

THE 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 No. 2015-000218

CACH, LLC,Respondent,

v.

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

**RESPONDENT'S RESPONSE IN OPPOSITION TO
PETITIONER'S MOTION TO STRIKE ARGUMENT IN RESPONDENT'S BRIEF**

Edward H. Overcash, Jr.
37 Villa Rd., Suite 507
Greenville, South Carolina 29615
South Carolina Bar Number: 4300
Phone: (864) 298-1110
Fax: (864) 233-5588

Manuel H. Newburger
Barron & Newburger, P.C.
1212 Guadalupe, Suite 104
Austin, Texas 78701
Texas Bar Number: 14946500
Phone: (512) 476-9103
Fax: (512) 279-0310

ATTORNEYS FOR RESPONDENT

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TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Air Land Forwarders, Inc. v. U.S.</i> , 172 F.3d 1338 (Fed. Cir. 1999)	2
<i>Cage v. CACH, LLC</i> , No. C13-01741, 2014 U.S. Dist. LEXIS 71467 (W.D. Wash. 2014)	2
<i>Midfirst Bank, SSB v. C.W. Haynes & Co.</i> , 893 F.Supp. 1304 (D. S.C. 1994)	2
<i>United States v. Childs</i> , 5 F.3d 1328 (9th Cir. 1993)	2
<i>United States v. Jakobetz</i> , 955 F.2d 786 (2d Cir. 1992)	2
 <u>Statutes</u>	
South Carolina Appellate Court Rules: Rule 242(d)(2)	1
South Carolina Appellate Court Rules: Rule 242(i)	1

COMES NOW, Respondent, CACH, LLC, and files this *Response in Opposition to Petitioner's Motion to Strike Argument in Respondent's Brief*. Respondent requests this Honorable Court to deny Petitioner's Motion to Strike Argument in Respondent's Brief. In support of this Response, Respondent would respectfully show the Court the following:

Petitioner's Motion to Strike should be denied as a matter of law because his cited authority prohibits an appellant from briefing issues not discussed in his or her petition for certiorari, not a respondent's discussion of issues clearly before the court. Petitioner has moved to strike part of the argument contained in the Brief of Respondent, citing Rule 242(d)(2), SCACR. This rule, cited by Petitioner, sets forth what issues Petitioner may include in his Petition for Certiorari. Respondent agrees that Petitioner may not raise an argument for the first time in his Petition for Certiorari. Rule 242(i), SCACR, however, states, "If the petition is granted, the Clerk shall notify each party or his attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s)." Respondent has not raised any issues for the first time in its Brief. It has merely addressed the issues previously raised by Petitioner.

Regardless, Respondent directs the Court to the following record citations, where Respondent has previously discussed the business records exception to the hearsay rule:

1. Petitioner's hearsay objections and the business records exception to the hearsay rule has been briefed by the parties throughout the appellate stages of these proceedings. *See, e.g.*, Brief of Appellant, at pp. i, iv, 3-5, filed with the Court of Appeals; Final Brief of Respondent, at pp. 3, 5, 7-11, filed with the Court of Appeals; Reply Brief of Appellant, at pp. i, 1-2, filed with the Court of Appeals; Appellant's Petition for Rehearing, at pp. 2-3, filed with the Court of Appeals; Respondent's Response to Appellant's Petition for Rehearing, at pp. 2-5, filed with the Court of Appeals; Petitioner's Amended Petition for Certiorari, at pp. 1, 5-7, filed with this Court; Respondent's Return

to Amended Petition for Certiorari, at pp. 7-12, filed with this Court; and corrected Brief of Petitioner, at pp. iv, 2-7, filed with this Court. Respondent discussed cases from other courts and jurisdictions on the business records exception to the hearsay rule and, in fact, Respondent even cited, quoted or footnoted some cases in the Section I.A. of its Brief that it had previously cited in its prior appellate briefing. *See, e.g., Air Land Forwarders, Inc. v. U.S.*, 172 F.3d 1338, 1343 (Fed. Cir. 1999); *Midfirst Bank, SSB v. C.W. Haynes & Company*, 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); *United States v. Childs*, 5 F.3d 1328, 1333 (9th Cir. 1993); *United States v. Jakobetz*, 955 F.2d 786, 801 (2nd Cir. 1992); *Cage v. CACH, LLC*, No. C13-01741, 2014 U.S. Dist. LEXIS 71467 (W.D. Wash. 2014). The *Midfirst Bank* case was even cited by the Court of Appeals in its *per curiam* Opinion.

2. Respondent's witness, Magic West, testified throughout trial that the Bills of Sale, Affidavits, and Statements were all requested by Respondent from the bank, and incorporated into Respondent's records in the ordinary course of Respondent's business—as is the case for Respondent's accounts generally. (R.¹ p. 24, line 22-p. 26, line 4; p. 27, line 21-p. 28, line 3; p. 28, lines 14-20; p. 29, lines 5-14; p. 32, lines 18-25; p. 33, lines 3-23; p. 24, line 17-p. 25, line 1; p. 42, line 19-p. 43, line 2). This testimony was (along with Magic West's other testimony qualifying him as an appropriate witness)—and is—the crux of basis for the proffer, and admission, of these records under the business records exception to hearsay rule.

3. Petitioner made many hearsay objections at trial, in response to some of which, Respondent asserted that the business records exception to the hearsay rule applied, as follows: (a) to Respondent's trial Exhibit 2 (Statements) to which Respondent responded by arguing the business

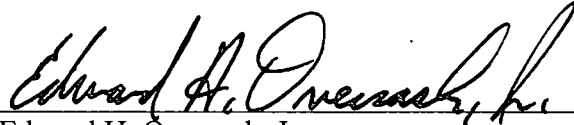
¹ Herein, citations to "R." are to the Record on Appeal.

records exception to the hearsay rule (R. p. 26, lines 13-20); (b) to Respondent's trial Exhibit 3 Statements (R. 29, lines 15-17); (c) to Respondent's trial Exhibit 4 Bill of Sale and ledger documents (R. p. 32, lines 4-11); (d) to Respondent's trial Exhibit 5 (Affidavit of Sale) (R. p. 33, lines 8 -14); (e) to trial Exhibit 6 (Statements) (R. p. 35, lines 2-12); and (f) to the underlying data in Respondent's trial Exhibits 7 and 8 (Summaries) (R. p. 35, line 25–p. 26, line 10).

Respondent therefore requests Petitioner's motion be denied.

Respectfully submitted,

October 1, 2015



Edward H. Overcash, Jr.
37 Villa Rd., Suite 507
Greenville, South Carolina 29615
South Carolina Bar Number: 4300
Phone: (864) 298-1110
Fax: (864) 233-5588

Manuel H. Newburger
Barron & Newburger, P.C.
1212 Guadalupe, Suite 104
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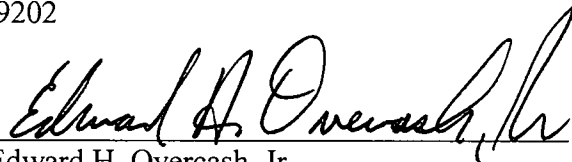
v.

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

PROOF OF SERVICE

This is to certify that on the 1st Day of October, 2015, the undersigned served a copy of the Respondent's Response in Opposition to Petitioner's Motion to Strike Argument in Respondent's Brief 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