data to comply with numerous Federal and state laws, including but not limited to the Federal Fair Debt Collection Practices Act, its state counterparts across the nation, and the Federal Fair Credit Reporting Act.⁴ Bank records are inherently trustworthy. *See, e.g. United States v. Salmaniego*, 187 F.3d 1222, n.1 (10th Cir. 1999). As West testified, the individually-prepared Affidavits are used to verify other account information provided by the issuer, which bolsters the trustworthiness of the Account documents. The Bills of Sale, Affidavits and Statements all meet the incorporation, reliance, and trustworthiness requirements of the adoptive business records doctrine.

Hoffman implies in his brief that Bank of America's storage of account data on a computer diminishes its reliability, but that notion is contrary to law. Courts have recognized that "modern businesses rely largely on computers to store large quantities of information, and such information is admissible so long as it is trustworthy and reliable." *See, e.g., Midfirst*, 893 F.Supp. at 1310.

Hoffman also claims that the Affidavits should be excluded since they were prepared in anticipation of litigation, but that assertion lacks any support in the record. Again, West stated that Affidavits were used by CACH to double-check the information on the loan schedule attached to the Bill of Sale.

⁴ 15 U.S.C. § 1692 et seq.; 15 U.S.C. § 1681 et seq.

B. Regardless, West Was a Qualified Witness, Based on his Bank of America Training, Familiarity with CACH Processes, and Experience.

West was certainly qualified to authenticate the records under South Carolina Rule of Evidence: Rule 803(6), SCRE based on the liberal principles discussed in *Midfirst*, above, the “broad interpretation” of who may serve as a “qualified witness,” and West’s extensive experience and knowledge of CACH recordkeeping processes. Indeed, the South Carolina Court of Appeals has held that the custodian can convey information predating their custodianship, if the information is obtained from a person who had knowledge at the time that the records were created. *Twelfth RMA Partners, L.P. v. National Safe Corporation*, 335 S.C. 635, 518 S.E.2d 44 (1999). West was a qualified witness at the trial of this case.

Even if this Court were to move away from the weight of authority cited above and adopt the more stringent requirements announced in the *Askew* case Hoffman cites, West is still qualified here because of his Bank of America training and knowledge. 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.

CACH, L.L.C v. Askew, 358 S.W.3d 58, 64 (Mo. 2012). As is discussed below, the *Askew* court actually distinguished the record before it from other cases in which a witness had shown knowledge of another entity’s business records.

Here, 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 West’s testimony on cross-examination concerning his training and qualifications to testify. West’s knowledge—and training—are sufficient to attest to the issuer’s records. In fact, the *Askew* court recognized that a witness with the qualifications attested to by West is qualified to testify:

CACH argues that Eakins’ testimony was sufficient because she was in nearly an identical position as the custodian of records in *State v. Carruth*, 166 S.W.3d 589 (Mo. App. 2005). 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 Provident, 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.

358 S.W.3d at 64-65 (footnote omitted). In stark contrast to the witness Eakins in the *Askew* case, West testified in this case about his knowledge of the bank’s standard record-keeping procedures and his receipt of that training from the bank. He, therefore, satisfied the requirements imposed by *Askew*.

In *Klinedinst v. CACH, LLC*, a case bearing remarkable similarity to this one, the testimony of CACH’s agent in support of the business records exception was affirmed. *Klinedinst*, No. S14A-11-001, 2015 Del. Super. LEXIS 254 (Del. Super. Ct. May 22,

2015). To prove ownership of the account at trial, CACH offered the testimony of Christie Coston (“Coston”), who, like West, was employed by CACH’s parent company SquareTwo Financial Corporation. Coston testified that FIA Card Services was the successor-in-interest to MBNA, she attested to account statements sent by FIA Card Services to Klinedinst showing that FIA Card Services was the account issuer and administrator on Klinedinst’s account, and she attested to the Bill of Sale and Assignment of Loans showing that FIA Card Services assigned Klinedinst’s account to CACH. Like West here,⁵ Coston testified there that she had testified over 200 times in her capacity as the records custodian of CACH, that she had reviewed over 300 accounts, that based on her training she was familiar with the record-keeping practices of FIA Card Services and CACH’s process of acquiring accounts, and that the Assignment and Loan Schedule and account statements were made in the regular course of business and all relied upon by CACH when purchasing the accounts. The Court of Common Pleas admitted the documents and ruled in favor of CACH.

On appeal, Klinedinst argued that the Court of Common Pleas erred in finding Coston’s testimony a sufficient foundation for the admission of the documents used to establish CACH’s ownership of his account. Holding to the contrary, the Superior Court found that Coston’s testimony “certainly satisfies the foundational requirements for Coston in her role as records custodian of CACH to be considered an ‘other qualified witness.’” *Klinedinst*, 2015 Del. Super. LEXIS 254 at 10-11. The same conclusion is appropriate regarding West’s testimony here.

⁵ See R. p. 20, line 20-p. 22, line 5; p. 22, line 25-p. 24, line 13.

CACH is not the only debt buyer to be successful on these issues. For example, in *WAMCO*, plaintiff WAMCO purchased the defendants' loans from Bank of America. At trial, Robert Grauer WAMCO's vice president testified to the acquisition and boarding of the loans, to the records received from Bank of America and maintained by WAMCO and its affiliate, First City Servicing, which services loans for WAMCO, and to the maintenance of entries related to payments and balance adjustments in the ordinary course of business. He also testified that the loan payment histories reflected payments at the time they were made and the outstanding balances. He stated that WAMCO relied on the documentation and balance information that it received from Bank of America at the time WAMCO purchased the loans, and he testified that while he did not know the specific person at the bank who would have put information into its system, he knew how bank loan accounting systems worked and that the procedures were "bank-acceptable accounting systems."

The Court of Appeals in *WAMCO* held that the trial court erred in concluding that there was a lack of admissible evidence and a failure of proof as to the outstanding loan balances. *Id.* at 233. The Court of Appeals specifically stated:

Section 90.803(6) provides that records may be excluded from evidence if "the sources of information or other circumstances show lack of trustworthiness." Yet here, in admitting exhibit 10, the trial court stated that the payment history was admitted as a record of WAMCO's but that the Guarantors had the right to challenge the beginning number. The Guarantors did not demonstrate, and nothing in the record establishes, that the loan information WAMCO received from Bank of America was suspect or untrustworthy or that the balances that WAMCO claimed as due were incorrect.

Because WAMCO met its burden and properly established the amounts due under the loans through Grauer's testimony and exhibits 10 and 17, we reverse the trial court's determination that WAMCO failed to prove its damages.

Id. Court after court has recognized that the type of proof offered by CACH at trial was sufficient. Respectfully, the judgments of the trial court and the Court of Appeals should be affirmed.

II. THE STATEMENTS WERE PROPERLY ADMITTED FOR NON-HEARSAY PURPOSES, AS EVIDENCE OF THE ACCOUNT STATED BETWEEN THE PARTIES, AND TO SHOW THE EFFECT ON HOFFMAN AND HIS ADOPTIVE ADMISSION OF THEIR CONTENTS BY FAILING TO ACT.

The Statements were properly admitted for a non-hearsay purpose: to prove that Hoffman assented to the terms as set forth in the statements on an account stated theory. “An account stated is a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor. A party’s retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent.” (Restatement (Second) of Contracts § 282 (1981). CACH argued this point of law at trial. (R. p. 50, line 20-p. 51, line 9). Thus, the Statements were properly admitted as evidence of Hoffman’s intent to be bound by the terms of the statements that he admitted to having received and failed to dispute.

The Statements were also properly admitted to show their effect on Hoffman, a non-hearsay purpose. A statement is not hearsay when it is: “a statement of which the party has manifested an adoption or belief in its truth.” South Carolina Rules of Evidence: Rule 801(d)(2), SCRE. When a party to an action fails to act in response to an accusation, that failure can be considered an admission as to its truth. (*State v. Sharpe*, 239 S.C. 258, 122 S.E.2d 622 (1962), rev’d on other grounds, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)). Hoffman received the Statements, month after month, and did not dispute them-rather, he concedes having made payments on the Cards. He did not

appear at trial, so the Court received no alternate explanation as to his silence. The Statements, and Hoffman's subsequent ratification thereof by payment and failure to dispute their contents, are Hoffman's admission that the amounts specified therein were owed.

III. PETITIONER DID NOT SUFFER ANY PREJUDICE AS A RESULT OF THE ADMISSION OF THE DISPUTED EVIDENCE, SINCE PETITIONER'S OWN ADMISSIONS AND EVIDENCE ADMITTED WITHOUT OBJECTION ESTABLISHED THE ELEMENTS OF RESPONDENT'S CASE IN CHIEF.

Hoffman could not have suffered any prejudice by virtue of the admission of the disputed evidence, since his discovery responses conceded nearly every element of CACH's case in chief. Before the trial even began, Hoffman admitted nearly every element of Respondent's case in chief in the collection action. He admitted that he had Bank of America Cards with the account numbers at issue in the case. He admitted that he used the Cards, carried a balance on the Cards, and made payment on Card balances. He admitted that he received Statements and-though he has since decided to dispute the balances listed on the Statements for several years-that he never disputed any of the contents of any Statement. As a matter of law, any matter admitted in response to a request for admission is conclusively established. *See* South Carolina Rules of Civil Procedure: Rule 36(b), SCRPC. 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 (1987).

West provided additional testimony regarding CACH's receipt of the Accounts which further bolstered Respondent's case in chief, without objection from Hoffman.

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). Based on his review of the Account, he also testified without objection to the balances 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 West and to the answers given by West 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 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, as noted above, the Bills of Sale were admitted at trial without objection by Hoffman as to the assignment to CACH for both accounts.⁶ (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 West's testimony merely cumulative of other evidence, such as the exhibits to the bill of sale that 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, West testified without objection to CACH's ownership of the accounts and to the balances due.

⁶ Although Hoffman lodged hearsay objections to CACH's trial Exhibit 4 Bill of Sale and ledger documents (R. p. 32, lines 4-11), he lodged no hearsay objections or any other objection to CACH's trial Exhibit 1 Bill of Sale and ledger documents. (R. p. 24, lines 16-18).

(R. p. 30, line 3-p. 31, line 23; p. 33, line 18-p. 34, line 16). Under such circumstances, even the bills of sale were cumulative of the unobjected-to oral testimony. Furthermore, the failure to object precludes the argument that Hoffman makes. *Reid v. Kelly*, 274 S.C. 171, 174, 262 S.E.2d 24, 26 (1980); *Beck v. Gibson*, 268 S.C. 627, 630, 235 S.E.2d 716, 717-18 (1977).

It is also important to note that the bills of sale were not necessary evidence, as CACH's ownership of the accounts had not been put into dispute. CACH had no need to prove chain of title, as such proof would go to the issue of standing. 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). South Carolina Rules of Civil Procedure: Rule 8(c), SCRCPP, 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 (1989).

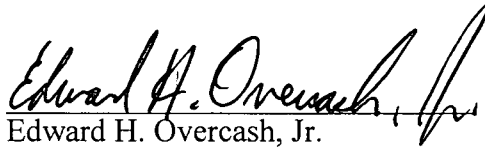
CONCLUSION

Respectfully, Hoffman's attempt to essentially establish a stringent requirement that the sponsoring witness must be an employee of the business that generated the record serves no logical purpose in light of the reasoning behind the business records exception. CACH submits that South Carolina's business records exception is more than sufficient to protect the interests of parties, including defendant debtors, without reading into the rule a harsh requirement that the sponsor of the records be from the business creating the

record. Trustworthiness and the requirements of the business records hearsay exception can all be met by non-employee sponsors as well as employee sponsors. Regardless, the Statements were also admitted as non-hearsay evidence of the existence of an account stated, and as Hoffman's admission that the accounts were owed. And finally, any error in admitting the documents was harmless, since CACH's entitlement to judgment was established by Hoffman's own judicial admissions in discovery responses and other evidence which was not objected to. The trial court and Court of Appeals ruled correctly in this case, and their judgments should be affirmed.

Dated: August 25, 2015

Respectfully submitted,



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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
In the Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Supreme Court Case No.: 2015-000218

CACH, LLC,.....Respondent,

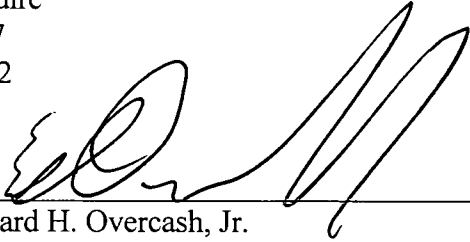
vs.

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


PROOF OF SERVICE

This is to certify that on the 25th Day of August, 2015, the undersigned served a copy of the Brief of Respondent by depositing a copy of the same into the United States Mail, postage pre-paid and in the correct amount to the following:

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Columbia, SC 29202


Edward H. Overcash, Jr.
Attorney for Respondent

SWORN to before me this 25th
day of August, 2015.

 (SEAL)
Notary Public for South Carolina
My Commission Expires: 10/04/2020

RECEIVED
AUG 27 2015
SC SUPREME COURT