State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER BARRING TESTIMONY
OAL DKT. NO. BKI 06053-14
AGENCY DKT. NO. OTSC #E14-46

COMMISSIONER OF BANKING AND INSURANCE,
Petitioner,
v.
JOHN SAVADJIAN,
Respondent.

Ryan S. Schaffer, Deputy Attorney General, and **Aziz Nekoukar**, Deputy Attorney General, for petitioner (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Matthew S. Adams, Esq., and **Jordan B. Kaplan**, Esq., for respondent (Fox Rothschild LLP, attorneys)

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

The Department of Banking and Insurance (DOBI) seeks to admit audio recordings into evidence through a foundational witness who has no technical knowledge of the record system used to create and store them. Can such writings be admitted into evidence through such a witness? No. For electronic writings to be admitted into

evidence, the foundational witness must be sufficiently familiar with the record system used. See Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11 (App. Div. 1996).

PROCEDURAL HISTORY

On April 10, 2014, DOBI issued an Order to Show Cause, alleging that respondent John Savadjian violated the New Jersey Insurance Producer Licensing Act, N.J.S.A. 17:22A-26 et seq., by transferring orphaned accounts to his book of business without the authorization of his managing director or the consent of the policyholders. DOBI further alleged that in other instances, Savadjian forged the signatures of other policyholders. On November 7, 2014, DOBI amended the Order to Show Cause, alleging that Savadjian violated the Act by misrepresenting his identity to Prudential's Customer Service Office (CSO) on the telephone.

To prove these allegations, DOBI offers three pieces of physical evidence: (1) a compact disc, which contains a recording of the calls ("the CD"); (2) a printout of an Excel spreadsheet, which lists the dates and times of the calls, the numbers from which the calls were allegedly placed, whether the voice on the calls was Savadjian's, the policy numbers mentioned on the calls, the names of the clients whose information was sought, and a summary of what was discussed ("the Spreadsheet"); and (3) a closing memo, which contains a summary of the investigation ("the Report"). The Report also contains the CD and the Spreadsheet as attachments. Parenthetically, a recording of the calls is embedded in the Spreadsheet, but the Spreadsheet is a computer printout, so the audio recordings are not accessible through the Spreadsheet.

On December 19, 2016, DOBI sought to authenticate the CD, the Spreadsheet, and the Report through Charles Shanley, who held the position of Director in Prudential's Corporate Investigation Division (CID), but Shanley had no personal knowledge of the investigation or the writings. In fact, he had no role in the creation of the writings and no role in the investigation of Savadjian. He did not even supervise anyone who did.

Given his lack of personal knowledge, I ruled that Shanley could not authenticate the CD, the Spreadsheet, or the Report. I also ruled that he could not prove that the CD,

the Spreadsheet, or the Report was a business record. Therefore, I barred Shanley from testifying any further about the CD, the Spreadsheet, and the Report.

On January 19, 2017, I memorialized my ruling in an order; on February 27, 2017, DOBI modified my order and remanded the matter so Shanley could continue his testimony; and on August 29, 2017, I permitted Shanley to complete his testimony.

DISCUSSION AND FINDINGS OF FACT

Background Information

The audio recordings contained in the CD, embedded in the Spreadsheet, and attached to the Report had not been forensically collected and were not in native format. In fact, they had been stripped of their metadata in their entirety. As a result, Savadjian could not verify their authenticity and so objected.

To overcome this objection, DOBI intended to call their author, Thomas Schreck, to authenticate them. In his certification dated July 1, 2016, Schreck certified that he was first asked to investigate Savadjian in 2013, and as part of his investigation, he identified sixty calls he claimed originated from Savadjian. Moreover, Schreck explained that he, together with a temporary employee who worked remotely from her home in South Carolina, created a spreadsheet, which included the dates and times of the calls, the numbers from which the calls were allegedly placed, whether the voice on the calls was Savadjian's, the policy numbers mentioned on the calls, the names of the clients whose information was sought, and summaries of what was discussed on the calls. His certification is reproduced below in full:

> I, Thomas Schreck, of full age, do of my own personal knowledge hereby certify and say in lieu or affidavit pursuant to R. 1:14-4(b):
>
> 1. I am fully familiar with the facts set forth herein. I make this Certification in support of Prudential's Motion to Quash Subpoenas Directed to Caroline Feeney, Anita Wallwork and John Shashaty.

2. I currently hold the position of Director of Prudential's Corporate Investigations Division. I have held this position since 2014.

3. I had previously held the position of Manager in the Corporate Investigations Division, and I held that position from November 2009 through mid-2014.

4. In early 2013, while a Manager, I was asked to investigate the conduct of Mr. Savadjian, a prior employee.

5. As part of this investigation, Prudential identified 60 phone calls that originated from telephone numbers associated with Mr. Savadjian. I created a spreadsheet to capture pertinent information about each call, including the date and time of the call, the number from which the call was placed, whether the voice on the call was Mr. Savadjian's, whose authentication information was used, the policy number mentioned on the call, the names of the clients whose information was sought, and a summary of what was discussed on the call. A true and correct (though redacted) copy of this spreadsheet is attached hereto as Exhibit 1.

6. I personally reviewed the recordings of a number of telephone calls identified by Prudential, and I incorporated that information into the spreadsheet.

7. Once I had assured myself as to which data should be captured and how best to capture it, I delegated the task of listening to 16 of the 60 recordings and entering the information I had selected onto the spreadsheet to Anita Wallwork, a temporary employee who worked remotely from her home in South Carolina. A true and correct copy of an email I sent to Ms. Wallwork assigning her this task is attached hereto as Exhibit 2.

8. Ms. Wallwork had been a full-time Prudential employee in South Carolina before retiring in 2011. Ms. Wallwork no longer does any temporary work for Prudential, and I am not aware of whether she still resides in South Carolina.

9. During the period from February 14, 2013 to February 21, 2013, Ms. Wallwork worked at this task under my direction and supervision. A true and correct copy of an email I received from Ms. Wallwork, informing me that she had completed these tasks, is attached hereto as Exhibit 3.

> 10. My investigation was ongoing, and in June 2013, I was investigating calls initiated by Mr. Savadjian using another person's authenticating information. As a result of those calls, some clients surrendered their policies or took out a loan against the policy. I identified specific questions that I had drafted. True and correct copies of two emails containing these requests are attached hereto as Exhibits 4 and 5.
>
> 11. I did not ask Ms. Wallwork to do anything else in connection with the investigation, and she would not have undertaken additional tasks without my directions.
>
> I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.
>
> [Certification of Thomas Schreck dated July 1, 2016.]

Significantly, Schreck does not mention the creation of the CD, the record system used to create the Spreadsheet, or the creation of the Report.

The date Schreck was supposed to testify was November 28, 2016, but on November 22, 2016, less than a week before Schreck was to testify, DOBI advised that it was not going to call Schreck as its witness to authenticate the CD, the Spreadsheet, or the Report. DOBI explained that Schreck had been suspended from Prudential so it wanted to find someone else to authenticate the writings. DOBI later advised that Prudential had fired Schreck for unspecified reasons while Savadjian added that Schreck had filed a complaint against Prudential for wrongful termination. As a result, DOBI asked for an adjournment so it could find someone else to authenticate the CD, the Spreadsheet, and the Report.

Savadjian objected, but I acceded, and DOBI found Shanley, who testified on December 19, 2016, and then again on August 29, 2017.

His testimony is summarized below.

Initial Testimony

Shanley

Shanley testified that he had been employed by Prudential for five years, and that he held the position of director. (Tr. of Dec. 19, 2016 ("T1"), 6:11–19.) Shanley stated that the CID investigates fraud for Prudential, and that the CID investigates approximately 200 to 300 cases each year. (T1, 9:23–25.) Shanley explained that during an investigation it was customary to create a report, and that those reports are kept in a file. (T1, 10:4–10.) When asked if the file was computer-based or cloud-based, Shanley was non-responsive. He said that CID was "encouraged to do it more electronically," and that documents are scanned and kept in an "electronic file." (T1, 10:15–22.)

Shanley testified that he was aware of the CID investigation into Savadjian; that he had investigated other cases that involved the misrepresentation of identity to the CSO; and that those investigations also involved the review of calls. (T1, 11:7 to 25:4.)

Shanley testified that he has completed hundreds of investigations in his years at Prudential—just not this one. (T1, 25:5–13.)

Verint

Shanley testified that CID investigators use software called the "Verint System" to retrieve the phones calls from the CSO. (T1, 25:24 to 26:1.) Shanley stated that the Verint System is "more than a giant answering machine." (T1, 26:11.) He explained that it records the phone number of the originating call, the number it went to, and the call itself so you can listen to it. (T1, 26:12–16.) He also said that it records the date and time of the call. (T1, 26:17–18.)

Shanley testified that the Verint System records calls to the CSO automatically and contemporaneously, and that it stops recording when the call ends. (T1, 26:20 to 27:3.) Shanley stated that he has used the Verint System. (T1, 27:4–5.) Shanley explained that he will listen to a call and then search the number associated with the call to see if

there are other calls from the same number. (T1, 27:7–18.) Shanley further explained that the basic search parameters allow the user to search by date and by incoming or outgoing call. (T1, 27:19 to 28:7.) Shanley said that the Verint System has been in use at Prudential for as long as he has worked at Prudential. (T1, 28:16–19.)

Regarding record retention, Shanley testified that it is forever—but he was equivocal:

> Q: When that information comes in, how long is it stored?
>
> A: As far as I know it's forever. I mean I'm sure there's an archive process to it, and there is a document retention period that it might fall in, but I've never gone back to find something and not found it. So, I don't know if there's a back in that cut it off."
>
> [T1, 28:10–15.]

Shanley was also unsure about the ability of the Verint System to delete calls:

> Q: Okay. Can telephone calls, the audio of that, be removed from the Verint System in any way, downloaded?
>
> A: They could be downloaded, certainly.
>
> Q: Onto what?
>
> A: Well, what we—I mean again from a technological standpoint, I don't know if I'm explaining it right, but we'll create the equivalent—well, it is, it's an Excel spreadsheet where we basically download the calls, and they're all on there. You can click on it and play the calls from the spreadsheet.
>
> [T1, 28:2 to 29:5.]

Finally, Shanley testified that creating such spreadsheets depends on the case: "I mean, if you have a lot of calls, you'll do that. If you only have one or two, you usually just leave the call in the file." (T1, 29:6–12.)

Schreck

Shanley confirmed that he had no part in the CID's investigation of Savadjian and no supervisory role over Schreck:

> Q: Did you supervise Thomas Schreck?
>
> A: No.
>
> Q: Did you supervise any part of the investigation in 2013 by the CID into John Savadjian?
>
> A: No.
>
> [T1, 29:13–17.]

Order

Given his lack of personal knowledge, I barred Shanley from testifying any further about the CD, the Spreadsheet, or the Report. My ruling and order, however, was modified and remanded. Thus, Shanley returned to continue his testimony.

Additional Testimony

Shanley returned on August 29, 2017, to continue his testimony. By then, he had retired from Prudential. He had also been better prepared. Curiously, he now calls the Report a "closing memo" and its exhibits "business records." His testimony is summarized below.

Records

Shanley testified that he goes into the "business record of Prudential" and assembles records, and that he sometimes creates spreadsheets or "something" to keep the records organized. (Tr. of August 29, 2017 ("T2"), 8:3–9.) Shanley stated that the closing memo is a memorandum that lays out the background of the investigation, details the steps that the CID takes, and includes the conclusion that is reached. (T2, 8:21–13.)

Shanley explained that there will also be exhibits to support the closing memo, and that the exhibits are "business records." (T2, 8:23 to 9:5.) Shanley said that the investigator has the discretion to create the spreadsheet based on the number of calls. (T2, 9:15–20.)

Shanley testified that memos and their exhibits used to be stored physically but were later stored electronically. (T2, 10:7–11.) Shanley stated that he was unsure when the memos and exhibits were switched from "paper files" to "electronic files," but guessed that the process began in 2013 or 2014 and was completed by 2016. (T2, 10:12–23.) Shanley explained that everyone in the CID has access to these files so they are only secure to the extent that everyone in the CID has access to them. (T2 11:6–12.)

Shanley then turned his attention to Savadjian.

Savadjian

Shanley testified that a report was issued in 2013 about Savadjian, that he had reviewed the report about Savadjian and its exhibits, and that the documents about Savadjian were authentic. Yet Shanley had no personal knowledge about when or how the documents were created. Incredibly, Shanley stated that he knew the documents were authentic because he was given the documents by someone in Prudential's legal department who told him that the documents were authentic. In other words, Shanley was not even the one who retrieved the documents from the record system. As such, the sole basis for authenticity of the documents at issue in this case is the hearsay statement by Shanley that someone in Prudential's legal department told him that the documents were authentic:

> Q: Do you know of any CID investigation done at Prudential regarding John Savadjian?
>
> A: Yes.
>
> Q: What do you know about that?

A: I know about—I have the—there was a report that was issued in 2013 and exhibits and I've received [the report] and the exhibits and I've gone in the records basically to authenticate that those documents and exhibits were in our business records.

[T2, 11:17–25.]

Q: Have you personally reviewed any of the records created by CID regarding John Savadjian?

A: Yes.

[T2, 13:7–9.]

Q: Does the CID report contain all the usual sections the report would contain?

A: Yes.

[T2, 17:23–25.]

Q: [I]s this the 2013 CID Report?

A: Yes.

[T2, 47:19–20.]

Q: How do you know that this is the same copy of the 2013 CID report that's maintained at Prudential?

A: I was—it had every indication that it's the same report. I was given a copy of it out of the file. This appears to be exactly the same as the file copy that I was provided with.

[T2, 47:25 to 48:5.]

Q: Who gave the document to you?

A: Someone from Prudential's legal department.

Q: Okay. And is that copy the same as this copy?

A: Yes.

Q: And where was that original copy at Prudential maintained?

A: I got it from the legal department.

Q: [W]here did the legal department get it from?

A: I think the CID file.

[T2, 48:16 to 49:1.]

Q: What did the legal department tell you about the copy they gave you?

[T2, 49:15–16.]

Counsel for Prudential objects based on privilege, and DOBI withdraws the question, but I ask Shanley directly if Schreck wrote the report:

THE COURT: [I]s this the CID report that Thomas Schreck wrote?

A: Yes.

THE COURT: How do you know that?

A: It was the report that Mr. Schreck wrote [that] was given to me by a Prudential attorney along with the exhibits. I spent time going through the report and the exhibits and I'm looking at it now and this appears to be the exact same thing . . . .

THE COURT: Meaning the exact same thing that the legal department gave you?

A: Yes.

THE COURT: Okay. And all the attachments to the body of the report appear to be the same report and the same attachments that you received from the legal department?

A: Exactly.

[T2, 52:20 to 53:15.]

DOBI then turns to the Spreadsheet:

Q: What is Exhibit 5 to the CID report?

A: That is the Excel spreadsheet related to the calls.

Q: Have you seen Exhibit 5 before?

A: Yes.

Q: Where did you see it?

A: It was given to me by Prudential and I reviewed it just recently in preparation for—

THE COURT: When you say "Prudential" you mean?

A: The legal department.

[T2, 53:18 to 54:3.]

DOBI: Did you review a paper copy or an electronic copy?

A: I had both.

Q: [W]here did you get the electronic copy from?

A: The High Technology Investigation Unit.

Q: [W]here did they get it from?

A: Out of the file—the electronic file.

[T2, 54:7–16.]

Shanley testified that the audio recordings of the telephone calls are embedded in the Excel spreadsheet, and that there are sixty calls, but that he could not play three of them. (T2, 99:17 to 100:3.) Shanley stated that he did not know why he could not play them. (T2, 100:4–7.) Shanley explained that the electronic version and the printed version of the Spreadsheet are the same. Moreover, Shanley said that he knows the electronic version and printed version are the same because he compared the two when he saw them for the first time in December 2016 or January 2017:

Q: Is that electric version the same as this print version that you see in front of you?

A: Yes . . . .

Q: [H]ow do you know that the calls embedded in this spreadsheet here are the same calls that were in the Verint System?

A: [I] went in myself to the Verint System and pulled them up and listened to them.

Q: Were they still available in the Verint System?

A: Yes.

[T2, 100:10–21.]

Q: When did you do that review?

A: [T]he last time I was supposed to testify just before that. I don't know the exact date, must have been like January [2017] or December [2016].

[T2, 100:25–101:3.]

Q: [D]id you listen to two calls simultaneously—the ones that are in the spreadsheet and the ones that are in the Verint System?

A: No, I couldn't do that . . . . I listen to one first and then—I wanted to make sure that what was on the document was what I was hearing, so I listened to the electronic, read it, and then I went in and created—went into Verint and listened to them, and I also had the same document in front of me, so I read it, too. So, they were the same.

Q: [A]re the calls that are in Verint System the same calls that are in the embedded spreadsheet?

A: Yes.

[T2, 100:10–101:24.]

Shanley testified that others had access to the Verint System, but that he cannot make any additions or deletions to it, which is something Shanley was unsure of when he first testified on December 19, 2016:

> Q: The calls that you listened to from the Verint System . . . . [D]oes anybody have access to that?
>
> A: Well people in CID, investigators, it is part of our jobs. We have to go into it and we have to have access to it.
>
> Q: Do you have access to—are you able to change—[to] make any additions or deletions to any of the calls from Verint?
>
> A: No, no.
>
> Q: Do you have the ability to change—make any additions or deletions to any of the time, dates, or any of the information that is in the spreadsheet in Verint System?
>
> A: No.
>
> [T2, 102:25 to 103:13.]

> Q: [H]ow certain are you that the calls that are embedded in the spreadsheet identified as PRU 9042 are the same calls that are on file at Verint?
>
> A: Oh, absolutely. No question about that.
>
> Q: [Y]ou reviewed the calls from Verint directly from that system?
>
> A: Yes.
>
> [T2, 105:14–23.]

Nevertheless, Shanley could not testify that the audio recordings he reviewed in the Verint System in 2016 were the ones that existed in the Verint System in 2013—or whether they even existed in 2013.

Cross

On cross-examination, Shanley revealed just how little he knew about the audio recordings at issue and the software system that recorded them. When shown a copy of the certification of Savadjian's expert in this case, Tino Kyprianou, which questioned the authenticity of the audio recordings, among other things, Shanley admitted that he did not have enough knowledge to agree or disagree with the expert. (T2, 144:4 to 146:25.) Shanley does not even know what "metadata" is. (T2, 145:6–18.) Indeed, Shanley states that he does not "have . . . the knowledge [or] expertise or the specific understanding of the aspects of the recordings that were . . . examined by [Schreck]." (T2, 153:4–8.) Moreover, Shanley admits that he has no technical knowledge about the Verint System—including whether additions or deletions can be made to recordings on it—only that he knows how to use it:

> Q: Okay. Now, if I were to ask you questions about the technical abilities of the Verint System, would you be able to answer those questions?
>
> A: Fairly basic level. I could tell you my understanding.
>
> Q: Okay. Do you have any reason to challenge the notion that the Verint System would have provided the ability to take pristine versions of recordings without modifying them in any way, shape, or form?
>
> A: I don't know enough about the system. I mean, what I know about it is it's basically, you know, a telephone recording machine.
>
> Q: So, you know basically how to use it?
>
> A: Right.
>
> [T2, 154:3–17.]

More pointedly, Shanley did not know if the Verint System could capture metadata. In fact, Shanley acknowledged that he is not the one who extracted the calls from the Verint System. Indeed, Shanley admitted that he did not even consult the Verint System manual to become apprised of the system and its capabilities. (T2, 156:3 to 158:1.)

Likewise, Shanley did not even have a working knowledge of what it means to have something in "native format." (T2, 162:5–7.)

Moreover, Shanley acknowledged that even Schreck, in his certification, did not identify the source of the calls, because nowhere in his certification does he even mention the Verint System. (T2, 170:13 to 171:15.)

Redirect

On redirect examination, Shanley confirmed that he does not understand the technical significance of the words "path," "size," "created," "modified," and "access," which appear on Demonstrative Exhibits C, D, and E, and pertain to the audio recordings. (T2, 174:1–24.) Shanley repeated his newfound understanding that the information pertaining to the audio recordings, including the recordings themselves, cannot be changed, modified, or deleted in the Verint System. (T2 177:15–20.) Most significantly, Shanley changed his testimony on re-cross back to his initial testimony from December 19, 2016, that he does not know who downloaded the calls from the Verint System, whether those calls could be modified, or whether the calls from the Verint System were in fact modified. (T2, 177:21 to 181:5.)

Explicit Findings

After Shanley completed his testimony, I found at the hearing, and I explicitly **FIND** now, that Shanley did not investigate Savadjian during Shanley's employment at Prudential, nor did Shanley supervise anyone who did. Shanley also has no personal knowledge about the three pieces of physical evidence at issue. He created neither the CD, nor the Spreadsheet, nor the Report. Shanley does not even know how these writings were created and has no technical knowledge about the record system used to create them—including the Verint System used to create the audio recordings and populate the spreadsheet. Thus, all Shanley knows is that the CD, the Spreadsheet, and the Report, which DOBI seeks to admit into evidence, match the ones that someone in

Prudential's legal department gave to him in 2016. As such, Shanley does not know whether the CD, the Spreadsheet, or the Report—which DOBI proffers are from 2013—were altered between 2013 and 2016, when Shanley reviewed them. In fact, Shanley does not even know whether the CD, the Spreadsheet, or the Report even existed in 2013. Assuming they did, Shanley simply cannot prove by a preponderance of the evidence that these writings are those three pieces of physical evidence.

DISCUSSION AND CONCLUSIONS OF LAW

Authenticity

> Any writing offered into evidence which has been disclosed to each other party at least 10 days prior to the hearing shall be presumed authentic. At the hearing any party may raise questions of authenticity. Where a genuine question of authenticity is raised the judge may require some authentication of the questioned document. For these purposes the judge may accept a submission of proof, in the form of an affidavit, certified document or other similar proof, no later than 10 days after the date of the hearing.
>
> [N.J.A.C. 1:1-15.6.]

In this case, Savadjian raised the question of the authenticity of the CD, the Spreadsheet, and the Report more than six months in advance of the hearing. Savadjian objected to their authenticity, among other things, because the audio recordings contained in them did not contain the metadata associated with their creation. I ruled that if DOBI brought in Schreck, so he could answer questions on cross-examination about how he created them, it would likely satisfy me as to their authenticity, and I would admit them into evidence. When DOBI did not produce Schreck, I gave DOBI the opportunity to produce someone else who could authenticate the CD, the Spreadsheet, and the Report, and DOBI produced Shanley, who had no personal knowledge and no technical knowledge about how Schreck created the audio recordings, or any other aspect of the writings. Now DOBI wants to sidestep the requirement of authentication as a precondition to their admissibility.

A. The authenticity of a writing can be established by direct proof or circumstantial evidence.

The rule of evidence regarding authentication is plain enough: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." N.J.R.E. 901. Meanwhile, the proponent of tangible evidence has the burden of laying a proper foundation for admission. State v. Brunson, 132 N.J. 377, 393 (1993). Ultimately, authentication must show that the object offered is the object that was involved in the underlying controversy. See State v. Morton, 155 N.J. 383, 468 (1998).

A "writing" is an example of real or tangible evidence, and both the audio recordings and the Excel spreadsheet are contemplated in the definition of a writing, as set forth in our rules of evidence. See N.J.R.E. 801(e). "The fundamental idea of authentication is to connect the writing with the person alleged to be its author." In re Blau, 4 N.J. Super. 343, 351 (App. Div. 1949) (quoting 5 Wigmore on Evidence § 1496 at 319 (Chadbourn rev. 1974)). Although the rule regarding authenticity does not require absolute certainty or conclusive proof that the writing is authentic, the proponent must still make some prima facie showing that the writing is what the proponent claims it is. Ibid. Toward this end, the authenticity of a writing can be established by direct proof, such as testimony by its author, or by circumstantial evidence. See State v. Bassano, 67 N.J. Super. 526, 532 (App. Div. 1961).

Where the authenticity of a writing is established by circumstantial evidence, such circumstantial proof may include "intimate knowledge of information which one would expect only the person alleged to have been the writer or participant to have." Konop v. Rosen, 425 N.J. Super. 391, 411 (App. Div. 2012) (quoting Biunno, Weissbard & Zegas, N.J. Rules of Evidence, comment 3 on N.J.R.E. 901).

This evidentiary rule, however, is not absolute. A judge still has the inherent power to reject the testimony if the judge finds that no trier of fact could reasonably believe that the witness perceived the matter. Comment to N.J.R.E. 602. For example, in Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 599 (App. Div. 2011), the Appellate Division

rejected foreclosure documents attached to a certification from the attorney for Wells Fargo because the attorney for Wells Fargo did not have personal knowledge that the foreclosure documents were true copies. Similarly, in Claypotch v. Heller, Inc., 360 N.J. Super. 472, 489 (App. Div. 2003), the Appellate Division rejected a certification, which the trial court had accepted in support of a motion for summary judgment, because it was based on "information and belief" and not on "personal knowledge," even though the certification was unopposed. Although it is not necessary to negate every possibility of substitution or change in condition between the event and the time of trial, there must still be a reasonable probability that the evidence has not been changed in important respects. See State v. Brown, 99 N.J. Super. 22, 27–28 (App. Div. 1968).

In this case, the absence of metadata indicates that the audio recordings have, in fact, been changed, and the question that remains is whether they have been changed in any important respects. Shanley, however, does not know. He does not even know what metadata is.

More expansively, Shanley is not the author of the CD, the Spreadsheet, or the Report, and he has presented no "intimate knowledge of information one would expect only the person alleged to have been the writer or the participant to have" in their creation. In fact, Shanley could only testify that the CD, the Spreadsheet, and the Report were the ones that someone from Prudential's legal department gave to him in 2016. Again, he does not even know whether they even existed in 2013. Moreover, when it came to the audio recordings, the central evidence, and the sole basis for the amendment to the order to show cause, Shanley could not answer basic questions about their method, purpose, or circumstances of creation.

B. There must be a showing that a recording is authentic and correct.

For an audio recording to be admissible into evidence, the proponent must show: (1) that the device can record the conversation or statement; (2) that its operator was competent; (3) that the recording is authentic and correct; (4) that no changes, additions, or deletions have been made; and in instances of alleged confessions, (5) that the

statements were elicited voluntarily and without any inducement. State v. Driver, 38 N.J. 255, 287 (1962).

This test has since been abrogated in part by State v. Nantambu, 221 N.J. 390, 405 (2015), where the Supreme Court found that the second factor no longer requires separate consideration because of technological advances.

In this case, the third and fourth factors (whether the audio recordings are authentic and correct and whether any changes, additions, or deletions have been made) are at issue, but in this section I will focus on the third factor (whether the audio recordings are authentic and correct) because that was the focus of the argument at hearing and in the briefing for this ruling.

None of the cases that have analyzed Driver, however, have analyzed this third factor. Why? Because in each of those cases, the witnesses who testified were police officers who had recorded the criminal confessions or who knew how the criminal confessions were recorded. Thus, they could testify whether the audio recordings were authentic and correct. See Nantambu, 221 N.J. at 405; State v. Harris, 298 N.J. Super. 478, 482 (App. Div. 1997); State v. Cusmano, 274 N.J. Super. 496 (App. Div. 1994); State v. Zicarelli, 122 N.J. Super. 225 (App. Div. 1973).

Since DOBI will not call the author of the CD, the Spreadsheet, and the Report to testify as to their authenticity and correctness, DOBI argues instead that I should listen to the audio recordings contained in them to determine their probative value. In support of their argument, DOBI relies on Nantambu, 221 N.J. at 405, which states that courts should weigh the Driver factors on a case-by-case basis. Such consideration, however, does not obviate authentication. Indeed, the facts of Driver make the point. In Driver, the police officers who testified at the suppression hearing were the ones who were present and recorded the conversation at issue. Driver, 38 N.J. at 288. Thus, their personal knowledge negated any authentication issue and left the correctness of the tapes as the only issue.

In this case, Shanley was not present and did not record the conversations at issue. He was not even involved in their investigation. Moreover, he is not the one who extracted the recordings from the record system used. In fact, he does not even know how the record system works. So, for me to listen to the calls before DOBI makes some prima facie showing that the calls are authentic, that they are what DOBI claims they are, would not only be dismissive of this third factor but also improvident, for I would be turning the logical order of admissibility on its head.

C. The audio recordings must be authenticated because they can be manipulated.

There are at least three other reasons why I should not listen to the recordings before they are authenticated. First, this case, as noted above, is not a criminal case. In criminal cases like Driver, authentication is typically not in issue because in such cases, witnesses with personal knowledge must be available for cross-examination. See Crawford v. Washington, 541 U.S. 36 (2004).

Second, this hearing is not a jury trial. In jury trials like the one in Driver, the suggestion that "in all situations" the tape should be listened to outside the presence of the jury, Driver, 38 N.J. at 287–88, makes sense, but in bench trials like this one, in which I am the judge and jury, it does not. In fact, I explicitly stated so during the hearing. Once I hear the calls, I cannot unhear them. Thus, the best practice is still for me to determine their authenticity before I determine their correctness.

Third, recordings can be manipulated. Although the Supreme Court noted in Nantambu, 221 N.J. at 405, that tangible evidence produced from a machine may impart more reliability than human perception, the Court previously noted in Jenkins v. Rainner, 69 N.J. 50, 57 (1976), that such technology may also make the recordings more vulnerable to undetectable tampering. As the Court wrote in Jenkins: "The camera itself may be an instrument of deception, capable of being misused with respect to distances, lighting, camera angles, speed, editing and splicing, and chronology. Hence, 'that which purports to be a means to reach the truth may be distorted, misleading, and false.'" Jenkins, 69 N.J. at 57.

Federal courts recognize this vulnerability too, noting the "myriad of ways" in which electronic records may be deleted or lost, and allowing for their authentication by secondary evidence. Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 580 (D. Md. 2007). In fact, our own Third Circuit has cited Lorraine with approval, writing that the authentication of electronically stored information requires such consideration. United States v. Browne, 834 F.3d 403, 412 (3d Cir. 2016). Moreover, consideration of the ways in which data can be manipulated or corrupted has long required meaningful cross-examination. See Novartis Corp. v. Ben Venue Labs., Inc., 271 F.3d 1043, 1054 (Fed. Cir. 2001).

Unsurprisingly, the federal courts have recently amended their evidentiary rules, effective December 1, 2017, to streamline this process. N.J. Law Journal, May 28, 2018, at 30. "[I]nstead of using witness testimony to authenticate records generated by an electronic system or data copied from electronic devices or files, the party offering the evidence may provide a certification from a person with knowledge that the evidence is authentic." Ibid. The proponent of the evidence, however, must present the certification in advance of trial. Ibid. This way, "the opposing party can decide if legitimate grounds exist to challenge the authenticity of the evidence." Ibid.

Such a method of authentication, of course, is exactly what our administrative procedure rules already allow, see N.J.A.C. 1:1-15.6, and is exactly what we have been trying to do in this case.

Meanwhile, New Jersey caselaw supports a presumption of the reliability of computer records, which is why New Jersey courts disapprove of "the application of special evidentiary requirements for computer-generated business records." Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11, 18 (App. Div. 1996). Yet the presumption does not negate the inquiry. While caselaw recognizes that "[t]here is no reason to believe that a computerized business record is not trustworthy," caselaw still allows "the opposing party [to come] forward with some evidence to question its reliability.'" See Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 380 (2007) (citing Hahnemann, 292 N.J. Super. at 18). Toward this end, caselaw requires a witness who is "sufficiently familiar with the record system used," Carmona, 189 N.J. at 380 (citing Hahnemann, 292

N.J. Super. at 18), if for no other reason than to answer questions about the circumstances surrounding the creation of the proffered evidence, see State v. R.C., No. A-1084-05T4 (App. Div. June 3, 2008), https://njlaw.rutgers.edu/collections/courts/ (citing Driver, 38 N.J. at 287, and Rainner, 69 N.J. at 57). In other words, caselaw requires a witness who is sufficiently familiar with the record system used to allow for meaningful cross-examination.

Upon closer examination, the trial court in Carmona had excluded Resorts' investigative report in the context of the business-record exception to the hearsay rule because it was maintained in a computer system that was capable of being modified, and in the trial court's view, the electronic report was not trustworthy. On appeal, the Supreme Court wrote that it would not treat the electronic report any differently than a hard copy. Nevertheless, the Court still required a witness who was "sufficiently familiar with the record system used." Carmona, 189 N.J. at 380 (quoting Hahnemann, 292 N.J. Super. at 18).

In this case, I too had excluded evidence (the audio recordings) in the context of the business-record exception to the hearsay rule (at least thus far), not because the evidence (the audio recordings) was maintained in a computer system (the Verint System) that was capable of being modified (although evidence does exist that the Verint System is a computer system that is capable of being modified), but because the witness (Shanley) was not sufficiently familiar with the record system used (the Verint System) to allow for meaningful cross-examination surrounding the creation of the audio recordings.

D. Authentication may be a low bar to entry, but that does not mean it is no bar to entry.

To overcome the fact that Shanley was not sufficiently familiar with the record system used to allow for meaningful cross-examination surrounding the creation of the audio recordings, DOBI argues that authentication is a low bar to entry in the administrative setting. In support of its argument, DOBI relies on State v. Hannah, 448 N.J. Super. 78 (App. Div. 2016). Hannah was a criminal simple-assault case in which the defendant argued that a Twitter posting was improperly admitted into evidence. Id. at 82.

The Appellate Division held that New Jersey's current standards for authentication were adequate to evaluate the admission of social-media postings and upheld the trial court's determination. Ibid. In doing so, the Appellate Division applied concepts of authentication already in existence under federal and State rules of evidence, namely, "the reply-letter doctrine" and "the content-known-only-to-the-participants rule," and declined to create a new test for social-media postings. Id. at 88–89.

To authenticate the tweet, the State had used the testimony of the victim, who had been in a back-and-forth exchange with the defendant, who then argued that only an agent of Twitter could authenticate the tweet. Id. at 86. The Appellate Division reasoned that the victim's testimony was adequate for authentication because the victim had a history of "tweeting" with the defendant to the defendant's Twitter handle, and the subject matter of the tweet contained information that only those with personal knowledge of the assault would know. Ibid. Of significance to the Appellate Division was the content of the tweet, including "shoe to ya face" information, which one would expect only a participant in the incident to have. Id. at 90. (In that case, the defendant had struck the victim in the face with her high-heeled shoe and later posted a tweet saying, "shoe to ya face bitch." Id. at 82.) Also of significance to the Appellate Division was the testimony by the victim that the tweet was posted in response to her communications with the defendant, as part of a "back and forth" between them. Id. at 90. In sum, the defendant's Twitter handle, the defendant's profile photo, the content of the tweet, its nature as a reply, and the testimony presented at trial were sufficient to establish a prima facie case that the tweet was authentic. Id. at 90–91.

In this case, Shanley's testimony is insufficient to establish a prima facie case sufficient to support a finding that the audio recordings are authentic because Shanley did not participate in the calls or in the investigation of Savadjian and he did not supervise anyone who did. He did not even extract the calls from the Verint System. As such, Shanley cannot provide any of the information that one would expect only a participant in the recordings would have under either the reply-letter doctrine or the content-known-only-to-the-participants rule to meet the low bar to entry DOBI argues for in this administrative setting. If Shanley had testified in Hannah, his testimony would have been akin to, "I have used Twitter, and I read the tweet."

E. The authenticity of a multidimensional document can be established by technical knowledge.

When the writing is a multidimensional document like an audio recording, and the witness does not have the personal or firsthand knowledge under either the reply-letter doctrine or the content-known-only-to-the-participants rule as described above, then the witness must have the technical knowledge to authenticate it. Consider, for example, emails. While two emails may be facially identical, the date of transmission of an email can only be confirmed by a witness with personal or firsthand knowledge of the email's content, or by a witness with technical knowledge of its metadata. See N.J. Legislative Select Comm. on Investigation v. Kelly, 2014 N.J. Super. Unpub. LEXIS 3109, *68 (Law Div. 2014).

Indeed, the distinction between the metadata imbedded in an electronic file and the content of an electronic file is well established. See, e.g., Estate of Kennedy v. Rosenblatt, 447 N.J. Super. 444, 454 (App. Div. 2016) (where the Appellate Division distinguished between the review by an attorney of metadata in an electronic file and the review of content of the electronic file).

Again, the witness must have either personal or firsthand knowledge of the electronic file's content under either the reply-letter doctrine or the content-known-only-to-the-participants rule, see Hannah, 448 N.J. Super. at 88-89, see also, State v. D.D., No. A-1682-09T4 (App. Div. Jan. 27, 2012), https://njlaw.rutgers.edu/collections/courts/ (where the Appellate Division noted that the federal rules also permit authentication based on distinctive characteristics), or technical knowledge of its embedded metadata, see Hannah, 448 N.J. Super. at 88-89, see also, State v. Howard, No. A-2295-11T1 (App. Div. Sep. 10, 2013), https://njlaw.rutgers.edu/collections/courts/ (where the Appellate Division affirmed the decision of the trial court to allow testimony from a witness concerning the "created" and "modified" dates of voicemail messages).

In this case, Shanley has neither personal nor firsthand knowledge of the content of the audio recordings under the reply-letter doctrine or the content-known-only-to-the-participants rule because he was not a participant in the telephone conversations, and he does not have technical knowledge of their "created" and "modified" dates because he said as much at the hearing. To reprise, when Shanley first testified, he explained that he did not extract the calls from the Verint System or embed them in the Spreadsheet. He merely testified that he had reviewed them. Meanwhile, the audio recordings contain no metadata to verify their authenticity.

When Shanley testified next, he explained that he had since compared the audio recordings contained in the CD, embedded in the Spreadsheet, and attached to the Report with the calls as they existed in the Verint System in 2016. Significantly, he could not verify that the calls in the Verint System in 2016 were the calls that existed in the Verint System in 2013. Thus, Shanley only has personal knowledge that the audio recordings are the same ones that exist in the Verint System now—but not in 2013 when DOBI proffers they were created.

This is problematic because evidence exists that modifications, deletions, or alterations have been made to the calls, and Shanley has neither the personal nor the technical knowledge to explain this away. DOBI had been on notice for more than six months that this would be an issue and that they would have to bring someone to the hearing with either the personal or technical knowledge about the calls to authenticate them. Yet DOBI has failed to do so. So, without the direct proof that Schreck presumably could have provided, or the circumstantial evidence that Shanley was presumed to have been able to provide, I ruled that DOBI was unable to authenticate the audio recordings.

F. <u>The written words must also be authenticated.</u>

The Spreadsheet and the Report also contain one-dimensional aspects, namely, their written words, which must also be authenticated. More descriptively, the Spreadsheet is a computer printout of an Excel spreadsheet that Schreck created from the Verint System. Some of the information contained in the Spreadsheet was populated automatically by the Verint System, and some of the information contained in the

Spreadsheet was entered manually by Schreck, as well as by others who participated in the investigation. More specifically, the Spreadsheet contains an icon for the audio recordings in one column and the dates, times, and numbers of the incoming calls in other columns. The Spreadsheet also contains a column with the impressions Schreck and the others had of the calls. For example, Schreck noted whether he thought the person who made the call was who he said he was and what the caller and the customer-service representative said to one another. Schreck also identified the policy holder and the policy number the caller allegedly called about. Moreover, Schreck summarized the conversation between the caller and the customer-service representative.

Since the Spreadsheet is a computer printout and not a digital file, no metadata is associated with it to verify who created which parts of the Spreadsheet and when they were created. Yet Shanley testified the first time that he did not create any part of the Spreadsheet or supervise anyone who did, and that he did not know when any part of the Spreadsheet was created. As such, I concluded that Shanley could not authenticate the written words contained in Spreadsheet.

When Shanley testified the second time, he stated that he had listened to the calls on the Verint System and had cross-referenced them with the written words contained in the Spreadsheet to confirm that they matched.

As discussed above, this is insufficient because Shanley has neither the personal nor the technical knowledge to authenticate such information.

Similarly, Shanley has neither the personal nor the technical knowledge to authenticate the information contained in the Report, which is "the closing memo" Schreck wrote after his investigation. It contains Schreck's impressions, Schreck's findings, and Schreck's conclusions. Yet Schreck was not called to authenticate it. So, without its author, or someone else with either the personal or the technical knowledge to authenticate it, the Report remains hearsay.

Whether such hearsay is admissible will be discussed below.

Admissibility

> Parties in contested cases shall not be bound by statutory or common law rules of evidence or any formally adopted in the New Jersey Rules of Evidence except as specifically provided in these rules. All relevant evidence is admissible except as otherwise provided herein. A judge may, in his or her discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either:
>
> 1. Necessitate undue consumption of time; or
>
> 2. Create substantial danger of undue prejudice or confusion.
>
> [N.J.A.C. 1:1-15.1(c).]

Even if Shanley could authenticate the CD, the Spreadsheet, and the Report, DOBI must still prove that these writings meet an exception to the hearsay rule to be admissible because these documents, without their author, are hearsay documents, and I have already ruled under N.J.A.C. 1:1-15.1(c) that their probative value is substantially outweighed by the risk that their admission will create a substantial danger of undue prejudice or confusion, and that it will necessitate an undue consumption of time, without a residuum of legal and competent evidence to prove that Savadjian made the calls, and that he made the calls when DOBI alleges he did.

A. Some legally competent evidence must support each finding of fact.

Although hearsay is admissible at the OAL, see N.J.A.C. 1:1-15.5(a), "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness," see N.J.A.C. 1:1-15.5(b). This evidentiary rule, known as the "residuum rule," derives from the Supreme Court's decision in Weston v. State, 60 N.J. 36, 51 (1972):

> Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative

> force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

Thus, hearsay may be admitted to corroborate or give added probative force to competent evidence at the OAL, but hearsay cannot provide the residuum for an ultimate finding of fact at the OAL, and I am requiring that residuum now for the reasons stated below.

B. The admission of hearsay at the OAL is still subject to the judge's discretion.

As noted above, the admission of hearsay at the OAL under N.J.A.C. 1:1-15.5 is still subject to the judge's discretion under N.J.A.C. 1:1-15.1(c). So even though the parties are not bound by rules of evidence, see ibid., that does not mean that they are not bound by fundamental principles of fairness and justice. Sometimes parties seem to forget that. "Evidence rulings shall be made to promote fundamental principles of fairness and justice and to aid in the ascertainment of truth." N.J.A.C. 1:1-15.1(b). Accordingly, a judge may exclude evidence if its probative value is substantially outweighed by the risk that its admission will necessitate an undue consumption of time or create a substantial danger of undue prejudice or confusion. N.J.A.C. 1:1-15.1(c).

This advisory is contained in the same regulation that states that the parties shall not be bound by rules of evidence; as such, it is the opposite side of the same evidentiary coin and must be given equal worth.

In this case, DOBI has the burden of proving the authenticity of the CD, the Spreadsheet, and the Report under N.J.A.C. 1:1-15.1(e), but DOBI has produced no witness who is competent to do so, and I am requiring a residuum of legal and competent evidence now to support them. To overcome this deficit, DOBI seeks to gain their admission through the business-record exception to the hearsay rule. Whether these documents are excepted from the hearsay rule will be discussed below.

Exceptions

Hearsay is not admissible except as provided by these rules or by other law.

[N.J.R.E. 802.]

Records of regularly conducted activity, otherwise known as "business records," are excepted from the hearsay rule. See N.J.R.E. 803(c)(6). Yet business records often include hearsay statements. Thus, those statements—often referred to as "hearsay within hearsay"—must also meet this exception. For the sake of expediency, I will address this "inner layer" first. I will then turn to the "outer layer."

A. The Inner Layer: Hearsay within Hearsay

A statement within the scope of an exception to the hearsay rule shall not be inadmissible if the included statement also meets the requirements of an exception to the hearsay rule. N.J.R.E. 805. In other words, when statements are hearsay within hearsay, each level requires a separate basis for admission into evidence. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 375, n.1 (2010). Included in this exception to the hearsay rule are the hearsay statements often included in business records. See State v. Lungsford, 167 N.J. Super. 296 (App. Div. 1979).

In Lungsford, for example, the Appellate Division explained that while police records may be admissible as business records, their included hearsay statements may not, unless they are admissible under some other exception to the hearsay rule:

> While police records may qualify as business records for certain purposes and in certain respects, they are nevertheless not vehicles by which substantive evidential status may be conferred upon the otherwise hearsay declarations of a victim of or witness to a crime, accident or other occurrence. If the declarant is not available to testify and if the statement is not admissible under some other exception to the hearsay rule, such as excited utterance or dying declaration, then admissibility cannot be predicated exclusively upon the circumstance that the statement was

> made to a police officer who paraphrased its content in his report.
>
> [Id. at 309.]

Since the included hearsay did not meet some other exception to the hearsay rule, the Appellate Division held that the trial court erred in admitting the hearsay statements contained in the police report into evidence. Id. at 310.

If evidence is not offered for the truth of the matter asserted, however, the evidence is not hearsay and no exception to the hearsay rule is necessary to introduce that evidence at trial. State v. Long, 173 N.J. 138, 152 (2002).

For example, where statements are offered not to show their truthfulness, but to show the fact that they were made and that the listener took certain action as a result, the statements are not hearsay and are not deemed inadmissible. Russell v. Rutgers Cmty. Health Plan, Inc., 280 N.J. Super. 445, 456 (App. Div. 1995).

In this case, the CD, the Spreadsheet, and the Report are hearsay documents, but the audio recordings contained in them are not hearsay statements because they are not being offered for the truth of the matter they assert. To the contrary, they are being offered for their falsity. They are also being offered to prove that certain actions were taken as a result. Therefore, these statements are not excludable as hearsay.

As a corollary, it is well established in New Jersey that computer-generated information is admissible as long as a proper foundation is laid. Sears, Roebuck & Co. v. Merla, 142 N.J. Super. 205, 207 (App. Div. 1976).

Accordingly, the computer-generated information contained in the CD, populated in the Spreadsheet, and attached to the Report will be admissible as long as a proper foundation is laid for the CD, the Spreadsheet, and the Report, that is, as long as these outer layers can be authenticated or meet the business-record exception to the hearsay rule.

B. The Outer Layer: Business Records

Business records are not dependent upon the declarant's availability and are defined as statements contained in a writing made near or at the time of observation by a person with actual knowledge, or from information supplied by such a person, provided the writing was made in the regular course of business and it was the regular practice of that business to make it. N.J.R.E. 803(c)(6). There is, however, a caveat. The writing must still be trustworthy:

> *Records of regularly conducted activity*. --A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.
>
> [N.J. R.E. 803(c)(6) (emphasis added).]

In this case, the CD and the Spreadsheet are electronic writings. The former is an electronic duplicate; the latter is a paper copy; and both will be discussed together. The Report is not an electronic writing and will be addressed separately.

In the end, questions remain concerning their trustworthiness.

The CD and the Spreadsheet

For electronic writings to be admitted into evidence, they must pass a three-part test. See Hahnemann, 292 N.J. Super. 11. In Hahnemann, the Appellate Division explained that under both the State and federal rules of evidence, a foundational witness is usually not required to have personal knowledge of the facts contained in the business record. Id. at 17–18. Similarly, the Appellate Division continued that expert testimony regarding the reliability of computer programs or other technical aspects of their operation

is unnecessary to find their computer-generated aspects circumstantially reliable. Id. at 18. Thus, the Appellate Division asserted that a witness is competent to lay the foundation for systematically-prepared computer records if the witness (1) can demonstrate that the computer record is what the proponent claims, (2) is sufficiently familiar with the record system used, and (3) can establish that it was the regular practice of that business to make the record. Ibid.

Referencing N.J.R.E. 803(c)(6), and its caveat regarding trustworthiness, the Appellate Division surmised: "If a party offers a computer printout into evidence after satisfying the foregoing requirements, the record is admissible 'unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.'" Ibid.

Indeed, the Appellate Division noted that there is no reason to believe that a computerized business record is not trustworthy—unless the opposing party comes forward with some evidence to question its reliability. Ibid.

In this case, Savadjian came forward with some evidence, namely, the Certification of Tino Kyprianou, dated June 2, 2016, to question the reliability of the audio recordings, specifically, the absence of the metadata and the changes to their created and modified dates, yet Shanley was unable to respond to the questions raised. In fact, Shanley could satisfy none of Hahnemann's requirements. He could not demonstrate that the CD and the Spreadsheet are what DOBI claims; he is not sufficiently familiar with the Verint System that created the CD and populated the Spreadsheet; and he did not establish that it was the regular practice of Prudential to make the CD or the Spreadsheet. He could only establish that it was the regular practice of Prudential to record calls to the CSO and that Prudential often made CD's or spreadsheets during investigations—not that it was its regular practice to do so.

The second prong, as discussed earlier, is especially vexing in this case. Typically, a witness's position or title, such as a custodian of records, can facilitate the inquiry. For example, in New Century Financial Services, 437 N.J. Super. 299, 326–27 (App. Div. 2014), the Appellate Division held that certifications by employees having personal

knowledge of the books and records of plaintiffs, and the transactions whereby plaintiffs acquired the charged-off debts on which they sued, met the foundational requirements of a business record. Similarly, in Garden State Bank v. Graef, 341 N.J. Super. 241, 245 (App. Div. 2001), the Appellate Division held that an employee of a successor bank could certify the loan-history printouts of its predecessor because the employee's position rendered him sufficiently familiar with the record system used to allow him to establish that it was the regular practice of the predecessor bank to make the record. Indeed, the Appellate Division explained long ago in Webber v. McCormick, 63 N.J. Super. 409, 414–15 (App. Div. 1960), that custodians of records may tell what they know based on subsequently gained knowledge.

Still, the witness's position or title needs to be supported by knowledge of the procedures that would confirm this familiarity. Compare Hahnemann, 292 N.J. Super. at 15 (where the Appellate Division found that the custodian of records, who had knowledge of the billing procedures, was qualified to testify as to the charges contained in the hospital's bill) with Midland Funding, LLC v. Berry, 2013 N.J. Super. Unpub. LEXIS 1951, *3–4 (Law Div. July 25, 2013) (where the court found that the foundation witness did not have sufficient knowledge to authenticate either the essential assignment documents or the predecessor's assignment records because the witness was not familiar with any of the predecessor's record-keeping practices).

Significantly, the court in Midland Funding acknowledged that the foundational witness did not need personal knowledge of the essential documents, but that he still had to be sufficiently familiar with the record system used to prove that the business records were trustworthy:

> In this case, the Plaintiff's foundation witness lacked sufficient knowledge to authenticate either the essential assignment documents or the various predecessor assignor's records. Mr. Struck could not testify that he was familiar with any of the Plaintiff's predecessors record keeping practices. It is also the impression of the Court that Mr. Struck was not familiar with any of the Plaintiff's assignment practices. While Mr. Struck need not have personal knowledge of the documents and the legal basis for assignment, the Court is not satisfied

> that Mr. Struck had sufficient knowledge of the system used by his employer or others in the chain of ownership to ensure the documents relied upon to prove the debt assignment or the alleged debt were trustworthy business records.
>
> [Id. at *4.]

Regardless, it is still up to the trial court, as the Appellate Division explained in Webber, 63 N.J. at 415, to determine whether the testimony supports the conclusion that the record in question is admissible as a business record.

In this case, I determined that Shanley's testimony did not support the conclusion that the CD and the Spreadsheet were admissible as business records. To be sure, neither his title nor his testimony facilitated or demonstrated sufficient familiarity with the record system used. More pointedly, Shanley held the position of Director in Prudential's CID, but Shanley had no specific knowledge of the record keeping within the CID. In fact, Shanley only understood the record system used as a user and not as a custodian.

For example, Shanley knew that investigative reports were kept in a file, but he had no specific knowledge of the methods or types of storage used for the electronic writings, files, or reports, and he could not tell if any changes, additions, or deletions had been made to any of them. Indeed, Shanley had only a rudimentary understanding of the Verint System, and he could not even say that the records he reviewed, whether electronic or written, were from the record system used because he was not the one who extracted the records from the system. Again, they were simply handed to him by someone in Prudential's legal department.

To underscore, Savadjian had requested the CD and the Spreadsheet in native format to verify their authenticity, but DOBI produced the audio recordings without their metadata, and DOBI never produced the electronic version of the Spreadsheet. Since Savadjian was unable to verify the authenticity of the audio recordings independently, the determination was made that DOBI would produce Schreck at the hearing to authenticate them, but DOBI produced Shanley instead, and he has no knowledge of how Schreck created them. Shanley does not even know what metadata is. Without the answers to

these basic questions concerning trustworthiness, the method, purpose, and circumstances surrounding the preparation of the electronic writings remain at issue. Therefore, I ruled at the hearing that Shanley was without sufficient familiarity of the record system used to lay the foundation and authenticate either the CD or the Spreadsheet as a business record under N.J.R.E. 803(c)(6).

The Report

The Report is the closing memorandum that summarizes the investigation by the CID and contains the opinions and impressions of its investigators. Since DOBI did not call Schreck or any of its other investigators to authenticate the Report, DOBI seeks to admit it as a business record instead. Shanley's testimony, however, is deficient. He could not establish that the Report was made near or at the time of observation from actual knowledge or from information supplied to him by a person with such knowledge. Although Shanley could establish that the CID did conduct investigations and that it did write reports, Shanley could not establish that the method, purpose, or circumstances of the Report's preparation indicate that it is trustworthy. Therefore, I ruled at the hearing that Shanley could not prove that the Report is a business record under N.J.R.E. 803(c)(6).

Ruling

This remand is more than a reconsideration of whether evidence proffered at a hearing should be admitted into evidence as a business record. It is an infringement on the role and responsibility of the administrative law judge (ALJ) to determine what should be admitted into evidence at his or her discretion. Should we disregard the discretion of the ALJ to make such determinations, we would disregard the power and authority of the OAL to be an independent arbiter of agency determinations. As such, I ruled at the hearing and explicitly **CONCLUDE** now that Shanley cannot authenticate the CD, the Spreadsheet, or the Report as a business record and an exception to the hearsay rule under N.J.R.E. 803(c)(6). Until DOBI provides a witness who can authenticate these documents and provide a residuum of legal and competent evidence to prove that

Savadjian made the calls, and that he made those calls when DOBI alleges that he did, these documents will remain inadmissible and will not be admitted into evidence.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Shanley is barred from testifying any further about the authenticity of the CD, the Spreadsheet, and the Report, and whether the CD, the Spreadsheet, or the Report is a business record under N.J.R.E. 803(c)(6).

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF BANKING AND INSURANCE**, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

August 29, 2018
DATE

BARRY E. MOSCOWITZ, ALJ

dr