Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000332-001 DT 02/03/2016

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

MIDLAND FUNDING L L C

BARRY BURSEY

v.

JOANNE MCCONNELL (001)
JAMES MCCONNELL (001)

JOHN N SKIBA

ARROWHEAD JUSTICE COURT
REMAND DESK-LCA-CCC

UNDER ADVISEMENT RULING

Lower Court Case No. CC2014–093604.

On November 2, 2015, Plaintiff-Appellee Midland Funding LLC (Plaintiff or Midland Funding) filed two motions[1] and requested that this Court vacate the portion of its opinion in the Higher Court Ruling/Remand (Ruling) dated October 20, 2015, and filed on October 22, 2015, referring to the Consumer Financial Protection Bureau's Consent Order—File No. 2015–CFPB–0022 filed on September 9, 2015 (Consent Order). Defendants-Appellants Joanne and James McConnell (Defendants) responded to both of these motions on November 16, 2015. This Court's ruling on these two motions shall be combined.

Plaintiff took issue with this Court's reference to the Consent Order in its Ruling and argued the reference—to the Consent Order—was "egregious and prejudicial to Plaintiff in this case, and to all of its pending cases" [*sic*].[2] This Court held a hearing on Plaintiff's motions on January 26, 2016. At that hearing, Plaintiff's counsel argued the purpose of its motions was to urge this Court to "redo its opinion and take out the Consent Order."[3]

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[1] Motion to Vacate and Motion for Rehearing.
[2] Motion for Rehearing, filed Nov. 2, 2015, at p. 2, ll. 5–6.
[3] Audio Recording, January 26, 2016, at :9:31:45–55.

Is the Reference To The Consent Order In This Court's Ruling Prejudicial To Plaintiff In Its Pending Cases?

After Midland Funding claimed the reference to the Consent Order would be prejudicial in its "pending cases," this Court reviewed the Midland Funding cases brought on appeal since October 20, 2015. The rulings from these cases do not validate Plaintiff's projected fear. This Court has ruled on three appellate matters involving Midland Funding since this Court's Ruling. The first of these, LC2015–000434–00 DT involved a procedural motion Midland Funding filed re an untimely appeal. Midland Funding prevailed on that motion. The second appeal—LC2015–000310–001 DT—was a request for rehearing because this Court had not received a copy of Midland Funding's responsive appellate memorandum at the time this Court issued its opinion. This Court reviewed its determination in light of Midland Funding's appeal, and found Midland Funding did not meet its burden of proof. This Court did not refer to the Consent Order in its opinion and specifically found argument about the Consent Order was moot because this Court did not rely on the Consent Order in formulating its opinion. Midland Funding prevailed in the third case—LC2015–000381–001 DT. In that matter, Midland Funding's witness (1) traced the transfer of the portfolio of accounts; (2) provided specific transactions showing the consumer's use of the credit card; and (3) proffered specific testimony and documentation indicating the reliability of its evidence. Although Midland Funding may have fears about how future cases may be decided, their fears are speculative. In the two evidence-based cases presented since this Court referenced the Consent Order, Midland Funding prevailed one time and lost one time. When it did lose, it did so because its witness did not have sufficient information to establish the debt.

Midland Funding did not demonstrate any predilection on the part of this—or any trial court—for bias or prejudice. Its claim about the effect of the ruling in this case on other cases is hypothetical, particularly since LCA (Lower Court of Appeals) opinions have no precedential effect. Superior Court Local Rules—Maricopa County, Rule 9.12 states—in relevant part:

> While such an opinion is posted, it may be deemed persuasive, but without binding precedential effect, and may be referenced in legal memoranda filed in appeals from limited jurisdiction court to the Superior Court.

Midland Funding did not demonstrate the Ruling is or will be prejudicial to its future cases.

The Higher Court Ruling/Remand of October 20, 2015—In General

This Court has reviewed its Ruling. The first five pages of that Ruling consisted of a review of the facts of the case. This Court discussed the transfer of the credit card debt which originated with FIA Card Services, N.A.; was transferred to Asset Acceptance; and was subsequently purchased by Midland Funding. The case involved whether Midland Funding was able to demonstrate Defendants owed the debt.

To support Plaintiff's claim, it relied on the testimony of Emily Walker, a legal specialist with Midland Credit Management (MCM), a company that services accounts for Plaintiff and who reported she had been trained by MCM on the MCM systems. Ms. Walker described how MCM received documents; and explained the number and type of documents received depended on what was in the purchase agreement. She explained MCM sends a "validation letter" or "notice of new ownership letter" to the owner of the account. Ms. Walker also referred to the Field Data Sheet MCM created. Although Ms. Walker made statements identifying Plaintiff's proffered records as falling within the business record exception to the hearsay rule, she admitted she had no information showing how the balance allegedly owing was created; and no training in how either FIA Card Services or Asset Acceptance records came into existence. In the Ruling, this Court noted Defendants asked Ms. Walker if she had a complete Loan Schedule and if she had reviewed the specific accounts on the Loan Schedule and Ms. Walker admitted she (1) did not have access to the schedule; and (2) did not have a master list of every account. When the trial court asked Ms. Walker how she verified the authenticity of the debt, Ms. Walker stated she verified the authenticity of the debt by sending out the validation letter and asking the consumer if the information was correct. Defense counsel asked Ms. Walker if she could verify the use of the credit card and Ms. Walker said she could not as there were only two statements for the account.

This Court determined Plaintiff failed to establish a valid debt and observed Plaintiff failed to (1) provide the Loan Schedule which allegedly included Defendants' credit card account in the transfer of accounts between FIA Card Services and Asset Acceptance; or (2) proffer any testimony from any witness who reviewed this Loan Schedule. In the Ruling, this Court observed Ms. Walker testified she had no access to the Loan Schedule.[4]

This Court also commented about a similar problem with the documents provided by Asset Acceptance to Midland Funding because Plaintiff failed to produce Schedule A—the document listed in the Bill of Sale between Asset Acceptance and Midland Funding—showing a specific transfer of Defendants' alleged credit card debt. When asked how Plaintiff verified the accuracy of the alleged debt, Ms. Walker—Plaintiff's only witness—responded she verified the information based on the validation letter—a letter MCM sent to the Defendants which the Defendants failed to challenge.

This Court (1) determined Plaintiff could not prove it owned this debt and held the Defendants' failure to challenge MCM's validation letter was not sufficient to demonstrate any debt since the use of a validation letter as proof of a debt is barred by the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692(g)(c). This Court found Plaintiff failed to meet the burden of proof required for a contract case—proof by preponderance of the evidence.

[4] Higher Court Ruling/Remand at p. 6.

References To The Consent Order in The Higher Court Ruling/Remand

Plaintiffs took exception to this Court's reference to the Consent Order and argued consent orders cannot be referenced in this Court's opinion because (1) Defendants were not party to the Consent Order; and (2) the "contents therefor have no binding or precedential effect on the Court" [*sic*].[5] In discussing the Consent Order in its Ruling, this Court wrote:

> . . . this Court notes Midland Funding LLC, Midland Management, Asset Acceptance Capital Corp. and their parent company—Encore Capital Group, Inc. (Plaintiff et al.)—were recently sanctioned by the Consumer Financial Protection Bureau (CFPB) in an Administrative Proceeding—File No. 2015–CFPB—0022 filed on September 9, 2015, and found to often be unreliable. In that Consent Order, the CFPB found these entities bought debts that were potentially inaccurate, lacked documentation, and were unenforceable. The CFPB determined these entities violated the Fair Debt Collection Practices Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act in their debt collection practices. The CFBP addressed the affidavits provided by these entities and held (1) their affidavits often contained misleading statements and misrepresented that the affiants had reviewed the original account-level documentation when this had not occurred; and (2) the companies failed to do the due diligence research needed for a legitimate claim. Although several Circuit Courts have held the business record exception does not require the qualified witness to have personally participated in the creation or maintenance of a document—*Keplinger*, at 693-94; *United States v. Console*, 13 F.3d 641, 657 (3rd Cir. 1993); *Saks Int'l, Inc. v. M/V Exp. Champion, id.*, 817 F.2d at 1013; *U.S. v. Lauersen*, 348 F.3d 329, 342 (2nd Cir. 2003)—the CFPB determined Plaintiff and its related companies do not fall within this standard because of Plaintiff et al.'s past conduct and egregious violations. Plaintiff et al. did not challenge this finding and, instead, "executed a 'Stipulation and Consent to the Issuance of a Consent Order,' which is incorporated by reference and is accepted by the Bureau."[6] This makes Ms. Walker's statements suspect where, as here, she failed to review any of the allegedly attached documentation which provided the needed specifics for Defendants' account.[7]
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> Although Arizona follows the "adoptive business records doctrine" which allows for the admission of documents as business records where the organization—Midland Funding—(1) incorporates the records of another entity into

[5] Motion for Rehearing filed on Nov. 2, 2015, at p. 3, l. 21.

[6] File No. 2015–CFPB—0022 ¶ 2. According to Black's Law Dictionary, a consent order is synonymous with a consent decree. A consent decree is defined as "a court decree that all parties agree to." Thus, while Plaintiff et al. did not admit any of the facts or conclusions of law other than those of jurisdiction, Plaintiff et al. did not deny these fact findings.

[7] While Ms. Walker testified Midland owned account 2081, Ms. Walker was parroting the summary documents Midland created without anyone ever authenticating the original source.

> its own; (2) relies on them in its day-to-day operations; and (3) where there are strong indicia of reliability, *State v. Parker*, 231 Ariz. 391, 296 P.2d 54, ¶¶ 31 and 33 (2013), a key question is whether the records "have sufficient reliability to warrant their receipt in evidence." While this is a determination generally left to the sound discretion of the trial judge—*Saks Intern., Inc. id*., at 817 F.2d at 1013; *United States v. Lavin*, 480 F.2d 657, 662 (2d Cir. 1973)[8]—at the time the trial judge ruled, there was no extant Consent Order or finding by the CFPB. Because of the CFPB Consent Order, Midland Funding is not entitled to any presumption of the reliability of its records.[9]

This Court referenced the challenged Consent Order in its discussion of the business record exception where this Court "noted"[10] the Encore Capital Group and its subsidiary companies were found to have purchased debts that were potentially inaccurate, lacked documentation or were unenforceable.[11] The verb "noted" does not imply any mandatory consideration and this Court did not state the Consent Order had mandatory authority.

The Consent Order and Judicial Notice

The Consent Order is a matter of public record. Matters that are contained in public records such as judicial decisions, statutes, regulations and "records and reports of administrative bodies" are subject to judicial notice *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003); and courts can take judicial notice of government reports. *See e.g. Corrie v. Caterpillar Inc*., 503 F.3d 974, 978 n. 2, (9th Cir. 2007) where the court took judicial notice of military financing guidelines published on its website; *Dodd v. Tennessee Valley Authority*, 770 F.2d 1038, 1039, n.1 (Fed. Cir. 1985) where the court took judicial notice of a report by the TVA; and *Romine v. Diversified Collection Servs. Inc*., 155 F.3d 1142, 1146–47 & n.3 (9th Cir. 1998) where the Ninth Circuit took judicial notice of a 1996 FTC letter indicating that a service similar or identical to Western Union's AVT service amounted to an indirect form of debt collection.

Consent orders have been referenced in appellate opinions. The U.S. District Court for the District of New Mexico—in *Mulford v. Altria Group, Inc.* 506 F. Supp.2d 733, 756 (D. New Mexico, 2007)—held:

> An agency can make its permission known through clear words in ways other than through a formal regulation, for example, by adjudicated cases and consent orders.

[8] The Second Circuit held: "In the final analysis, the determination of whether that reliability exists must be left to the sound discretion of the trial judge."
[9] Higher Court Ruling/Remand at p. 8.
[10] The verb "noted" has multiple meanings including to write or mark down briefly; to make particular mention of; to observe carefully; or to take notice of. www.merriam-webster.com/dictionary/note
[11] *Id*. at p. 8.

The *Mulford* Court also held:

> Although the 1971 and 1995 consent orders were specific to American Brands, Inc., and American Tobacco Company, respectively, their legal effect had broader implications for all cigarette manufacturers. A consent order directed to one cigarette manufacturer legally serves to regulate behavior of other cigarette manufacturers, as it states what the FTC considers a violation of the law against unfair and deceptive practices.
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> . . . .
>
> The FTC's enforcement mechanism through consent orders is no less effective and coercive than direct enforcement through a formal regulation.

Mulford, id., 506 F. Supp.2d at 761–62. In addition, the *Mulford* Court commented:

> Although a consent order is directed to the parties to the order, clear rules can be announced in consent orders that have general application to the industry.

Mulford, id., 506 F. Supp.2d at 768, fn.7.

References To The Consent Order

Nonetheless, even if the Consent Decree could properly be the subject of judicial notice, Plaintiff is correct that it should have been given the opportunity to respond to the propriety of this Court taking judicial notice. Additionally, this Court erred when it implied the existence of the Consent Order made Ms. Walker's statements suspect. In its Ruling, this Court wrote:

> This makes Ms. Walker's statements suspect where, as here, she failed to review any of the allegedly attached documentation which provided the needed specifics for Defendants' accounts.[12]

This Court concedes it should not have used the phrase "this makes" in the above sentence, and, accordingly, retracts this sentence. Ms. Walker's statements were not suspect because of the Consent Order. Her testimony was unsupported because it came from (1) her reliance on Defendants' alleged failure to contradict the MCM validation letter; and (2) her failure to review the documentation which allegedly provided the needed specifics for Defendants' accounts.[13]

This Court similarly retracts its statement:

> Because of the CFPB Consent Order, Midland Funding is not entitled to any presumption of the reliability of its records.[14]

[12] *Id.*
[13] *Id.*
[14] *Id.*

This Court did not presume anything about the reliability—or unreliability—of Midland Funding's records in this case. Midland Funding needed to establish the reliability of its records. While this Court explained that Plaintiff was not entitled to any presumption of the reliability of its records in this case, this Court did not state there was any presumption that Plaintiff's records were unreliable—only that this Court would not presume the records were reliable where (1) there were gaps in the records which Plaintiff's witness reviewed; and (2) the evidence establishing the validity of Plaintiff's claim was based on Defendants' alleged failure to respond to the MCM validation letter—a violation of the FDCPA.

Plaintiff argued for the reliability of its business records in its "Appellee's Response Memorandum" and relied on *State v. Parker*, 231 Ariz. 391, 296 P.3d 54 (2013) and *State v. Riggs*, 186 Ariz. 573, 925 P.2d 714 (Ct. App. 1996) [vacated on other grounds, 189 Ariz. 327, 942 P.2d 1159 (1997)] in maintaining its business records were (1) admissible under the adoptive business records doctrine; and (2) inherently reliable. This Court rejected Plaintiff's conclusion and determined Plaintiff needed to demonstrate the reliability of its business records—before the records were admissible as exceptions to the hearsay rule—because there were gaps in the presented documentation and Defendants' alleged failure to respond to the Validation Letter did not support this exception to the hearsay rule.

In Plaintiff's Motion To Vacate, Plaintiff claimed this Court "implied that it has determined as a matter of law that any testimony offered by Plaintiff's witnesses in future cases is not credible, and that none of its records are reliable."[15] This Court has not made any such determination and has not deferred to the Consent Decree as authority. The Ruling was replete with references to (1) how and where Plaintiff failed to sustain its burden of proof; and (2) Plaintiff's failure to provide actual evidence to support its claim.[16] This Court did not make any determination or comment about testimony in future cases. This Court reminds the litigants that opinions from the Lower Court of Appeals division of the Maricopa County Superior Court have no binding precedential effect. Superior Court Local Rules—Maricopa County, Rule 9.12.[17]

[15] Motion To Vacate Opinion/Ruling Dated 10/20/2015, Filed 10/22/2015 at p. 2, ll. 17–18.

[16] For example, the Higher Court Ruling/Remand refers to the failure of Plaintiff's witness to review any of the documentation supporting Plaintiff's claim other than documentation MCM created. Plaintiff's witness did not review either the Loan Schedule or Schedule A and did not know whether Defendants' accounts had actually been included. Although Ms. Walker specifically referred to "many times" statements may be received, she could not state if Defendants' account was included in these received statements. Instead, to prove the debt, Ms. Walker relied on Defendants' alleged failure to respond to the MCM validation letter.

[17] Rule 9.12 discusses the posting of non-published decisions on the Superior Court website and states—in relevant part that while it may be referenced in legal memoranda, it has no binding effect. The rule states:

> While such an opinion is posted, it may be deemed persuasive, but without binding precedential effect . . . .

This Court is mindful of the purposes of a Consent Order. As the U.S. Supreme Court stated:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

United States v. Armour & Co., 402 U.S. 673, 681-82, 91 S. Ct. 1752, 1757, 29 L. Ed. 2d 256 (1971). This Court has not interpreted the Consent Decree and has not extended it. Instead, this Court referenced the Consent Decree in the context of illustrating Plaintiff needed to produce evidence for its claims and not just rely on an assertion that the documents MCM created were necessarily admissible as adoptive business records.

Revised Higher Court Ruling/Remand

Plaintiff requested that this Court "err on the side of caution in this delicate matter" and vacate its opinion. After reviewing and weighing the presented arguments, this Court agrees it should "err on the side of caution." To do so, and, in order to clarify its previously written opinion, this Court strikes the section of its Ruling entitled The Business Record Exception To The Hearsay Rule—pp. 7–8 of the Ruling and substitutes Exhibit A in its place:

III. CONCLUSION.

Based on the foregoing, this Court modifies its Higher Court Ruling/Remand and, in order to clarify its prior opinion, substitutes Exhibit A—***The Business Record Exception To The Hearsay Rule—***from this opinion for the one in the original Ruling.

IT IS THEREFORE ORDERED modifying the Higher Court Ruling/Remand of October 20, 2015.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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Exhibit A

The Business Record Exception To The Hearsay Rule

While Ms. Walker parroted the requirements for a Rule 803(6) business exception to the hearsay rule,[18] Ms. Walker never explained how she knew some of the information she testified about. Although she stated the FIA Card Service records (1) were made at or near the time the events occurred; and (2) were made by or from information transmitted by someone with knowledge; she also stated she had no training on the business records creation and retention policies of Bank of America, FIA Card Services, and Asset Acceptance. As stated, although Midland Funding maintained the McConnell debt was included in the Loan Schedule from FIA Card Services, Midland Funding (1) produced no witness who actually examined the Loan Schedule; and (2) failed to attach the Loan Schedule. Ms. Walker admitted she had not reviewed the Loan Schedule and had no access to it. A similar problem appeared with Schedule A from Asset Acceptance. The loans transferred to Midland Funding were allegedly listed in Schedule A, but (1) no Schedule A was provided; and (2) no witness testified about the contents of Schedule A. Ms. Walker was not able to establish which records—or the contents of the records—allegedly adopted by Midland Funding. Instead, Ms. Walker repeatedly claimed her basis for determining the validity of the debt was Defendants' failure to challenge the debt as described in the MCM Notice of New Ownership letter.

Courts often find ordinary business records "tend to be unusually reliable" and the business record exception was:

> . . . designed to avoid the burdensome process of "producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering and transmitting, and recording information...." See Notes of Advisory Committee on Proposed Rule 803.

United States v. Keplinger, 776 F.2d at 693. This does not relieve Plaintiff from its duty to produce evidence to support its claims where the reliability of the records is challenged. Midland Funding lacked documentation for the alleged debt. Ms. Walker failed to review the documentation about which she testified. Midland Funding failed to produce needed specifics for Defendants' account.[19]

Although Arizona follows the "adoptive business records doctrine" which allows for the admission of documents as business records where the organization—Midland Funding—(1) incorporates the records of another entity into its own; (2) relies on them in its day-to-day operations; and (3) where there are strong indicia of reliability, *State v. Parker,* 231 Ariz. 391, 296 P.2d 54, ¶¶ 31 and 33 (2013), a key question is whether the records in this case "have sufficient reliability to warrant their receipt in evidence." While this is a determination generally left to the sound discretion of the trial judge, *Saks Intern., Inc., id.,* at 817 F.2d at 1013*; United States v. Lavin,* 480 F.2d 657, 662 (2d Cir. 1973), the trial court must have a basis for exercising its discretion. The trial

[18] Ariz. R. of Evid., Rule 803(6).

[19] While Ms. Walker testified Midland owned account 2081, Ms. Walker was parroting the summary documents Midland created without anyone ever authenticating the original source.

court lacked this basis since the proffered reason for establishing the debt in this case was the (Validation) letter. As previously stated, Ms. Walker failed to review the documentation Midland Funding received and did not personally review any of the records supplied by Bank of America, FIA Card Services, or Asset Acceptance. She could not demonstrate the records on Schedule A were the same as the records on the Loan Schedule since she did not review either of these. She could not state how she knew the debts included in the Loan Schedule were created at or near the time represented in the records although she testified this had occurred. Instead, Ms. Walker testified she was able to establish the validity of the claim because Defendants failed to respond to the MCM letter re Notice of New Ownership and Pre-Legal Review (Validation Letter). This is an insufficient basis since Defendants had no obligation to contest this letter and imposing such requirement flies in the face of § 1692(g)(c) of the FDCPA.

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