FOX ROTHSCHILD LLP
By: Matthew S. Adams, Esq. (00141-2008)
Jordan B. Kaplan, Esq. (06080-2013)
Marissa Koblitz Kingman, Esq. (11054-2014)
49 Market Street
Morristown, New Jersey 07960
Telephone: (973) 992-4800
Facsimile: (973) 992-9125
Attorneys for Plaintiff John Savadjian

JOHN SAVADJIAN, *Plaintiff*, v. **MARLENE CARIDE, JOHN/JANE DOES 1 - 10, and XYZ CORPORATIONS 1-10,** *Defendants*.	SUPERIOR COURT OF NEW JERSEY MERCER COUNTY LAW DIVISION DOCKET NO.: _____ Civil Action **COMPLAINT AND JURY DEMAND**

Plaintiff John Savadjian, ("Plaintiff"), by and through his counsel, Fox Rothschild, LLP, by way of Verified Complaint against defendant, Marlene Caride, the Commissioner of the State of New Jersey Department of Banking and Insurance ("DoBI"), in her individual capacity ("Defendant"), hereby states as follows:

OVERVIEW

1. This case arises out of Defendant's deliberate disregard for established New Jersey law. With the specific intention to harm Plaintiff and subject Plaintiff to a predetermined outcome without regard to Plaintiff's rights, Defendant acted *ultra vires* of her clearly established legal authority to review and decide matters that are within the exclusive jurisdiction of the Office of Administrative Law ("OAL").

2. In a proceeding pending before the OAL between Plaintiff and DoBI, Administrative Law Judge ("ALJ") Barry Moscowitz ruled on issues of credibility and the admissibility of evidence in Plaintiff's favor.

3. Defendant, disappointed that the ALJ and the OAL would not reflexively sign off on her predetermined outcome of the matter, interposed her own subjective beliefs and opinions in place of the reasoned findings of the ALJ that were formed based upon the ALJ's personal observations from, *inter alia,* four (4) years of presiding over this matter and at least ten (10) days of live trial testimony.

4. As a consequence of Defendant acting outside of her clearly established authority, Defendant has turned the proceeding before the OAL into a sham, devoid of all constitutionally secured notions of fair play and justice.

THE PARTIES

5. Plaintiff is a resident of the State of New Jersey, with an address of 89 Old Tappan Road, Old Tappan, New Jersey, 07675. Plaintiff is a licensed insurance producer.

6. Defendant is the current Commissioner of DoBI, and is named herein in her individual capacity. As the Commissioner of DoBI, Defendant is responsible for the enforcement and implementation of various statutes and regulations concerning the banking and insurance industry. As set forth herein, however, Defendant acted *ultra vires* of her duties as the Commissioner and acted under the color of law to inflict harm upon Plaintiff.

7. John/Jane Does 1-10 are individuals, whose identities and precise role in connection with the allegations set forth herein shall be revealed through the discovery process, that have aided, abetted, assisted, and otherwise cooperated and/or participated with Defendant in

actionable conduct that persists to the ongoing and continuing detriment of Plaintiff, including, but not limited to, partners, employees, agents, lawyers, and other representatives of Defendant.

8. XYZ Corporations 1 – 10 are business entities, whose identities and precise role in connection with the allegations set forth herein shall be revealed through the discovery process, that have aided, abetted, assisted, and otherwise cooperated and/or participated with Defendant in actionable conduct that persists to the ongoing and continuing detriment of Plaintiff, including, but not limited to, consultancies, advisors, insurance companies, law firms, and other representatives of Defendant.

JURISDICTION AND VENUE

9. The Court has personal jurisdiction over Defendant because Defendant works in and systematically and continuously conducts business in Mercer County, New Jersey.

10. Venue is proper in this Court pursuant to R. 4:3-2(a)(2) because the harm faced by Plaintiff occurred in Mercer County, New Jersey, and all relevant actions taken by Defendant that are the subject matter of this action took place in Mercer County, New Jersey.

FACTS COMMON TO ALL COUNTS

A. The Administrative Action Between Plaintiff and DoBI

11. On or about April 10, 2014, DoBI filed its initial Order to Show Cause against Plaintiff (the "OSC"), alleging violations of the New Jersey Insurance Producers' Licensing Act, N.J.S.A. 17:22A-26 et seq. (the "Act").

12. Plaintiff contested the OSC and DoBI transferred the matter for adjudication to the OAL.

13. The transfer of this matter to the OAL was specific and intentional, as New Jersey law recognizes the OAL as an expert in the field of evidentiary issues in determining credibility and admissibility of evidence.

14. Moreover, the contested matter was transferred to the OAL to be conducted in a manner consistent with the Administrative Procedures Act to provide Plaintiff with due process.

15. ALJ Barry Moscowitz was appointed to preside over the contested matter.

B. The ALJ Requires that DoBI Authenticate Evidence at Trial in a Manner Consistent with the Rules Governing Administrative Proceedings

16. Six months in advance of the hearing before the OAL, Plaintiff filed a motion *in limine* that sought to exclude evidence from admission at the hearing on due process grounds (the "Due Process Motion").

17. Although the ALJ denied Plaintiff's Due Process Motion, the ALJ did not disregard Plaintiff's significant and well-founded challenge to the authenticity of DoBI's proposed evidence.

18. The ALJ held:

> If [DoBI] intends to offer [the relevant documents] into evidence, it is on notice that respondent may raise questions of their authenticity. "Where a genuine question of authenticity is raised, the judge may require some authentication of the questioned document." N.J.A.C. 1:1-15.6. Please be advised that I will require authentication of the documents at the hearing, not after the hearing as the rule allows.

C. DoBI'S First Failed Attempt to Authenticate the Subject Evidence at Trial

19. DoBI first attempted to authenticate the subject evidence in the proceeding before the ALJ on December 19, 2017 by offering the testimony of former Prudential employee.

20. The ALJ made a determination as to the lack of credibility of DoBI's witnesses, concluding specifically that DoBI's witness had no personal knowledge of the facts at issue in this

case and that he could not, therefore, provide the necessary evidentiary foundation to authenticate the proffered evidence.

21. For example, when DoBI presented the testimony of the individual tasked with conducting an investigation into the matters at issue in the OSC, the ALJ was able to observe the defensive and combative responses of that witness to direct questions and, at times, had to intervene and direct DoBI's witness to answer the questions presented to him by Plaintiff's counsel without being evasive and attempting to deflect cross examination.

22. That same witness' testimony also revealed significant flaws in connection with his investigation into Plaintiff, and the presiding ALJ admonished the Deputy Attorneys General representing DoBI for presenting witnesses that lacked first-hand knowledge of the matters in dispute.

23. By further example, the ALJ witnessed the testimony of individuals who stated, under oath, that DoBI's witnesses had likely forged her signature on documents that DoBI later attempted to introduce to falsely implicate Plaintiff. Based upon that testimony, the ALJ expressed his concern with DoBI's lack of integrity on the record of the proceedings.

24. Based upon his unique observations of DoBI's witnesses over a multi-day trial and after observing their lack of credibility, the ALJ ordered that DoBI's witness could not authenticate the proffered evidence (the "Initial Evidentiary Order").

D. DoBI Appeals the Initial Evidentiary Order and the Acting DoBI Commissioner Remands the Matter Back to the OAL

25. DoBI filed an interlocutory appeal with the then-acting DoBI Commissioner to challenge the ALJ's Initial Evidentiary Order.

26. On February 27, 2017, the then-Acting DoBI Commissioner modified the Initial Evidentiary Order and remanded the matter back to the OAL for an evidentiary hearing (the "Commissioner's Order").

27. The direction from the Acting DoBI Commissioner on remand was to provide a more thorough opportunity to develop the record before making an authenticity determination.

28. The Acting DoBI Commissioner, however, did not stop there.

29. Ignoring well-settled New Jersey law, the Acting DoBI Commissioner disregarded the findings of credibility made by the ALJ and substituted wholly new findings of fact for those made by the ALJ.

30. Plaintiff filed an application seeking leave to file an interlocutory appeal with the Appellate Division and argued, *inter alia*, that the Acting DoBI Commissioner violated established law by substituting his own unsubstantiated findings of fact for those of the ALJ.

31. The Appellate Division declined to hear Plaintiff's request for interlocutory review, and the matter reverted to the OAL for an evidentiary hearing.

E. DoBI's Second Failed Attempt to Authenticate Evidence

32. On August 29, 2017, DoBI again attempted to authenticate evidence at the hearing before the ALJ.

33. For the second time since these proceedings began, DoBI was unable to provide any evidence showing that subject documents are authentic.

34. Indeed, DoBI attempted to elicit testimony from its witness to show that "no changes, additions or deletions have been made" to the subject evidence, but failed.

35. In response to that testimony, the ALJ remarked that DoBI's witness was not credible because, *inter alia*, it was clear that DoBI's witness had been coached to say certain

phrases in a specific matter in a transparent effort to overcome DoBI's credibility and evidentiary problems, as reflected in the Initial Evidentiary Order.

F. The ALJ'S August 29, 2018 Decision and Order

36. Following the hearing on August 29, 2017 and extensive briefing by all parties, on August 29, 2018, the ALJ below issued a thirty-seven (37) page decision detailing the ALJ's determinations of credibility and the conclusions that flow therefrom (the "August 29 Order"). A true and accurate copy of the August 29 Order is annexed hereto as Exhibit A.

37. The conclusions set forth by the ALJ in the August 29 Order did not bear upon the application or interpretation of the Act. Instead, the conclusions contained in the August 29 Order rested exclusively upon the ALJ's determinations of credibility and related matters pertaining to the authentication of evidence.

38. In the August 29 Order, the ALJ made specific findings of fact as to the inability of DoBI's witness to authenticate the subject evidence based upon a lack of personal knowledge and general lack of credibility.

39. The ALJ provided a well-researched, detailed legal analysis supporting the Court's decision to bar DoBI's witness from authenticating the subject evidence.

40. Rejecting DoBI's witness as not credible and incapable of authenticating DoBI's proffered evidence, the ALJ specifically and unequivocally held that "until DoBI provides a witness who can authenticate these documents and provide a residuum of legal and competent evidence … these documents will remain inadmissible and will not be admitted into evidence." (*See* Exhibit A at p. 36 – 37).

41. Acknowledging the tactics taken by DoBI to avoid the application of established law, the ALJ acknowledged that "DoBI wants to sidestep the requirement of authentication as a precondition to their admissibility." (*See* Exhibit A at p. 17).

42. In the August 29 Order, the ALJ cited to established New Jersey law that provides the finder of fact in an administrative proceeding alone with "the inherent power to reject [] testimony if the judge finds that no trier of fact could reasonably believe that the witness perceived the matter." (*See* Exhibit A at p 18).

43. The ALJ went one step further, advising Defendant of the inherent powers of the ALJ and the OAL, outlining its purpose and function as a gatekeeper of evidence. On this point, the ALJ wrote:

> 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 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.

(*See* Exhibit A at p. 36 – 37).

44. Thus, Defendant was specifically informed that a decision *ultra vires* of the established authority of the Commissioner's officer would constitute an infringement upon Plaintiff's rights and upon the exclusive jurisdiction of the OAL.

45. The ALJ's decision, along with the extensive legal authority supporting that decision, was provided to Defendant in its entirety.

G. Defendant's October 16, 2018 Order on Matters Outside Her Authority

46. On October 16, 2018, Defendant issued a decision reversing the ALJ's August 29 Order, holding that, notwithstanding the ALJ's credibility determinations and the unambiguous

law establishing the ALJ as the arbiter of such determinations, DoBI had, in fact, already authenticated evidence at the hearing. A true and accurate copy of Defendant's October 16, 2018 Order is annexed hereto as Exhibit B.

47. Instead of evaluating the ALJ's findings of fact and well-reasoned determinations as to the credibility of witnesses that testified at the contested hearing presided over by the ALJ, Defendant ignored well-established law governing the ALJ's power to evaluate the credibility of witnesses and evidence presented in matters pending before the OAL, and ignored the ALJ's determinations of credibility, findings of fact, and conclusions of evidentiary law in their entirety.

48. Defendants' decision to order that DoBI *had already* authenticated the subject evidence at trial – notwithstanding the ALJ's well-reasoned August 29 Order based upon the lack of credibility of DoBI's witnesses – was made *ultra vires* of her authority as a New Jersey agency head and contrary to the powers granted to her.

49. Indeed, in overstepping her recognized authority and usurping the powers of the ALJ and the OAL, Defendant acted as the investigator, prosecutor, and gatekeeper of evidence, without the authority to do so.

50. Through her conduct, Defendant eliminated all argument that she was an independent and neutral arbiter of the claims asserted against Plaintiff.

51. Through her conduct, Defendant rendered the OAL proceeding pertaining to the allegations against Plaintiff a sham.

52. Defendant knew or should have known of the relevant legal standard governing the adjudication of proceedings before the OAL and the exclusive role of the ALJ with respect to the review of matters regarding witness credibility and evidentiary decisions. Nonetheless, Defendant affirmatively chose to ignore this established law without justification.

53. Instead, Defendant imposed her own will upon Plaintiff, clearly enforcing her own pre-determined outcome.

54. Defendant's decision, which is contrary to established New Jersey law, is irrational and erroneous.

55. Defendant abused her position of power as the DoBI Commissioner to achieve ends that are not sanctioned by New Jersey law in an effort to deprive Plaintiff of his property rights, the due process rights afforded to Plaintiff in connection with determinations of New Jersey Agencies, and to his equal protection rights.

56. While violating established New Jersey law and substituting her own determinations in the place of the well-reasoned decisions of the ALJ, Defendant treated Plaintiff differently than others similarly situated.

57. Defendant has demonstrated that she is not capable of providing Plaintiff with a neutral and impartial procedure for contesting the claims asserted against him by infringing upon the clearly defined role of the OAL.

COUNT I
Violation of 42 U.S.C. §1983
Equal Protection Under the Law

58. Plaintiff incorporates by reference the allegations set forth in the preceding paragraphs of the Complaint as though set forth at length herein.

59. 42 U.S.C. §1983 provides, in relevant part, that:

> Every person, who under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceeding for redress […]

60. Plaintiff is a citizen of the United States.

61. Defendant, in her individual capacity, is a person, as the term is used in 42 U.S.C. §1983.

62. Defendant, at all times relevant thereto, was acting under the color of New Jersey State law in her capacity as employee, agent, officer, or representative of the State of New Jersey, and her acts or omissions were conducted within the scope of her official duties or employment.

63. At the time of the events described herein, Plaintiff had a clearly established Constitutional right under the Fourteenth Amendment of the United States Constitution, to be secure within a state's jurisdiction against intentional and arbitrary discrimination.

64. Defendant intentionally treated Plaintiff differently from others similarly situated, including, but not limited to, those who are subject to the jurisdiction of the DoBI Commissioner under the Act, and there is no rational basis for the difference in treatment.

65. Defendant's actions and omissions, as described herein, were objectively unreasonable, arbitrary, irrational, and an abuse of discretion, thereby violating Plaintiff's rights.

66. Defendants' conduct, as described herein, was also malicious and/or involved reckless, callous, and deliberate indifference to Plaintiff's federally protected rights.

67. Defendant's extreme indifference to Plaintiff's protected rights shocks the conscience and violated Plaintiff's rights.

68. Defendant is not entitled to qualified immunity, absolute immunity, or quasi-judicial immunity for the complained of conduct because her actions, as set forth herein, were objectively unreasonable and a clear violation of established law.

69. As a direct and proximate result of Defendant's unlawful conduct, Plaintiff has suffered actual damages and irreparable harm.

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

a) A declaration that Defendant exceeded her powers by disregarding the evidentiary decisions of the ALJ;

b) An injunction immediately and permanently enjoining Defendant from overturning the ALJ's August 29 Order;

c) Compensatory damages, incidental damages, and consequential damages;

d) Attorneys' fees and costs; and

e) For such other relief as the Court may deem just and equitable.

COUNT II
Violation of 42 U.S.C. §1983
Deprivation of Procedural Due Process Rights

70. Plaintiff incorporates by reference the allegations set forth in the preceding paragraphs of the Complaint as though set forth at length herein.

71. 42 U.S.C. §1983 provides, in relevant part, that:

> Every person, who under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceeding for redress […]

72. Plaintiff is a citizen of the United States.

73. Defendant, in her individual capacity, is a person, as the term is used in 42 U.S.C. §1983.

74. Defendant, at all times relevant thereto, was acting under the color of New Jersey State law in her capacity as employee, agent, officer, or representative of the State of New Jersey, and her acts or omissions were conducted within the scope of her official duties or employment.

75. At the time of the events described herein, Plaintiff had a clearly established Constitutional right under the Fourteenth Amendment of the United States Constitution, and was

entitled to due process, which requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power.

76. Defendant knew, or should have known, of Plaintiff's rights at the time of the complained conduct, as those rights were clearly established at that time and have been established law for several years.

77. Defendants' conduct, as described herein, was also malicious and/or involved reckless, callous, and deliberate indifference to Plaintiff's federally protected rights.

78. Defendant's extreme indifference to Plaintiff's protected rights shocks the conscience and violated Plaintiff's rights.

79. Defendant is not entitled to qualified immunity, absolute immunity, or quasi-judicial immunity for the complained of conduct because her actions, as set forth herein, were objectively unreasonable and a violation of established law.

80. As a direct and proximate result of Defendant's unlawful conduct, Plaintiff has suffered actual damages and irreparable harm.

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

a) A declaration that Defendant exceeded her powers by disregarding the evidentiary decisions of the ALJ;

b) An injunction immediately and permanently enjoining Defendant from overturning the ALJ's August 29 Order;

c) Compensatory damages, incidental damages, and consequential damages;

d) Attorneys' fees and costs; and

e) For such other relief as the Court may deem just and equitable.

COUNT III
Violation of 42 U.S.C. §1983
Deprivation of Substantive Due Process Rights

81. Plaintiff incorporates by reference the allegations set forth in the preceding paragraphs of the Complaint as though set forth at length herein.

82. 42 U.S.C. §1983 provides, in relevant part, that:

> Every person, who under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceeding for redress […]

83. Plaintiff is a citizen of the United States.

84. Defendant, in her individual capacity, is a person, as the term is used in 42 U.S.C. §1983.

85. Defendant, at all times relevant thereto, was acting under the color of New Jersey State law in her capacity as employee, agent, officer, or representative of the State of New Jersey, and her acts or omissions were conducted within the scope of her official duties or employment.

86. Plaintiff possessed protected property interests of which Defendant knew, or should have known at the time of the complained conduct, as those property interests are the very subject of the actions taken by Defendant, as described herein.

87. Defendant knew, or should have known, of Plaintiff's rights at the time of the complained conduct, as those rights were clearly established at that time and have been established law for several years.

88. Defendants' conduct, as described herein, was also malicious and/or involved reckless, callous, and deliberate indifference to Plaintiff's federally protected rights.

89. Defendant's extreme indifference to Plaintiff's protected rights shocks the conscience and violated Plaintiff's rights.

90. Defendant deprived Plaintiff of a protected property interest and the procedures for challenging the deprivation were inadequate.

91. Defendant is not entitled to qualified immunity, absolute immunity, or quasi-judicial immunity for the complained of conduct because her actions, as set forth herein, were objectively unreasonable and a violation of established law.

92. As a direct and proximate result of Defendant's unlawful conduct, Plaintiff has suffered actual damages.

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

a) A declaration that Defendant exceeded her powers by disregarding the evidentiary decisions of the ALJ;

b) An injunction immediately and permanently enjoining Defendant from overturning the ALJ's August 29 Order;

c) Compensatory damages, incidental damages, and consequential damages;

d) Attorneys' fees and costs; and

e) For such other relief as the Court may deem just and equitable.

COUNT IV
Violation of the New Jersey Civil Rights Act N.J.S.A. § 10:6-2
Equal Protection Under the Law

93. Plaintiff incorporates by reference the allegations set forth in the preceding paragraphs of the Complaint as though set forth at length herein.

94. Plaintiff has been deprived of substantive rights and privileges secured by the Constitution and laws of the State of New Jersey.

95. Defendant was acting under color of law in depriving Plaintiff of his substantive rights, privileges or immunities.

96. Defendant intentionally treated Plaintiff differently from others similarly situated, including, but not limited to, those who are subject to the jurisdiction of the DoBI Commissioner under the Act, and there is no rational basis for the difference in treatment.

97. Defendant's actions and omissions, as described herein, were objectively unreasonable, arbitrary, irrational, and an abuse of discretion, thereby violating Plaintiff's rights under New Jersey state law.

98. Defendants' conduct, as described herein, was also malicious and/or involved reckless, callous, and deliberate indifference to Plaintiff's federally protected rights.

99. Defendant's extreme indifference to Plaintiff's protected rights shocks the conscience and violated Plaintiff's rights under New Jersey state law.

100. Defendant is not entitled to qualified immunity, absolute immunity, or quasi-judicial immunity for the complained of conduct because her actions as set forth herein, were objectively unreasonable and a violation of established law.

101. As a direct and proximate result of Defendant's unlawful conduct, Plaintiff has suffered actual damages and irreparable harm.

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

a) A declaration that Defendant exceeded her powers by disregarding the evidentiary decisions of the ALJ;

b) An injunction immediately and permanently enjoining Defendant from overturning the ALJ's August 29 Order;

c) Compensatory damages, incidental damages, and consequential damages;

d) Attorneys' fees and costs; and

e) For such other relief as the Court may deem just and equitable.

COUNT V
Violation of the New Jersey Civil Rights Act N.J.S.A. § 10:6-2
Deprivation of Substantive Due Process Rights

102. Plaintiff incorporates by reference the allegations set forth in the preceding paragraphs of the Complaint as though set forth at length herein.

103. Defendant, at all times relevant thereto, was acting under the color of New Jersey State law in her capacity as employee, agent, officer, or representative of the State of New Jersey, and her acts or omissions were conducted within the scope of her official duties or employment.

104. Plaintiff possessed protected property interests of which Defendant knew, or should have known at the time of the complained conduct, as those property interests are the very subject of the actions taken by Defendant, as described herein.

105. Defendant knew, or should have known, of Plaintiff's rights at the time of the complained conduct, as those rights were clearly established at that time and have been established law for several years.

106. Defendants' conduct, as described herein, was also malicious and/or involved reckless, callous, and deliberate indifference to Plaintiff's protected rights under New Jersey state law.

107. Defendant's extreme indifference to Plaintiff's protected rights shocks the conscience and violated Plaintiff's rights.

108. Defendant deprived Plaintiff of a protected property interest and the procedures for challenging the deprivation were inadequate.

109. Defendant is not entitled to qualified immunity, absolute immunity, or quasi-judicial immunity for the complained of conduct because her actions, as set forth herein, were objectively unreasonable and a violation of established law.

110. As a direct and proximate result of Defendant's unlawful conduct, Plaintiff has suffered actual damages.

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

a) A declaration that Defendant exceeded her powers by disregarding the evidentiary decisions of the ALJ;

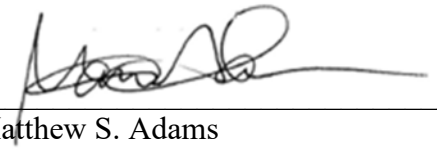
b) An injunction immediately and permanently enjoining Defendant from overturning the ALJ's August 29 Order;

c) Compensatory damages, incidental damages, and consequential damages;

d) Attorneys' fees and costs; and

e) For such other relief as the Court may deem just and equitable.

FOX ROTHSCHILD LLP
Attorneys for plaintiff John Savadjian



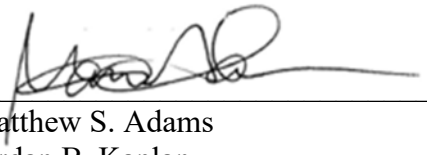
Matthew S. Adams
Jordan B. Kaplan
Marissa Koblitz Kingman

Dated: October 23, 2018

JURY DEMAND

Plaintiff John Savadjian hereby demands a trial by jury as to all issues so triable.

FOX ROTHSCHILD LLP
Attorneys for plaintiff John Savadjian



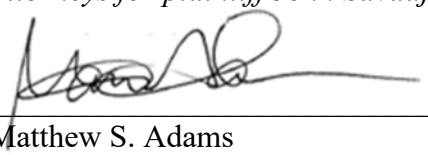
Matthew S. Adams
Jordan B. Kaplan
Marissa Koblitz Kingman

Dated: October 23, 2018

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, Matthew S. Adams, Esq. of the firm Fox Rothschild LLP is hereby designated as trial counsel in this matter on behalf of plaintiff John Savadjian.

FOX ROTHSCHILD LLP
Attorneys for plaintiff John Savadjian



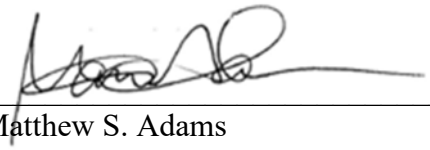
Matthew S. Adams
Jordan B. Kaplan
Marissa Koblitz Kingman

Dated: October 23, 2018

CERTIFICATION PURSUANT TO RULE 4:5-1

I certify that the matter in controversy is not the subject of any other action or arbitration proceeding, now or contemplated, and that no other parties should be joined in this action pursuant to R. 4:5-1.

FOX ROTHSCHILD LLP
Attorneys for plaintiff John Savadjian



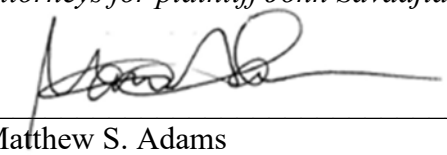
Matthew S. Adams
Jordan B. Kaplan
Marissa Koblitz Kingman

Dated: October 23, 2018

CERTIFICATION PURSUANT TO RULE 1:38-7(b)

I certify that confidential personal identifiers have been redacted from documents now submitted to the Court, and will be redacted from all documents submitted in the future in accordance with R. 1:38-7(b).

FOX ROTHSCHILD LLP
Attorneys for plaintiff John Savadjian



Matthew S. Adams
Jordan B. Kaplan
Marissa Koblitz Kingman

Dated: October 23, 2018

EXHIBIT A

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. The written words must also be authenticated.

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

EXHIBIT B

Order No. A18-111

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

OAL Dkt. No.: BKI 06053-14
Agency Ref. No.: 14-46 &14-130

Commissioner of the New Jersey Department of Banking and Insurance, Petitioner v. John Savadjian, Respondent.	DECISION AND ORDER GRANTING PETITIONER'S REQUEST FOR INTERLOCUTORY RELIEF

This matter comes before the Commissioner of the New Jersey Department of Banking and Insurance ("Commissioner") pursuant to the authority of N.J.S.A. 52:14B-1 to -31, N.J.A.C. 1:1-1 to -21, N.J.A.C. 1:1-14.10, the New Jersey Insurance Producer Licensing Act of 2001 at N.J.S.A. 17:22A-26 to -48 ("Producer Act") and all powers expressed or implied therein.

On September 6, 2018, Petitioner, the New Jersey Department of Banking and Insurance ("Department"), requested interlocutory review of Administrative Law Judge Moscowitz's ("ALJ") August 29, 2018 ruling barring the Department's witness, Prudential employee Charles Shanley ("Shanley"), from authenticating evidence created and collected during a Prudential investigation as a business record, an exception to the hearsay rule, under N.J.R.E. 803(c)(6). Respondent John Savadjian ("Respondent" or "Savadjian") opposed this motion on or about September 11, 2018.

By letter dated September 17, 2018, the Commissioner granted the Department's request for interlocutory review of the August 29, 2018 ruling. On September 21, 2018, Order No. E18-97 was issued granting an extension of time to issue a decision to October 16, 2018, pursuant to N.J.A.C. 1:1-14.10(c).

BACKGROUND AND PROCEDURAL HISTORY

This interlocutory review concerns two specific documents[1] – an Excel spreadsheet with embedded audio recordings and information about the calls that Savadjian allegedly made to Prudential's Customer Service Office ("CSO") ("Excel Spreadsheet") and a report created by Prudential's Corporate Investigations Division ("CID Report") detailing the CID's investigation into Savadjian.

On April 10, 2014, the Department issued Order to Show Cause No. E14-36 ("OTSC"), which alleged, in eight separate counts, that Savadjian committed multiple violations of the Producer Act by conducting bulk transfers of orphaned life insurance accounts[2] via facsimile

[1] Although the August 29, 2018 ruling discusses a compact disc containing audio recordings ("CD"), the Department's request for interlocutory review and a review of the transcript of the proceedings of August 29, 2017 indicate that the Department is seeking to authenticate and admit into evidence the audio recordings embedded in an excel spreadsheet, not on a compact disc. The August 29, 2018 ruling indicates that "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." See August 29, 2018 Order at 2. The transcript of the proceedings indicates, however, that the Department sought to play the audio recordings embedded in the excel spreadsheet. See Transcript of Recording Proceedings on August 29, 2017 ("T2"), 84:22-85:11. Moreover, in its Memorandum of Law in Support of its Request for Interlocutory Review ("Respondent's Moving Brief"), the Department seeks admission of the audio recordings embedded in the Excel Spreadsheet.

[2] An account becomes "orphaned" when the representative who wrote that piece of business leaves the company, therefore, no representative is assigned to it. Transcript of Recorded Proceedings on December 19, 2016 ("T1"), 19:6-16.

transmission sheets without the knowledge or consent of policyholders or his managing director. The OTSC also alleged that Savadjian committed forgery on a number of insurance documents.

Savadjian denied the allegations and requested a hearing and, as a result, this matter was transmitted to the Office of Administrative Law ("OAL") for a hearing.

On or about September 17, 2014, Prudential lodged an additional complaint with the Department about Savadjian, alleging that, on 52 occasions between December 1, 2011 and June 12, 2013, Savadjian called Prudential's CSO and impersonated six different persons to obtain policy information, conduct business, or help transfer orphaned accounts to Respondent's son, who is also a licensed insurance producer. In at least three phone calls, Savadjian identified himself. As a result, the Department filed Amended Order to Show Cause No. E14-130 ("AOTSC") on November 7, 2014, alleging, in 52 additional counts, that Savadjian made fraudulent telephone calls to Prudential wherein he impersonated others.

As part of the complaint against Savadjian, Prudential provided the Department with a CD containing electronic audio recordings of the alleged telephone calls and a summary of the investigation conducted by Prudential's Corporate Investigations Division ("CID"). The audio recordings contain metadata[3] reflecting the date they were downloaded from Prudential's recording system, Verint Impact 360 ("Verint System"), instead of the dates and times that the calls were purportedly made. Moreover, in November 2015, in response to Savadjian's discovery subpoena, Prudential produced 56,000 documents which also included copies of the audio recordings, and the Excel Spreadsheet created by Prudential's CID in the course of its internal investigation of Savadjian's telephone calls to Prudential's CSO containing the embedded audio

[3] "Metadata" is defined in the New Jersey Rules of Professional Conduct as information embedded in electronic documents. N.J.R. Prof. Conduct 1.10(b).

recordings, the dates and times each call was placed, and the phone number from which the calls originated.

Further, on or about January 21, 2015, and January 30, 2015, Savadjian issued subpoenas to Prudential demanding, among other things, the audio recordings with their electronically stored information ("ESI"). In other words, Savadjian sought the audio files in their native format – that is, with the original metadata intact. Prudential, however, objected to Savadjian's demand for the telephone calls with ESI and offered to produce the recordings in the same format in which they were produced to the Department.

On or about June 2, 2016, Savadjian moved in limine before the ALJ to exclude the Excel Spreadsheet and all copies of the telephone calls, arguing that the Department was responsible for the spoliation of metadata.[4] The Department opposed this motion. The ALJ denied the motion to exclude the evidence in a July 1, 2016 Order stating that "Respondent's motion in limine is denied for the reasons stated in Petitioner's papers in opposition to that motion. The ALJ stated that if Department intends to offer PRU-009042[5]... into evidence, it is on notice that Respondent may raise questions of its authenticity. Savadjian then sought interlocutory review of this denial, inter alia, with Acting Commissioner Peter Hartt ("Acting Commissioner"). In a letter issued on July 15, 2016, the Acting Commissioner denied this motion concluding that "ALJ Moscowitz's July 1, 2016 Order and subsequent Order dated July 6, 2016[6] adequately address the issues raised by

[4] In this July 1, 2016 Order, the ALJ also granted the Department's Motions to Quash the trial subpoenas issued to Deputy Attorney General Ryan Schaffer and transcriptionist Stefanie Lucas.

[5] PRU-009042 refers to the Excel Spreadsheet.

[6] The Acing Commissioner noted in his July 15, 2016 letter denying Savadjian's Motion for interlocutory review of ALJ's grant of two Motions to Quash and denial of a Motion in limine to exclude the evidence at issue that, "ALJ Moscowtiz, sua sponte, on July 5, 2016, amended his July 1, 2016 Order, of which interlocutory review is sought and allowed the Respondent to submit

Respondent in his request for interlocutory review and that the interests of justice do not suggest or compel review of the July 1, 2016 Order."

The hearing proceeded before the ALJ on October 17, 2016. The Department originally intended to have Thomas Schreck ("Schreck"), a Prudential employee at the time and Director of Prudential's CID Unit since 2014, authenticate the evidence at issue during the proceedings scheduled for December 19, 2016. Prior to the hearing, Schreck signed a certification detailing his personal knowledge of the evidence at issue and how he created the spreadsheet. However, Schreck was terminated from employment with Prudential on December 9, 2016. At the Department's request, Prudential identified Shanley as an individual who could testify in place of Schreck. Shanley began his testimony that day. At the hearing, counsel for Savadjian objected to Shanley appearing as a witness to authenticate the items of evidence, and the ALJ granted this objection and barred Shanley from testifying in this regard. The ALJ ruled that Shanley could not authenticate the audio recordings, the Excel Spreadsheet, or the CID Report.

On December 19, 2016, the ALJ made an oral ruling precluding the Department from authenticating the recordings of telephone calls made by Savadjian. On December 27, 2016, the Department sought interlocutory review by the Acting Commissioner of the ALJ's December 19, 2016 ruling. In response to a January 6, 2017 request by the Acting Commissioner, the ALJ memorialized his December 19, 2016 ruling in a formal Order dated January 18, 2017.

In the January 18, 2017 Order, the ALJ found that Shanley did not have the personal knowledge to authenticate the three pieces of evidence at issue. With respect to the audio recordings, the ALJ applied the factors set forth in State v. Driver, 38 N.J. 255 (1962), noting that,

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opposition to the two motions to quash the trial subpoena of Ryan S. Schaffer and Stefanie Lucas. Thereafter, on July 6, 2016, the ALJ issued a formal order that allowed the Respondent to file opposition to the aforementioned motions to quash by July 8, 2016."

while the Department may be able to satisfy the first two factors, that the device was capable of taking the conversation and that its operator was competent, the Department could not satisfy the third and fourth factors, which require the Department to establish that the recordings are authentic and correct and that no changes, additions, or deletions were made.[7] Moreover, the ALJ ruled that the Department failed to establish that the written documents or the audio recordings are business records under the business records exception to hearsay. He further ruled that the probative value of the report, without the calls, is substantially outweighed by the risk that its admission would necessitate an undue consumption of time and create a substantial danger of undue prejudice, and thus should be excluded under N.J.A.C. 1:1-15.1.

As discussed below, on February 27, 2017, the Acting Commissioner issued Decision and Order No. A17-105 ("Order No. A17-105"), granting the Department's request for interlocutory relief. The Acting Commissioner remanded the matter back to OAL for continued proceedings as to the authenticity and admissibility of the CID Report and the electronic evidence under the business records exceptions to the hearsay rule, including permitting the Department to continue its examination of Shanley.

On August 29, 2017, the ALJ heard additional testimony from Shanley. The ALJ issued a second ruling on August 29, 2018 ("August 29, 2018 Order"), barring Shanley from authenticating the CD,[8] the Excel Spreadsheet, or the CID Report as business records, an exception to the hearsay rule, under N.J.R.E. 803(c)(6). This Order is being reviewed herein.

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[7] State v. Driver, 38 N.J. 255, 287 (1962), also sets forth a fifth requirement for proponents of sound recordings to establish as a precondition to admissibility. This fifth factor, however, relates to instances of criminal confessions and therefore does not apply here.

[8] As previously noted, it is unclear why reference is made to the CD. See footnote 1. The Department's request for interlocutory review and a review of the transcript of the proceedings of

The Acting Commissioner issued Decision and Order No. A17-105 on February 27, 2017, finding that the ALJ erred in preventing Shanley from providing testimony to authenticate the CD containing audio recordings, the Excel Spreadsheet, and the CID Report. Order No. A17-105 at 21. In addition, the Acting Commissioner noted that the ALJ had not permitted the Department to continue their inquiry as to whether the written portions of the Excel Spreadsheet and CID Report should be admitted under the business record exception to the hearsay rule. Id. at 26. The matter was remanded back to the OAL to allow for further testimony. Id. at 27.

The Acting Commissioner made several modifications to the ALJ's Order relying primarily on State v. Driver, 38 N.J. 255, 287 (1962) and State v. Nan-Tambu, 221 N.J. 390, 405 (2015). First, the Acting Commissioner found that the certification provided by Schreck was a legally competent and direct piece of evidence that provided a reliable basis upon which to determine the authenticity of Prudential's records, including the CID Report and Excel Spreadsheet, because Schreck supervised the Savadjian investigation and described how the audio recordings were collected and maintained. Id. at 26. The Acting Commissioner also found that this certification should have been considered, as it is highly relevant to the authenticity of the recordings. Id. at 23.

Furthermore, the Acting Commissioner found that Shanley, by listening to each recording on the Verint System and the audio recording embedded in the Excel Spreadsheet, then reading and verifying the related information on the Excel Spreadsheet, obtained direct knowledge that the recordings and data in the Excel Spreadsheet being presented for admission are what the

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August 29, 2017 indicate that the Department is seeking to authenticate and admit into evidence the audio recordings embedded in the Excel Spreadsheet.

Department asserts they are, without alteration. Id. at 23-24. As such, the Acting Commissioner found that Shanley's testimony regarding the Verint System in conjunction with Schreck's certification established that the Verint System automatically records incoming calls and then stores these recordings, which are then capable of being downloaded from the Verint System if need be, satisfying the first prong of Driver. Id. at 24. As to the second prong, no indication or challenge from Savadjian was raised as to the competency of the operator as so required under prong two of Driver. Ibid.

The Acting Commissioner noted that the audio recordings could still be verified and authenticated, without the related metadata, as the metadata is only one indicia of reliability and is not fatal to determining whether the recordings are authentic and correct or that no changes, additions or deletions have been made, as required by prongs three and four of Driver. Id. at 24-25. The Acting Commissioner noted that the Department had presented a substantial amount of direct and circumstantial evidence to satisfy these remaining prongs, which should have been fully considered by the ALJ. Id. at 25. Furthermore, Shanley's testimony and Schreck's certification indicate that calls are automatically recorded by the Verint System, lacking "human intrusion," which speaks to the authenticity of the CD. Ibid. In conclusion, the Acting Commissioner held that there is no indication that the recordings themselves have been altered in any meaningful way. Ibid.

The Acting Commissioner noted that the written entries on the Excel Spreadsheet contain information that could be used authenticate and verify the reliability of the audio recordings. Ibid. The Acting Commissioner also noted that the Department offered many other pieces of evidence in an attempt to verify the reliability of the evidence but was prevented from doing so. Id. at 26.

Lastly, the Acting Commissioner found that Shanley clearly can and has established that the Excel Spreadsheet and CID Report are created in the regular course of business and that it was the regular practice of Prudential to make them. Ibid.

The Acting Commissioner relied on Shanley's direct testimony, including his current role as Director of CID at Prudential, testimony about the general investigatory practices employed at Prudential, his testimony about the Verint System, his description that the audio recordings can be downloaded onto a spreadsheet, and his testimony that spreadsheets are often created by the CID to track an investigation, and his testimony that a report is customary written at the close of an investigation. Ibid.

In conclusion, the Acting Commissioner remanded the matter to the OAL to allow the Department the opportunity to present its case in full regarding whether the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy, as set forth in N.J.R.E. 803(c)(6). Id. at 27.

ALJ's August 29. 2018 Order

The ALJ issued an order on August 29, 2018, addressing several of the evidentiary issues remaining in this matter, following the issuance of Order No. A17-105. The ALJ provided the full and complete reproduction of Thomas Schreck's certification, a summary of Shanley's initial testimony on December 19, 2016 and his most recent testimony on August 29, 2017 to support several explicit findings. August 29, 2018 Order at 3 – 16.

The ALJ noted that Savadjian raised the question of the authenticity of the CD, the Excel Spreadsheet, and the CID Report more than six months in advance of the hearing based primarily on the fact that the audio recordings did not contain the metadata associated with their creation. Id. at 17. The ALJ continued that rather than producing Schreck, who would have likely satisfied

the ALJ's inquiry as to how the audio files were created, the Department 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." Ibid.

The ALJ noted that while the authenticity of a writing, which in this case includes the CD, Excel Spreadsheet and CID Report, can be established by either direct or circumstantial evidence, the proponent must make some prima facie showing that the writing is what the proponent claims it to be. Id. at 18. Furthermore, the authenticity of a writing can either be established by direct proof, such as the testimony of its author, or circumstantial evidence, which must "include intimate knowledge of information which one would expect only the person alleged to have been the writer or participant to have." Ibid. However, the ALJ pointed out that this is not absolute, as, pursuant to N.J.R.E. 602, 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. Ibid. Finally, the ALJ noted that while 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. Id. at 19.

As it relates to the authenticity of the CD, which contains the audio recordings, the ALJ focused his analysis on prongs three (the recording is authentic and correct) and four (no changes, additions, or deletions have been made) of State v. Driver, 38 N.J. 255 (1962). As it relates to the third prong of Driver, the ALJ noted that as Driver is typically applied in the context of criminal cases, where the witnesses testifying about the authenticity of a recording are the same police officers who made the recording or who knew how the criminal confessions were recorded, enabling them to testify as to whether an audio recording is authentic and correct. Id. at 20. The ALJ noted that the Department maintains that the ALJ should listen to the audio recordings to

determine their probative value and to determine if the recordings authentic and correct. Ibid. The ALJ found that as the recordings have not, in his view, been authenticated, it would be illogical for the ALJ to listen to the recordings since Shanley did not record the conversations at issue, did not extract the recordings from the recording system used or know how the record system works. Id. at 21.

As it relates to the fourth prong of Driver, that no changes, additions or deletions have been made, the ALJ found that the absence of the metadata associated with the audio recordings 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. Ibid. The ALJ applied Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 380 (2007), wherein the Court held that an investigative report could not be submitted pursuant to the business records exception of the hearsay rule, as it was maintained in a computer system that was capable of manipulation, and therefore, was not trustworthy. Ibid. As in the instant matter, the ALJ pointed out that the metadata related to the audio recordings is missing, thus, the ALJ found that there is sufficient reason to question the reliability/trustworthiness of the Verint System. Id. at 23. The ALJ concluded that Shanley was not sufficiently familiar with the Verint System to allow for meaningful cross-examination surrounding the creation of the audio recordings to demonstrate that the Verint System is reliable/trustworthy. Ibid. Furthermore, he held that that Shanley cannot speak to this point because 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. Ibid.

The ALJ addressed the Department's assertion that authentication is a low bar to entry, relying on State v. Hannah, 448 N.J. Super. 78 (App. Div. 2016). The Court in Hannah held that the current standards for authentication pursuant N.J.R.E. 901, which generally follows Fed. R.

Evid. 901, were adequate to authenticate a social media post on Twitter. NJ.R.E. 901 includes the "the reply letter doctrine [and] content known only to the participants"[9] was sufficient to establish authentication of the Tweet in question. Id. at 23 (citing Hannah, 448 N.J. Super. at 88-89). In Hannah, 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. (citing Hannah, 448 N.J. Super. at 88-89). 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. Ibid. (citing Hannah, 448 N.J. Super. at 90–91).

The ALJ found that the application of Hannah in the instant matter was 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, extract the calls from the Verint System, perform the investigation of Savadjian or supervise anyone who did. Id. at 24. As such, Shanley cannot meet "the reply letter doctrine and or content known only to the participants" standard applied in Hannah. Ibid.

The ALJ pointed out that when a writing is a multidimensional document, such as the audio recordings at issue here, and the witness does not have personal or firsthand knowledge under either the reply letter doctrine or the content known only to the participants standard, "the witness must have the technical knowledge to authenticate it." Id. at 25. The ALJ provided the example

[9] The August 29, 2018 Order does not explain what "the reply letter doctrine and content known only to the participants" rule means. Pursuant to Hannah, the reply letter doctrine and content known only to the participants rule states that a writing may be authenticated by circumstantial evidence establishing that it was sent in reply to a previous communication. Hannah, 448 N.J. Super. at 91.

of two emails, which may be facially identical, however the transmission of the email can only be confirmed by a witness with personal knowledge or a witness with technical knowledge of its metadata. Ibid. (citation omitted). The ALJ acknowledged that the distinction between metadata and the content of the electronic file is well established. Ibid. (citing 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). In this case, the ALJ pointed out that Shanley also does not have the technical knowledge to authenticate the documents either. Id. at 26.

The ALJ noted that Shanley's testimony of his recreation of Schreck's investigation may establish that he has personal knowledge that the audio recordings are the same ones that exist in the Verint System now – but not in 2013 when the Department proffers they were created. Ibid. However, this is problematic because the metadata indicates that modifications, deletions, or alterations have been made to the files. Ibid.

As it relates to the authentication of the Excel Spreadsheet and CID Report, the ALJ found that as the Excel Spreadsheet's metadata has also been compromised, Shanley cannot authenticate the written words contained in the document as he does not have the personal or technical knowledge to do so. Similarly, the ALJ found that Shanley has neither the personal nor the technical knowledge to authenticate the CID Report. The ALJ noted that the CID Report contains Schreck's impressions, findings, and conclusions, but that Schreck was not called to authenticate the CID Report. The ALJ concluded that without the author or a witness with personal or technical knowledge, the CID Report is hearsay.

The ALJ noted that while all relevant evidence is admissible in an administrative proceeding however, evidentiary rulings shall be made to promote fundamental principles of

fairness and justice and to aid in the ascertainment of truth. Ibid. (citing N.J.A.C. 1:1-15.1(b)). However, judges, at their discretion, may determine if the probative value of the evidence is substantially outweighed by the risk that its admission will either necessitate undue consumption of time; or create substantial danger of undue prejudice or confusion. Id. at 28 (citing N.J.A.C. 1:1-15.1(c)). The ALJ stated that even if the evidence at issue could be authenticated by Shanley, these writings must meet an exception to the hearsay rule to be admissible. In this case, the ALJ noted he has already ruled the probative value of the evidence is substantially outweighed by the risk of creating substantial danger of undue prejudice or confusion and 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 the Department alleges he did. Furthermore, although hearsay is admissible, 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. Ibid. (citing N.J.A.C. 1:1-15.5(a) and N.J.A.C. 1:1-15.5(b)).

The ALJ noted that while hearsay may be employed to corroborate competent proof or competent proof may be given added probative force by hearsay testimony, there must be a residuum of legal and competent evidence in the record to support it. Thus, the ALJ concluded, hearsay may be admitted to corroborate or offer added probative force to competent evidence at the OAL, but hearsay cannot provide the residuum for an ultimate finding of fact at the OAL. Id. at 29 (citing Weston v. State, 60 N.J. 36, 51 (1972)).

The ALJ noted that the Department has the burden of proving the authenticity of the CD, the Excel Spreadsheet, and the CID Report under N.J.A.C. 1:1-15.1(e) but has not produced a witness who is competent to do so. The ALJ stated that to overcome this deficit, the Department seeks to gain their admission through the business record exception to the hearsay rule. Ibid. The

ALJ stated that he is requiring a residuum of legal and competent evidence now to support them. Ibid.

The ALJ noted that pursuant to N.J.R.E. 802, hearsay is not admissible, except as provided by the rules or by other law. Id. at 30. However, records of regularly conducted activity, otherwise known as "business records," are excepted from the hearsay rule. Ibid. (citing N.J.R.E. 803(c)(6)). As business records often include hearsay statements, those statements—often referred to as "hearsay within hearsay"—must also meet this exception, pursuant to N.J.R.E. 805. Ibid.

However, the ALJ noted that if evidence is not offered for the truth of the matter asserted, the evidence is not hearsay and no exception to the hearsay rule is necessary to introduce that evidence at trial. Id. at 31. (citing State v. Long, 173 N.J. 138, 152 (2002) and Russell v. Rutgers Cmty. Health Plan, Inc., 280 N.J. Super. 445, 456 (App. Div. 1995)). The ALJ found that in the instant case, while the writings at issue are hearsay documents, the audio recordings contained in them are not hearsay statements because they are not being offered for the truth of the matter they assert. Ibid. To the contrary, they are being offered for their falsity. Therefore, the ALJ found that the audio recordings are not excludable as hearsay. Ibid. Furthermore, it is well established in New Jersey that computer generated information is admissible as long as a proper foundation is laid. Ibid. (citing Sears, Roebuck & Co. v. Merla, 142 N.J. Super. 205, 207 (App. Div. 1976)). Therefore, the computer generated information contained on the CD, populated in the Excel Spreadsheet, and attached to the CID Report will be admissible as long as a proper foundation is laid, that is, as long as these outer layers can be authenticated or meet the business record exception to the hearsay rule. Ibid.

The ALJ stated that a statement is a business record if it is contained in a writing or other record of acts, events, conditions made at or near the time of observation by a person with actual

knowledge or from information supplied by such a person, if made in the regular course of business and if 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. Id. at 32 (citing N.J. R.E. 803(c)(6)).

The ALJ held that the CD and Excel Spreadsheet are electronic writings, due to the computer generated audio recordings on the CD and embedded in the Excel Spreadsheet. Id. at 32. For a computer generated record to be admissible under the business record exception to the hearsay rule, the proper foundation must be laid. Ibid. (citing Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11 (App. Div. 1996)). A foundational witness is usually not required to have personal knowledge of the facts contained a computer generated business record. Furthermore, the ALJ noted that expert testimony is unnecessary if the foundational witness can demonstrate that the computer record is what the proponent claims, is sufficiently familiar with the record system used, and, can establish that it was the regular practice of that business to make the record. Id. at 33. (citing Hahnemann, 292 N.J. Super. 17 – 18). The ALJ noted that pursuant to N.J.R.E. 803, the record is admissible "unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy." Ibid.

The ALJ noted that Savadjian came forward with evidence, namely the certification of a digital forensics expert, Tino Kyprianou, to question the reliability of the audio recordings at issue and Shanley could not satisfy any of the prongs set forth in Hahnemann. Id. at 33. Shanley could not establish that the audio recordings on the CD embedded in the Excel Spreadsheet are what the proponent claims, that he is unfamiliar with the Verint System, does not hold the correct title to establish familiarity, and that he could not establish that the CD or Excel Spreadsheet were made in the regular practice of business, only that "it was the regular practice of Prudential to record

calls to the CSO and that Prudential often made CDs or spreadsheets during investigations - not that it was its regular practice to do so." Ibid. Therefore, the ALJ ruled Shanley was without sufficient familiarity of the record system used to lay the foundation and authenticate either the CD or the Excel Spreadsheet as a business record under N.J.R.E. 803(c)(6). Ibid.

The ALJ described the CID Report as a closing memorandum that summarizes the investigation by the CID and contains the opinions and impressions of its investigators. Id. at 35. The ALJ found that Shanley's testimony as to whether the CID Report constitutes a business record is deficient. Ibid. Shanley could not establish that the CID 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. Ibid. The ALJ noted that although Shanley could establish that the CID did conduct investigations and that it did write reports, he could not establish that the method, purpose, or circumstances of the CID Report's preparation indicate that it is trustworthy. Ibid. Therefore, the ALJ ruled that Shanley could not prove that the CID Report is a business record under N.J.R.E. 803(c)(6). Ibid.

In conclusion, the ALJ asserted that the Acting Commissioner's remand infringes on the role and responsibility of the ALJ to determine what should be admitted into evidence at his or her discretion and disregards the power and authority of the OAL to be an independent arbiter of agency determinations. Id. at 36. As such, the ALJ ruled that Shanley cannot authenticate the CD, the Excel Spreadsheet, or the CID Report as a business record exception to the hearsay rule under N.J.R.E. 803(c)(6). Ibid. Furthermore, the ALJ stated that until the Department provides a witness who can authenticate these documents and provide a residuum of evidence to prove that Savadjian made the calls, and that he made those calls when the Department alleges that he did, these documents will remain inadmissible and will not be admitted into evidence. Id. at 37.

Department's Arguments

On September 6, 2018, the Department submitted a brief in support of its motion for interlocutory review of the ALJ's August 29, 2018 Order.

The Department argues that interlocutory review by the Commissioner is necessary to prevent injustice in this matter. Department's Moving Brief at 13. The Department argues that the Commissioner is vested with the sole regulatory authority over John Savadjian as an insurance producer, who has been ordered to show cause as to serious allegations of fraudulent conduct and dishonesty involving his recorded statements to Prudential. Ibid. (citing N.J.S.A. 17:22A-26 through -48; In re Appeal, 90 N.J. at 99). The August 29, 2018 Order has an enormous impact on the scope of issues and presentation of evidence, and essentially barred the Department from introducing into the record evidence critical to the majority of the counts alleged in the Order to Show Cause. Ibid. (citing In re Appeal, 90 N.J. at 99). To exclude this evidence will predetermine the Commissioner's decision because it results in 52 Counts of the Order to Show Cause being dismissed. Id. at 35. The OAL's unauthorized determination of the case based on misapplication of law and facts frustrates the strong public policy of this State for regulation of insurance producers who commit fraud. Ibid. (citing In re Kallen, 92 N.J. at 30-31). Thus, interlocutory review is necessary at this time.

As it relates to the authentication of the audio recordings, the Department asserted that the standard for authentication at the OAL is a low bar. The Department indicated that the only requirement under the Uniform Administrative Procedure Rules ("APA") for the exclusion of evidence in an OAL proceeding is if the ALJ determines that the probative value of the evidence "is substantially outweighed" by the risk that the admission will "create [a] substantial danger of undue prejudice or confusion." Id. at 14. (citing N.J.A.C. 1:1-15.1(c)). Thus, the burden of

authentication is not "designed to be onerous" and only requires prima facie showing of authenticity. Id. at 15 (citing Hannah, 448 N.J. Super. at 89).

To authenticate a recording, the party offering the evidence must show: "(1) the device was capable of taking the conversation or statement, (2) its operator was competent, (3) the recording is authentic and correct, (4) no changes, additions or deletions have been made." Ibid. (citing State v. Nan-Tambu, 221 N.J. 390, 403 (2015) (quoting State v. Driver, 38 N.J. 255 (1962)). "[E]ven a flawed audio recording is 'not inadmissible per se, so long as its capacity to record accurately, and the other conditions precedent [are] established.'" Ibid. (citing Nan-Tambu, 221 N.J. at 403).

The Department asserts that Shanley's testimony satisfies the authentication test set forth in State v. Driver, 38 N.J. 255 (1962). First, the Department asserts that Shanley established the first two prongs of the Driver test during his December 2016 testimony. As it relates to the third prong of Driver, that the recording is authentic and correct, the Department asserted that the ALJ must listen to the audio recordings to determine if the recording's probative value is substantially outweighed by the risk that the admission will create a substantial danger of undue prejudice or confusion. Id. at 14 (citing N.J.A.C. 1:1-15.1(c)). In support of this assertion, the Department cites Hannah, which states that in the context of a bench trial, "considering the judge's dual role with regard to [an item's] admission and weight, the better practice . . . will often warrant the admission of the document and then a consideration by the judge, as factfinder." Id. at 16 (citing Hannah, 448 N.J. Super. at 156-57). As the Department has been prevented from playing the audio recordings repeatedly, the administrative forum has not evaluated or considered that the nature of the evidence is not the metadata or even the file, but the recorded telephone conversation of Savadjian himself. The Department also cites Order No. A17-105, wherein the Acting Commissioner ruled that Shanley "obtained direct knowledge that the recordings and the data in

the spreadsheet being presented for admission are what the Department asserts they are, without alteration," satisfying the fourth prong of Driver. Id. at 18 (citing Order No. A17-105 at 24). The Department argues that this is permissible as N.J.A.C. 1:1-15.8(c) allows a witness to testify as to the authenticity of evidence using hearsay statements. Ibid.

The Department also asserted that Shanley's testimony has established the authenticity of the CID Report in that he has established that the CID Report and attached exhibits are what the proponent claims them to be. Id. at 17 (citing T2, 16:25-17:1; T2, 47:18-20). Furthermore, the Department asserts there is no evidence that suggests the CID Report and attached exhibits are not what they purport to be. Ibid. Specifically, Shanley testified that he was provided with the original CID Report from the legal department at Prudential. Ibid. (citing T2, 48:16-22). Shanley then testified that Exhibit P13 (the CID Report) is a true and accurate copy of that original CID Report and attached exhibits. Ibid. (citing T2, 16:25-17:1; T2, 47:18-20). The Department states that this is sufficient, as personal knowledge of the matter is required in OAL, but personal knowledge may be obtained through hearsay. Ibid. (citing N.J.A.C. 1:1-15.8(c)). Therefore, the Department maintained that Shanley has met the low burden of admissibility for the CID Report in the context of an administrative hearing. Ibid.

Furthermore, the Department asserts that during Shanley's testimony on August 28, 2017, Shanley testified in detail about how he recreated Schreck's investigation. The Department reiterates that Shanley also testified that the voice of the person who identified himself as Savadjian in a recorded call is the same as the voice of all other callers. Id. at 19 (citing State v. LaBrutto, 114 N.J. 187, 199 (1989) (a lay witness is permitted to testify that the voice of a defendant taken from a voice exemplar matched a voice in a taped telephone conversation); State v. Perez, 150 N.J. Super. 166, 170 (App. Div. 1977) (a taped conversation and the voice exemplar are both

admissible)). The Department also points out that Shanley's testimony where he states that he knows of other persons who have personal knowledge of Savadjian's voice and who have previously identified Savadjian as the caller, referring specifically to Michael Saccento, Savadjian's longtime colleague, who testified that he has significant personal knowledge of Savadjian's voice, reviewed one of the recorded calls and positively identified Savadjian as the caller. Ibid. (citing T2, 105:1-5; T2, 104:1-9; T2, 132:150-136:9). The Department maintains that Saccento's testimony is permissible as evidence of the identity of a telephone caller through recognition of the caller's voice is a means of authentication pursuant to State v. Mays, 321 N.J. Super. 619, 628-29 (App. Div. 1999). Id. at 20. The Department concludes that Shanley can testify that the audio recordings and Excel Spreadsheet created in 2013 is the same copy introduced at the hearing, which Shanley reviewed and properly authenticated. Ibid.

The Department also asserts that the Respondent failed to raise a genuine question of authenticity during their cross-examination of Shanley. Specifically, the Department stated that it only offered the Excel Spreadsheet and its embedded audio files into evidence, but, that during the Respondent's cross-examination, the Respondent focused on outside calls, effectively waiving the opportunity to challenge the Excel Spreadsheet and embedded audio recordings themselves. T2, 125:23-139:6. Furthermore, the Department argues that as no evidence was offered to suggest that the audio recordings offered have been changed in any way outside of metadata, the Respondent has failed to raise any other issue of authenticity relating to the offered evidence. Ibid.

The Department also asserts that Schreck's certification is sufficient to authenticate the Excel Spreadsheet and embedded audio recordings. Id. at 21 (citing N.J.A.C. 1:1-15.6). The Department cites the Acting Commissioner, who determined that the Schreck certification "provides a direct and reliable basis upon which to determine the authenticity of Prudential's

records, including the CID report and the Excel Spreadsheet." Ibid. (citing Order No. A17-105 at 23). Furthermore, the rules permit authentication of evidence by affidavit or certification and do not require that an affiant be produced at trial for cross-examination. Ibid. (citing N.J.A.C. 1:1-15.6). The Department notes that the certification at issue in this matter was admitted into the record. Ibid. (citing T2, 55:7-13). The Department argues that requiring Schreck to appear for cross-examination would contradict the rationale for authentication by certification. Ibid. Furthermore, the Department states that certification, as proof of authentication, is consistent with the general standard of relaxed rules in administrative hearings. Id. at 22 (citing In re Lalama, 343 N.J. Super. 560, 566 (App. Div. 2001)). As the Schreck certification satisfies the authentication requirement under N.J.A.C. 1:1-15.6, the Excel Spreadsheet should have been deemed authenticated. Ibid. The Department argues that the August 29, 2018 Order's disregard of the certification and neglect to comply with the Order No. A17-105 clear remand instructions, constitutes an abuse of discretion. Ibid. The Department notes that the Excel Spreadsheet was produced directly to Respondent via his own subpoena to Prudential. The Department has never held a different copy. Id. at 25.

The Department argues that the ALJ erred by failing to listen to the audio recordings to determine the probative value of the evidence. Id. at 22. As discussed above, to exclude evidence, the administrative forum must weigh any undue prejudice against the probative value of the evidence. Ibid. (citing N.J.A.C. 1:1-15.1(c)). If the probative value of evidence is "substantially" outweighed by the risk of a "substantial" danger of undue prejudice, the court may exclude evidence. Ibid. (citing N.J.A.C. 1:1-15.1(c)). This requires that the Court explore the probative value relative to prejudice. Ibid. Pursuant to Nan-Tambu, the Court must consider the evidential purpose of the recording and whether one or more theories of the case rest on the recordings. Ibid.

(citing Nan-Tambu, 221 N.J. at 408). The Department argues that as the audio recordings are the sole direct evidence against Savadjian for 52 Counts of the Order to Show Cause, the evidence is not anecdotal, remote, or simply a theory of the case, the audio recordings are the case. Ibid. The Department notes that while the forum can determine the probative value based on the AOTSC, proffers, and what is contained in the Excel Spreadsheet, this is not a proper substitute for actually listening to the calls themselves, which is made clear in State v. Driver, 38 N.J. 255, 287-288 (1962), where the Court held that "[i]n all situations" the court should listen to the recording to determine their authenticity. Id. at 23. In the instant matter the forum has declined to listen to the audio recordings. Ibid. The August 29, 2018 Order held that since the ALJ is both "judge and jury" that "once I hear the calls I cannot unhear them." Ibid. (citing August 29, 2018 Order at 21). The Department maintains that this frustrates the entire purpose of N.J.A.C. 1:1-15.1(c). Ibid. The Department asserts that all judges, including those in bench trials, must routinely review evidence for unfair prejudice and, if prejudicial, disregard the evidence from their decision and argues that this case is no different. Ibid.

The Department argues that the significant probative force of the audio recordings is unquestioned, in that they are the case against the Respondent; the probative force, therefore, is not substantially outweighed by the risk of undue prejudice, which is minimal because altered metadata does not impact the content of the audio recordings themselves – that is, the misrepresentations spoken by Savadjian to the CSO on at least 52 different occasions. Ibid. The Department states that the Respondent's argument that the date and time of each call cannot be verified due to the missing metadata is irrelevant. Id. at 24. First, this information appears on the Excel Spreadsheet, which has been verified by Shanley. Ibid. (citing T2, 101:25-102:23). While the metadata on those calls was "altered" because they reflect the dates the files were downloaded

from the Verint System, that information is not critical to the central issues of this case, which alleges that the Respondent violated the Producer Act by fabricating his identity – not when he did so. Ibid. The Department asserts that whether the Respondent committed the conduct today, or years prior to the AOTSC, is irrelevant. Ibid.

Furthermore, the Department argues that excluding evidence based on metadata ignores the guidance provided in Nan-Tambu and the Acting Commissioner's remand order on the specific issue. Ibid. Pursuant to Nan-Tambu, the administrative forum must determine if the metadata renders the audio recording unduly prejudicial. Ibid. (citing Nan-Tambu, 221 N.J. at 406). Here, even if metadata were "altered," the audio recordings are not inadmissible if it otherwise has probative value, which depends on "the extent to which the omission adversely affects the evidentiary purpose or purposes for which the recording has been offered." Ibid. (citing Nan-Tambu, 221 N.J. at 403, 406). The Department reasserts that the audio recordings are central to this case and that altered metadata does not change the fact that Savadjian is heard on the audio recordings misrepresenting his identity; in fact, just because original metadata is not provided does not render the audio recordings themselves either altered or inauthentic. Id. at 25.

In addition, the Department notes that there has been no challenge to the content of the audio recordings themselves. Ibid. The Department has alleged that Savadjian violated the Producer Act by contacting Prudential's CSO, misrepresenting his identity, and using the identity of others to gain access to information, therefore, the content of these calls are in no way unfairly prejudicial to the Respondent because they are his own statements. Ibid. There is no evidence that the content of these calls is not what Petitioner purports it to be. Ibid. Furthermore, the allegation that metadata was altered is not so unfairly prejudicial because the metadata has minimal, if any, probative value, as there is no link between the metadata and the fact that

Savadjian is heard on the audio recordings misrepresenting who he is and using the identity of others. Ibid.

The Department also argues that the offered evidence is admissible under the residuum rule. Id. at 26. Hearsay evidence is admissible in an administrative hearing. Ibid. (citing N.J.A.C. 1:1-15.5(a)). Notwithstanding the admissibility of hearsay evidence, 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. Ibid. (citing N.J.A.C. 1:1-15.5(b)).

The Department argues that the audio recordings provide residuum for all other evidence which flows from them, supports the admission of the CID Report and annexed exhibits, including the Excel Spreadsheet with embedded audio files. Ibid. The Department asserts that applying the residuum rule requires identifying the "ultimate finding of fact" that must be supported by a residuum of competent evidence. Ibid. (citing Matter of Tenure Hearing Cowan, 224 N.J. Super. 737, 750 (App. Div. 1988) (quoting N.J.A.C. 1:1-15.5(b))). The Department asserts that in the instant matter, the ultimate issue to be determined is if Savadjian violated the Producer Act; specifically, if Savadjian "contacted an insurance company, lied about his true identity, and fraudulently used the identity of another [person], to collect private and sensitive policy information and data on multiple insurance consumers and policy holders. . . in violation of N.J.S.A. 17:22A-40a(2), (8), and (16) as alleged in Counts 9-60." Id. at 27. Furthermore, the residuum rule does not require that every fact be based on a residuum of legally competent evidence, but is concerned with its weight relative to facts material to the case. Ibid. (citing Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 359 (2013)). Applied here, the Department argues that each fact in the CID Report or each date and time of a call on the Excel

Spreadsheet need not be supported by non-hearsay, as that would frustrate the purpose of the residuum rule itself. Ibid. Rather, evidence which supports the finding of the ultimate issue may be admitted, even if hearsay, as long as a residuum exists to support the ultimate finding that Savadjian called Prudential's CSO and lied about his identity. Ibid. The Department asserts that this residuum is provided by the audio recordings containing the statement of the party-opponent – John Savadjian. Id. at 28. "A statement offered against a party which is the party's own statement, made either in an individual or in a representative capacity" is not excluded by the hearsay rule. Ibid. (citing N.J.R.E. 803(b)(1)). Thus, the Department argues, the audio recordings are admissible under the hearsay rule and the secondary facts in the CID Report and the details contained in the Excel Spreadsheet are supported by these non-hearsay audio recordings. Ibid.

Furthermore, the Department states that Shanley has provided a substantial foundation for the admission of the evidence under the business records exception. Ibid. The Department cites the Acting Commissioner's Order, which ruled that "Shanley clearly can and has established that [the evidence] are created in the regular course of business and that it was the regular practice of Prudential to make them." Ibid. (citing Order No. A17-105 at 26-27). The Department notes that the August 29, 2018 Order concludes that the evidence cannot be admitted because Shanley does not have personal knowledge, however, the APA expressly states that a witness may testify to evidence based on personal knowledge obtained through hearsay. Id. at 29 (citing N.J.A.C. 1:1-15.8(c)). This rule is similar to N.J.R.E. 803(c)(6), which does not require testimony from the original author of the document sought to be admitted. Ibid.

The Department next argues that the only other objection made to the evidence in the August 29, 2018 Order regards metadata. The Department noted that this was already addressed by the Acting Commissioner's Order, which held that the audio calls may be authenticated absent

the metadata. Ibid. (citing Order No. A17-105 at 24-25). The Department notes that there are no legitimate issues raised, outside of metadata, which would indict that the "source of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy" pursuant to N.J.R.E. 803(c)(6). Ibid.

The Department concluded that portions of the CID Report and Excel Spreadsheet contain hearsay within hearsay and may not be admissible or should be given limited weight, the entire CID Report and Excel Spreadsheet should not be disregarded. Id. at 30.

Respondent's Arguments

The Respondent cites several cases that support his contention that evidentiary decisions made by the ALJ should remain undisturbed by agency heads. See Respondent's Opposition Brief at 45-47 (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587-88 (1988); H.K. v. Dep't of Human Servs., 184 N.J. 367, 384 (2005); City of Passaic v. New Jersey Div. of State Police, 332 N.J. Super. 94, 100 (App. Div. 2000); Cavalieri v. Ed. of Trs. of PERS, 368 N.J. Super. 527, 534 (App. Div. 2004); Coughlin v. Ed. of Trustees, Police & Firemen's Ret. Sys., 2011 WL 850114 (N.J. Super. Ct. App. Div. Mar. 14, 2011); Asdal Builders, LLC v. New Jersey Dep 't of Envtl. Prat., 2012 WL 2368755 (N.J. Super. Ct. App. Div. June 25, 2012); M.R. v. Div. of Developmental Disabilities, 2009 WL 169742, at *1 (N.J. Super. Ct. App. Div. Jan. 27, 2009); Dep't of Children & Families, Div. of Youth & Family Servs. v. V.D., 2013 WL 1163981 (N.J. Super. Ct. App. Div. Mar. 22, 2013); In re Certificates of Benjamin Norton by the N.J. State Ed. of Exam'rs, 2016 WL 6122859 at *3 (N.J. App. Div., Oct. 20, 2016)).

The Respondent argues that Shanley cannot authenticate the audio recordings. Respondent's Opposition Brief at 53. If a party opposing evidence to be offered may not be authentic, the offering party must submit adequate proof in response to said authenticity challenge.

Ibid. (citation omitted[10]). If the proof is not adequate, the rules require that the evidence be excluded from consideration. Id. at 54 (citation omitted). Relying on State v. Driver, 38 N.J. 255 (1962) and State v. Hannah, 448 N.J. Super., 78 (App. Div. 2016), the Respondent argues that the ALJ properly found that Shanley possess no personal knowledge and therefore, cannot testify as to the authenticity of the audio recordings under Hannah which requires "intimate knowledge of information which one would expect only the person alleged to have been the writer or participant to have." Id. at 56 (citation omitted). Furthermore, the Respondent asserts that Shanley could not demonstrate that the audio recordings provided to Savadjian in discovery are the same as the "original" versions of the audio recordings that he purportedly reviewed. Ibid. (citation omitted). The Respondent argues that the Department failed to show that the documents at issue are accurate representations of what the Department purports they are, and as such, the ALJ properly found that the audio recording should be excluded from evidence. Id. at 57.

The Respondent further argues that Shanley's testimony is insufficient to authenticate the CID Report because Shanley lacks the personal knowledge necessary to authenticate the CID Report. Ibid. The Respondent argues that the ALJ's finding that Shanley's "personal knowledge" is not credible because "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." Id. at 58 (citation omitted). As such, the Respondent focuses on the fact that Shanley was not aware if the version of the CID Report he reviewed in 2016 was the same version of the CID Report generated in 2013. Ibid.

[10] The Respondent's Opposition Brief cites to the bate-stamp number of the page they are referencing in their Exhibits, which is comprised of 15 Volumes and totals 2,778 pages. Citing to the bate-stamp would not be helpful to the reader, and they provide no context as to which document is being referred to. As such, these citations have been omitted.

The Respondent argues that Shanley cannot demonstrate that the recordings were not altered or modified as required by State v. Driver. Id. at 59. The Respondent notes that he raised bona fide questions as to the authenticity of the recordings six months prior to trial. Ibid. (citation omitted). As such, the ALJ required the Department to present sufficient evidence at trial to overcome this challenge. Ibid. (citation omitted). The Respondent asserts that the ALJ properly held that Shanley could not testify that the audio recordings had not been modified or digitally altered between 2013 and 2016 as Shanley failed to "create personal knowledge" as to the content of the audio recordings, because Shanley could not testify that the recordings existed in 2013, and because Shanley has no technical knowledge about the recording system, including whether additions or deletions could be made. Id. at 60-61 (citation omitted). The Respondent asserts that the audio recordings can in fact be modified, relying on the Verint System Content Producer User Manual. Id. at 62 (citation omitted). The Respondent concludes that the Department has failed to meet their burden to demonstrate that the audio recordings are authentic. Ibid.

The Respondent argues that he raised genuine questions of authenticity as to all versions of the recordings produced by the Department and Prudential in discovery. Ibid. (citation omitted). First, the Respondent asserts that the bona fide questions raised as to the authenticity of the audio recordings pertains to both the audio recordings on the CD and the audio recordings embedded into the Excel Spreadsheet. Id. at 63 (citation omitted). The Respondent maintains that the Department has mischaracterized Savadjian's authenticity challenge by claiming it was limited to only the audio recordings, and not the audio recordings embedded in the Excel Spreadsheet. The Respondent asserts that this is incorrect. Ibid. (citation omitted). The Respondent argues that Savadjian's digital forensics expert has confirmed, on multiple occasions, that the files embedded in the Excel Spreadsheet were modified and altered in such a manner that their original properties

have been compromised and destroyed, leading to the conclusion that the audio recordings that were downloaded and embedded into the Excel Spreadsheet are not the same as the version that existed in the first instance. Ibid. (citation omitted). The Respondent argues that, as this compromised ESI constitutes a "deletion" within the meaning of the Driver standard, and that as the proponent of said evidence, the Department has not demonstrated that the recordings are, in fact, authentic. Ibid. (citation omitted). As such, the Respondent concludes that the ALJ's findings were proper, and no abuse of discretion exists. Therefore, the Respondent states that the Department's application for interlocutory relief should be denied. Id. at 65.

The Respondent further argues that the Schreck certification fails to authenticate the contents of the Excel Spreadsheet. Ibid. The Respondent argues that reliance on Schreck's certification to establish the authenticity of the Excel Spreadsheet would be misplaced as Schreck did not establish whether the audio recordings contained in the Excel Spreadsheet are the same audio recordings that were provided to Savadjian in discovery, the source of the audio files embedded in the Excel Spreadsheet and whether the version of the Excel Spreadsheet annexed to Schreck's certifications contains audio files at all. Ibid. (citation omitted). In addition, the Respondent asserts that Schreck's certification does not contain any information demonstrating that the proffered evidence is what the Department claims it to be. Id. at 66 (citation omitted). The Respondent concludes that the ALJ's findings were proper, no abuse of discretion exists therefore, the Department's application for interlocutory relief should be denied. Ibid.

The Respondent next argues that the ALJ properly rules that the prejudicial impact of playing the audio recordings substantially outweighs the probative value of playing the audio recordings. Id. The Respondent argues that the issue is not whether the Department is precluded from playing the audio recordings, but whether the ALJ would be listening to audio recordings

that, consistent with Driver, the Department has not shown to be authentic and not altered. Id. at 67. The Respondent argues that based on the balancing of equities, it is clear that the ALJ's decision to not play the audio recordings until the Department has authenticated them, promotes the interests of justice and avoids substantial prejudice to Savadjian. Ibid. Furthermore, the Respondent points out that as Shanley testified that he had not previously met or spoken with Savadjian, it is mysterious how he would then be able to authenticate Savadjian's voice. Ibid. (citation omitted).

Finally, the Respondent argues that the probative value of playing the audio recordings is zero and is reflected in the ALJ's August 29, 2018 Order. Id. at 68 (citation omitted). The Respondent reiterates that along the lines of promoting the principles of fundamental fairness and justice proscribed by N.J.A.C. 1:1-1.3, the ALJ is correct in finding that the Department may be able to play the audio recordings, but only after the Department has demonstrated that they are authentic and have not been altered. Ibid. The Respondent concludes that the ALJ's findings were proper and no abuse of discretion exists; therefore, the Department's application for interlocutory relief should be denied. Id. at 69.

LEGAL DISCUSSION AND ANALYSIS

Authority of an Agency Head

N.J.A.C. 1:1-15.1(c) affords an ALJ, as trier of fact, broad discretion in determining whether to admit evidence at a hearing. As such, the ALJ is tasked with determining whether the probative value of the evidence offered is substantially outweighed by the risk admission would create an undue consumption of time or create substantial danger of undue prejudice or confusion.

However, the Legislature specifically addressed the role of the ALJ in the review of contested matters, stating that the OAL shall not "deprive the head of any agency of the authority to… adopt, reject or modify the findings of fact or conclusions of law of any administrative law judge." N.J.S.A. 52:14F-7. The legislative intent was reaffirmed by In re Appeal of Certain Sections of the Unif. Admin. Procedure Rules, 90 N.J. 85, 94 (1982), which held that ALJs "have no independent decisional authority." The Legislature preserved agency jurisdiction and regulatory responsibility, with the agency retaining "the exclusive right ultimately to decide these cases." New Jersey Election Law Enforcement Comm'n v. DiVincenzo, 451 N.J. Super. 554 (App. Div. 2017). See also N.J.S.A. 52:14B-10(c) (gives the head of an agency the power to "adopt, reject or modify the recommended report and decision" of an ALJ); N.J.S.A. 52:14F-7(a) (The APA "shall [not] be construed to deprive the head of any agency of the authority . . . to determine whether a case is contested or to adopt, reject or modify the findings of fact and conclusions of law of any" ALJ); and N.J.S.A. 52:14F-8(b) (providing that no ALJ shall hear a contested case in which the agency head has determined "to conduct the hearing directly and individually").

Furthermore, leave may be granted in cases for good cause shown or where justice suggests the need for interlocutory review. In re Appeal, 90 N.J. at 100. Good cause exists when the Commissioner deems it likely that an OAL order "will have an impact upon the status of the parties, the number and nature of claims or defenses, the identity and scope of issues, the presentation of evidence, the decisional process, or the outcome of the case." Ibid.

In addition, the New Jersey Supreme Court in In re Kallen, 92 N.J. 14 (1982), examined whether an agency head appropriately remanded a hearing back to the OAL to admit further evidence prior to the entry of a final decision, and held that " because the agency has the statutory

jurisdiction to set and enforce regulatory policy, the final decision in contested cases is entrusted solely to the agency head." In re Kallen, 92 N.J. at 20 (citing In re Appeal, 90 N.J. at 96).

The Respondent cites a myriad of cases to support their contention that evidentiary decisions made by the ALJ should remain undisturbed by agency heads, however, the Respondent mischaracterizes the holdings in these cases. For example, the Respondent cites H.K. v. Dep't of Human Resources, 184 N.J. 367, 384 (2005) to support the position that the ALJ and not the agency head is best suited to make evidentiary decisions. H.K., however, states that it is not for the agency head "to disturb a credibility determination, made after due consideration of the witnesses' testimony and demeanor during the hearing." Respondent's Moving Brief at 47 (citing H.K, 184 N.J. at 384). H.K. does not state what the Respondent contends.

The August 29, 2018 Order states that the Commissioner's remand of the December 27, 2016 ruling is an infringement of the role and responsibility of the ALJ to determine what should be admitted into evidence at his or her discretion and disregards the power and authority of the OAL to be an independent arbiter of agency determinations. August 29, 2018 Order at 36. This assertion is incorrect. As noted by the above, the Commissioner is vested with the sole regulatory authority over John Savadjian as an insurance producer. N.J.S.A. 17:22A-26 through -48; See also In re Appeal, 90 N.J. at 99. Savadjian has been ordered to show cause as to serious allegations of fraudulent conduct and dishonesty involving his recorded statements to Prudential. The August 29, 2018 Order has an enormous impact on the scope of issues and presentation of evidence, and essentially barred the Department from introducing into the record evidence critical to the majority of the counts alleged in the Order to Show Cause. To exclude this evidence will predetermine the Commissioner's decision because it results in 52 Counts of the Order to Show Cause being dismissed. The OAL's unauthorized determination of the case based on misapplication of law and

facts frustrates the strong public policy of this State for regulation of insurance producers who commit fraud. In re Kallen, 92 N.J. at 30-31. Thus, interlocutory review as granted by Order No. A17-105 is appropriate and the grant of interlocutory review is appropriate at this time.

Evidentiary Standard in Administrative Hearings

N.J.A.C. 1:1-15.1(c) provides that, "[p]arties 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." Further, pursuant to N.J.A.C. 1:1-15.1(b), "evidence rulings shall be made to promote fundamental principles of fairness and justice and to aid in the ascertainment of truth."

There are two pieces of evidence at issue in this matter. The first piece of evidence is the Excel Spreadsheet, which was first provided directly to Savadjian by Prudential in response to his November 2015 subpoena duces tecum. Patel Cert. at ¶8. This is the only copy of the Excel Spreadsheet that has been attempted to be introduced in these proceedings, as the Department has never held another copy. Department's Moving Brief at 25. A paper copy of the Excel Spreadsheet was also attached to Schreck's certification as Exhibit 1. Schreck Cert. at ¶5. The Excel Spreadsheet is comprised of ten columns, one of which includes audio files downloaded from the Verint System and embedded into the document. The other columns include written statements as to the date and time of the call, the phone number where the call originated from, whether the voice on the call was similar to Savadjian, the authenticating information used by the caller, the policy numbers mentioned by the caller, the clients name, and a summary of what took place during the call. The written statements were made by Schreck and his supervisee, Anita

Wallwork, upon listening to each audio recording embedded in the document. Schreck Cert. at ¶¶5,7-10.

The second piece of evidence at issue is the CID Report. The CID Report was first provided to the Department on September 17, 2014, as part of the complaint filed by Thomas Schreck on behalf of Prudential against Savadjian. Patel Cert. at ¶4. The CID Report is titled "Summary of Prudential's Corporate Investigations Division ("CID") Investigation Re: John Savadjian." It is a two-page document that describes Schreck's investigation into the 60 phone calls made by Savadjian to the CSO between December 1, 2011 to June 12, 2013 from three different phone numbers associated with Savadjian.[11]

The August 29, 2018 Order discusses the authentication of the CD marked DOBI 0768 and the audio recordings contained therein at great length. However, in this request for interlocutory review, the Department requests that the Commissioner remand the matter back to OAL with instructions that Department has satisfied the requirements for authentication and admissibility of only the CID Report and annexed exhibits, which includes the Excel Spreadsheet and its embedded audio recordings. This request does not relate to the CD marked DOBI 0768 and as such, the CD marked DOBI 0768 is not one of the items at issue in this matter.

Authentication

With respect to authenticity, the standard set forth in N.J.A.C. 1:1-15.6, provides that, "[w]here a genuine question of authenticity is raised the judge may require some authentication of

[11] Upon learning of the allegations that Savadjian had impersonated other persons in telephone calls to the CSO, Schreck conducted a search of the Verint System for all calls to the CSO originating from telephone numbers associated with Savadjian. Patel Cert. at ¶5. For example, as discussed in the CID Report, (201) 660 8500 is the main number for Old Tappan Financial, LLC for which John Savadjian is Principal, the author of the report was able to search the Verint System for this number and generated 15 calls that were included in his investigation.

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." The New Jersey Rules of Evidence also provide guidance on this issue, setting a low bar for authentication, stating that "authentication...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.

Furthermore, the burden of authentication is "not designed to be onerous." State v. Hannah, 448 N.J. Super. 78, 89 (App. Div. 2016). Authentication "does not require absolute certainty or conclusive proof - only prima facie showing of authenticity is required." Hannah, 448 N.J. Super. at 89.

1. Authentication of the Audio Recordings Embedded in the Excel Spreadsheet

As described above, the Excel Spreadsheet contains embedded audio recordings and written statements regarding those audio recordings. Pursuant to State v. Driver, 38 N.J. 255 (1962), to authenticate an audio recording, the proponent must show that the device can record the conversation or statement; that its operator was competent; that the recording is authentic and correct; and, that no changes, additions, or deletions have been made.

The first prong of Driver requires a showing that the device can record the conversation or statement. Driver, 38 N.J. at 288. The Acting Commissioner found that Shanley described the Verint System in sufficient detail to satisfy the first prong of Driver, which requires that the device can record a conversation or statement. Order No. A17-105 at 24. Furthermore, the Acting Commissioner found that between Schreck's certification and Shanley's testimony, the record is clear that the Verint System automatically records incoming calls and stores these recordings, which are then capable of being downloaded if need be. Ibid. The August 29, 2018 Order notes that the first factor is not at issue and does not go into a further analysis regarding the first prong

of the Driver. August 29, 2018 Order at 20. In addition, neither the Department's Moving Brief nor the Respondent's Opposition Brief discuss the first prong of Driver. Consistent with Order No. A17-105, I find that the first prong of Driver, as it relates to the audio recording embedded in the Excel Spreadsheet, has been satisfied.

The second prong of Driver requires that the operator of the recording system was competent. Driver, 38 N.J. at 288. In Order No. A17-105, the Acting Commissioner found that there is no indication or challenge from Savadjian as to the competency of the operator under prong two of Driver. Order No. A17-105 at 24. The August 29, 2018 Order states that the Driver test has since been abrogated in part by State v. Nan-Tambu, 221 N.J. 390, 405 (2015), wherein the Supreme Court found that the second factor no longer requires separate consideration because of technological advances." August 29, 2018 Order at 20 (citing Nan-Tambu, 221 N.J. at 406). In addition, both the Department's Moving Brief and the Respondent's Opposition Brief do not discuss this second prong of Driver. No evidence has been submitted to indicate that the operator of the recording system was not competent. As such, I find the second prong of Driver, as it relates to the audio recordings embedded in the Excel Spreadsheet, has been satisfied.

The third prong of Driver requires a showing that the recordings at issue are authentic and correct. Driver, 38 N.J. at 288. The Acting Commissioner found that Shanley had obtained direct knowledge that the recordings in the Excel Spreadsheet being presented for admission are what the Department asserts they are, without alteration. Order No. A17-105 at 24. In addition, the Acting Commissioner found that the Department had presented a substantial amount of direct and circumstantial evidence, not fully considered by the ALJ, to support the reliability of the audio recordings. Order No. A17-105 at 25.

In the August 29, 2018 Order, the ALJ points out that in Driver, this factor was never fully analyzed because the audio recordings at issue were authenticated by the police officers who were present and made the recordings, thus their personal knowledge negated any issues of authentication. The August 29, 2018 Order focuses on the fact that Shanley was not present when the audio recordings were made, was not involved in the recording of the telephone calls, and concludes that he does not know how the recording system works, rendering him unable to satisfy this prong of Driver. August 29, 2018 Order at 21.

The Department argues that prior to making the determination that a recording is authentic and correct, pursuant to Driver, in all situations, the trial court should listen to the recording to determine if it is "sufficiently audible, intelligible, not obviously fragmented, and, also of considerable importance, whether it contains any improper and prejudicial matter which ought to be deleted." Respondent's Moving Brief at 16 (citing Driver, 38 N.J. at 287-288). The Department asserts that they have routinely been prevented from playing the audio recordings and that the ALJ has not evaluated or considered the fact that the nature of the evidence is not the metadata, or even the electronic file, but the recorded telephone conversation of Savadjian himself. Ibid.

The Respondent asserts the audio recordings offered by the Department are not authentic or correct, based on the absence of metadata associated with said audio recordings. First, the Respondent implies that the Department is purposefully withholding the metadata requested by Savadjian, who sought the files in "native format." Respondent's Opposition Brief at 7. Then, the Respondent relies heavily on the testimony of their computer forensic expert, Tino Kryprianou, who found that because of issues relating to the metadata, the audio recordings provided to Savadjian in discovery are not "exact digital duplicates of each other." Id. at 9.

A review of the record, however, indicates that a prima facie showing exists to support a finding that the audio recordings embedded in the Excel Spreadsheet are accurate and correct. The certifications of Patel, Schreck, and the testimony of Shanley support such a finding.

Upon learning of the allegations that Savadjian had impersonated other persons in telephone calls to the CSO, Schreck conducted a search of the Verint System for all calls to the CSO originating from telephone numbers associated with Savadjian. Patel Cert. at ¶5. Schreck's certification describes how he and his supervisee, reviewed each recording embedded in the Excel Spreadsheet and incorporated related information onto the document. Schreck Cert. at ¶¶5-11. Schreck's testimony is corroborated by Shanley's later recreation of the investigation, through which Shanley obtained direct knowledge that the audio recordings in the Excel Spreadsheet being presented for admission are what the Department asserts they are. A review of Shanley's testimony includes the following statements: Shanley obtained an electronic copy of the Excel Spreadsheet from where it is regularly maintained at Prudential; Shanley accessed the Verint System where the original calls are still maintained; and, Shanley compared the calls embedded in Excel Spreadsheet to those maintained in the Verint System and testified that they are the same calls. T2, 54:12-16; T2, 100:14-101:24. The Respondent's digital forensic expert, Tino Kryprianou, found: "I am able to conclude to a reasonable degree of certainty that the data captured in the body of the spreadsheet identified as PRU-009042 was populated on or before July 9, 2013." June 2, 2016 Certification of Tino Kryprianou at ¶46. This further corroborates Shanley's testimony that the audio recordings embedded in the Excel Spreadsheet are the same as the original recordings maintained in the Verint System in 2013. Therefore, based on this evidence, I find that the Department has satisfied the third prong of Driver, that the audio recordings embedded in the Excel Spreadsheet are accurate and correct.

The fourth prong of Driver requires a showing that no changes, additions, or deletions have been made to the recordings. Driver, 38 N.J. at 288. In Order No. A17-105, the Acting Commissioner rejected the ALJ's ruling that the absent metadata indicates the audio recordings cannot be verified or authenticated. Order No. A17-105 at 25. Second, the Acting Commissioner noted that metadata is only one indicia of reliability and the absence of said data is not fatal to the analysis. Ibid. Lastly, the Acting Commissioner noted that the written entries on the Excel Spreadsheet contain information that could be used authenticate and verify the reliability of the audio recordings. Id. at 26.

The ALJ's August 29, 2018 Order does not examine other indicia of reliability as to the audio recordings. Rather, the ALJ applies Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 380 (2007), wherein the Court held that evidence could not be submitted pursuant to the business records exception of the hearsay rule, as it was maintained in a computer system that was capable of manipulation, and therefore, was not trustworthy. August 29, 2018 Order at 23. The ALJ points out that the metadata related to the audio recordings are missing; thus, the ALJ concludes that deletions have been made and there is sufficient reason to question the reliability/trustworthiness of the Verint System. Ibid. The ALJ concludes that Shanley was not sufficiently familiar with the Verint System to allow for meaningful cross-examination surrounding the creation of the audio recordings to demonstrate that the Verint System is reliable/trustworthy. Ibid.

The Department again, relies on the Acting Commissioner's finding that Shanley "obtained direct knowledge that the recordings and the data in the spreadsheet being presented for admission are what the Department asserts they are, without alteration," satisfying the fourth prong of Driver. Department's Moving Brief at 11 (citing Order No. A17-105 at 24). The Respondent argues that Shanley cannot show that "no changes, deletions or additions have been made." Respondent's

Opposition Brief at 30. The Respondent states that the audio files recorded by Verint can be edited, relying on the Verint Impact 360 Content Producer User Manual. Id. at 31 (citing Verint Impact 360 Content Producer User Manual at 2683a-2696a).

A review of the record indicates that a prima facie showing has been made that no changes, additions or deletions have been made to the audio recordings embedded in the Excel Spreadsheet, pursuant to Driver. I agree with the Acting Commissioner that Shanley has direct knowledge to demonstrate that the audio recordings are what they purport to be, without alteration. The Respondent's digital forensics expert stated: "I can conclude to a reasonable degree of certainty that the spreadsheet was last modified on July 9, 2013, and that no edits have been made to PRU-009042 since that date." June 2, 2016 Certification of Tino Kryprianou at ¶45. Together with the evidence discussed above that establishes that the audio recordings are accurate and correct as stored in Prudential's system, addresses any concerns that the calls maintained in the Verint System reviewed by Shanley in 2016 were somehow altered in the interim. In addition, I agree with the Acting Commissioner that the written entries on the Excel Spreadsheet contain information that should be used to further authenticate and verify the reliability of the audio recordings.

Upon reviewing other indicia of reliability, it is apparent that the audio recordings created by the Verint System are "tamper proofed automatically." Respondent's Opposition Brief, Exhibits Volume 1, Full-Time Recorder: System Administration Guide at 321a. Furthermore, as to the Respondent's representation that the audio files recorded by the Verint System can be edited, a closer look at the pages indicated by the Respondent show that Verint System allows users to download audio files and edit them for insertion into power point presentations and other content. Respondent's Opposition Brief, Exhibits, Volume 15 at 2683a-2696a. These pages to do not

indicate that a user is able to download an audio recording from the Verint System, modify it, and then upload that same audio recording back into the Verint System to replace the original audio recording, and the testimony of Shanley demonstrated that the audio recording in the Excel Spreadsheet match what is contained in Prudential's Verint System.

2. Authentication of a Writing

A writing consists of letters, words, numbers, data compilations, pictures, drawings, photographs, symbols, sounds, or combinations thereof or their equivalent, set down or recorded by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or by any other means, and preserved in a perceptible form. N.J.R.E. 801(e). A writing can be authenticated by either by direct proof, such as testimony by its author, or by circumstantial evidence. State v. Bassano, 67 N.J. Super. 526 (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 (App. Div. 2012). In the instant matter, there are two writings at issue: the Excel Spreadsheet and the CID Report.

As it relates to the authentication of the written statements contained in the Excel Spreadsheet, the Acting Commissioner noted that Shanley had provided testimony about how he listened to each recording and verified the related information on the Excel Spreadsheet after comparing the audio recordings embedded on the Excel Spreadsheet to the original recordings maintained in the Verint System. Order No. A17-105 at 24. The Acting Commissioner concluded that through this process, Shanley had obtained "direct knowledge that the recordings and the data

in the spreadsheet being presented for admission are what the Department asserts they are, without alteration." Ibid.

The ALJ held contrary to the Acting Commissioner, finding that "Shanley has neither the personal nor the technical knowledge to authenticate such information" based on Shanley's initial testimony that he did not know when the Excel Spreadsheet was created, was not involved in creating any part of the Spreadsheet or supervising anyone who did. August 29, 2018 Order at 27.

The Department argues that although the Acting Commissioner already ruled that Shanley "obtained direct knowledge that the recordings and the data in the spreadsheet being presented for admission are what the Department asserts they are, without alteration," the ALJ continues to insist that Shanley is not a proper witness because he lacks the personal knowledge to authenticate the Excel Spreadsheet. Department's Moving Brief at 31. The Department points to Shanley's testimony, wherein he detailed how he recreated Schreck's investigation, obtaining personal knowledge of the Excel Spreadsheet. Ibid. (citing T2, 99:17-21). The Department asserts that this process is sufficient for authentication. Id. at 20.

The Respondent argues that reliance on Schreck's certification to establish the authenticity of the Excel Spreadsheet would be misplaced as Schreck did not establish whether the recordings contained in the Excel Spreadsheet are the same audio recordings that were provided to Savadjian in discovery, the source of the audio files embedded in the Excel Spreadsheet and whether the version of the Excel Spreadsheet annexed to Schreck's certifications contains audio files at all. Respondent's Opposition Brief at 65. Thus, the Respondent argues, the certification fails to contain any information demonstrating that that Excel Spreadsheet is what the Department claims it to be. Id. at 66.

There is sufficient direct proof and circumstantial proof in the record to find that the Excel Spreadsheet is an authentic writing. In this matter, there is direct proof in Schreck's certification, describing when and how he created the Excel Spreadsheet. The ALJ does not address this direct piece of evidence in the August 29, 2018 Order. Schreck's certification is enough to satisfy the low bar for the authentication of written documents. However, in this matter, substantial circumstantial evidence also exists to bolster the authentication analysis.

Under Konop, circumstantial evidence to authenticate a writing includes "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 may include information like the date of creation, as suggested by the ALJ. However, as Shanley testified, he recreated Schreck's investigation in preparation for his testimony. Shanley states that after comparing the calls embedded in the Excel Spreadsheet to those original recordings maintained in the Verint System and determining that they are the same, he reviewed the written entries on the Excel Spreadsheet and compared that information to the content of the audio recordings and information stored in the Verint System, and testified that the dates, times and telephone numbers on the Excel Spreadsheet are accurate.[12] T2, 101:25-102:23. I find that this testimony establishes that Shanley has "intimate knowledge of the information that one would expect the author to have."

[12] During his testimony, Shanley noted that as he recreated Schreck's investigation by comparing the audio recordings embedded in the Excel Spreadsheet to the original recording of the calls in the Verint System, he compared the data stored in the Verint System about each call to the corresponding written entries on the Excel Spreadsheet. Shanley testified there was only one discrepancy. T2, 102:3-5. The Excel Spreadsheet indicates that the duration of call #44 was two minutes and twenty-five seconds, when in reality, the call was two minutes and twenty-nine seconds in duration. T2, 102:7-17.

Furthermore, the ALJ stated that Shanley could not verify that the calls present in the Verint System in 2016 are the same as those that were present in 2013. However, and as discussed above, pursuant to the certification of Tino Kryprianou, based upon a forensic analysis of the Excel Spreadsheet, Kryprianou could "conclude to a reasonable degree of certainty that the spreadsheet was last modified on July 9, 2013, and that no edits have been made to the Excel Spreadsheet since that date." This combined with the testimony of Shanley that the calls on the Excel Spreadsheet are the same as in the Verint system indicates that the embedded calls on the excel Spreadsheet are authentic. Overall, the embedded calls and the data on the Excel Spreadsheet have been sufficiently authenticated to permit admission into the record of this administrative proceeding.

As it relates to the CID Report, the Acting Commissioner held that the certification of former CID Director Schreck provides a direct and reliable basis upon which to determine the authenticity of Prudential's records, including the CID Report and the Excel Spreadsheet, which Schreck authored. Order No. A17-105 at 23. The Acting Commissioner noted that Schreck did not need to be present at the hearing to testify as to the process or to his personal knowledge of the investigation or to authenticate the recordings, the Excel Spreadsheet or the CID Report. Moreover, the Acting Commissioner found that if the Respondent had an actual basis upon which to dispute the assertions in the certification, he could call Schreck as a rebuttal witness. Id.

The August 29, 2018 Order finds that the Schreck certification does not mention the creation of the CD containing the audio recordings, the recording system used to create the Excel Spreadsheet, or the creation of the CID Report. August 29, 2018 Order at 5. Furthermore, the ALJ notes that Savadjian will not have the opportunity to cross examine Schreck, which is not required, pursuant to N.J.A.C. 1:1-15.6 and specifically addressed in Order No. A17-105.

The Department argues that Shanley's testimony has established that the CID Report and exhibits are what the proponent claims them to be. Department's Moving Brief at 17. Furthermore, there is no evidence that suggests that the CID Report is not what it purports to be. Shanley testified that the CID Report and exhibits are the same as the copy maintained at Prudential. Ibid. (citing T2, 16:25-17:1; T2, 47:18-20). Shanley testified that he was provided with the original CID Report from an individual in Prudential's legal department. Ibid. (citing T2, 48:16-22). Pursuant to N.J.A.C. 1:1-15.8(c), while personal knowledge of the matter is required in the OAL, personal knowledge may be obtained through hearsay. Therefore, when an employee of the legal department at Prudential informed Shanley that the CID Report provided to him was a true and accurate copy of the original CID Report and Shanley testified that Petitioner's Exhibit P13 is a true and accurate copy of the original, this is sufficient proof that this evidence is what it purports to be, a true and accurate copy of the original CID Report. T2, 16:25-17:1; T2, 47:18-20. The Department asserts that Shanley's testimony satisfies the low burden of authentication for an administrative proceeding. Id. at 17.

The Respondent argues that Shanley's lack of personal knowledge renders his testimony *per se* insufficient. The Respondent focuses on the fact that Shanley was not aware if the version of the CID Report he reviewed in 2016 was the same version of the CID Report generated in 2013.

Upon a review of the full record, I agree with the Department's argument that Shanley's testimony has satisfied the low burden of authentication in an administrative proceeding. No evidence has been presented to suggest that the CID Report has been altered.

Hearsay in Administrative Proceedings

Hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c). Hearsay is generally admissible in administrative proceedings. See N.J.A.C. 1:1-15.5(a).

The hearsay rule applies when "a declaration is offered to prove the truth of the statement attributed to the declarant." State v. Long, 173 N.J. 138, 152, (2002). There is no violation of the hearsay rule when the truthfulness of the statement was not at issue. State v. Johnson, 216 N.J. Super. 588, 600 (App. Div. 1987). Furthermore, statements that are offered to show that they were made and not for the truthfulness of the statements are not hearsay. Toto v. Princeton Tp., 404 N.J. Super. 604, 619 (App. Div. 2009).

In the August 29, 2018 Order, the ALJ determined that the audio recordings are not hearsay because they are not offered to proof the truth of the matter asserted. August 29, 2018 Order at 31. I concur with this finding as the audio recordings which appear on the Excel Spreadsheet are not being introduced to support the proposition that the information contained in the recordings is true. For example, the audio recordings contain calls made by an individual who identified himself, at times, as Mario Fernandez ("Fernandez"), to Prudential's CSO. The audio recordings are not being introduced to prove that Fernandez made said phone call. Rather, the audio recordings are being introduced to show that the Savadjian made calls where he impersonated six individuals, including Fernandez, to obtain policy information, conduct business, and help transfer accounts. Accordingly, the audio recordings are not hearsay and are admissible, unless another Rule of Evidence barring their admission applies.

In Order No. A17-105, the Acting Commissioner held that the ALJ erred in finding Shanley could not establish that the audio recordings, Excel Spreadsheet and the CID Report were made in

the ordinary course of business. The Acting Commissioner found Shanley's testimony, as the then current Director of CID at Prudential, describing the general investigatory practices employed at Prudential and his use of the Verint System, sufficient. Order No. A17-105 at 26 – 27. The matter was remanded to allow Shanley to continue to testify as to how the documents at issue satisfy the business records exception. Id.

In the August 29, 2018 Order, the ALJ held that the CD, the Excel Spreadsheet, and the CID Report are hearsay. As noted above, the Department is not seeking admission of the CD marked DOBI 0768, but the admission of the audio recordings embedded in the Excel Spreadsheet. As the audio recordings have been deemed as non-hearsay, no hearsay analysis is required as it relates to the audio recordings. However, the written statements on the Excel Spreadsheet and CID Report are hearsay and an analysis of whether these items meet an exception to the hearsay rule follows.

1. Business Records Exception to the Hearsay Rule

Business records 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, made in the regular course of business, and, it was the regular practice of the business to make the record, 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).

In Order No. A17-105, the Acting Commissioner remanded this matter to the OAL, in part, to provide the Department with the opportunity to present its case in full regarding whether the sources of information or the method, purpose or circumstances of preparation indicate that the CID Report and Excel Spreadsheet are not trustworthy, as set forth in N.J.R.E. 803(c)(6). Order No. A17-105 at 27. In addition, the Acting Commissioner also noted that "Shanley clearly can

and has established that such documents are created in the regular course of business that that it was the regular practice of Prudential to make them." Id. at 27-28.

a) Application of the Business Records Exception to the Excel Spreadsheet

In the August 29, 2018 Order, the ALJ held that the Excel Spreadsheet is an electronic writing, due to the computer generated audio recordings embedded in the file. August 29, 2018 Order at 32. The ALJ noted that for a computer generated record to be admissible under the business record exception to the hearsay rule, the proper foundation must be laid. Ibid. The ALJ stated that a foundational witness is usually not required to have personal knowledge of the facts contained a computer generated business record. Id. at 34 (citing Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. at 17 – 18). The Court in Hahnemann explicitly states that 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 33 (citing Hahnemann, 292 N.J. Super. at 18). However, the ALJ pointed out that the Appellate Division still required witness who is sufficiently familiar with the record system used, and, can establish that it was the regular practice of that business to make the record. Id. at 34 (citing Hahnemann, 292 N.J. Super. at 15). The ALJ concluded that Shanley could not satisfy any of the prongs set forth in Hahnemann because he could not establish that the audio files embedded in the Excel Spreadsheet are what the proponent claims, that he is unfamiliar with the Verint System and does not hold the correct title to establish familiarity, and that Shanley could not establish that the Excel Spreadsheet was made in the regular practice of business, just 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." Id. at 33.

The Department cites the Acting Commissioner's Order, which ruled that "Shanley clearly can and has established that [the evidence] are created in the regular course of business and that it was the regular practice of Prudential to make them." Respondent's Moving Brief at 28 (citing Order No. A17-105 at 27). The Department argues that while the August 29, 2018 Order concludes that the Excel Spreadsheet cannot be admitted because Shanley does not have personal knowledge, the APA expressly states that a witness may testify to evidence based on personal knowledge obtained through hearsay. Id. at 29 (citing N.J.A.C. 1:1-15.8(c)). This rule is similar to N.J.R.E. 803(c)(6) which does not require the original author to testify to a business record. Ibid. The Respondent argues that the Excel Spreadsheet constitutes inadmissible hearsay and its admission would violate the residuum rule. Respondent's Opposition Brief at 69. The Respondent also argues that the audio recordings cannot serve as said residuum to admit the Excel Spreadsheet as the audio recordings have not been authenticated. Id. at 72.

The Excel Spreadsheet is a document that contains ten columns, only one of which contains computer generated audio recordings. However, there are several other columns on the Excel Spreadsheet that notate the date, time, the number from which the call originated, whether the voice on the call is similar to the referral call, the authentication information used by the caller, the policy number mentioned on the call, the corresponding clients name, and a summary of the call. As only one of these columns is generated electronically, and because the written information at issue appears on a paper copy of the Excel Spreadsheet being offered into evidence, the Excel Spreadsheet does not constitute an electronic writing, but will be analyzed using the traditional analysis for a business record exception.

A review of the record indicates that the written statements on the Excel Spreadsheet constitute a business record exception to the hearsay rule pursuant to N.J.R.E. 803(c)(6). As

discussed above, business records 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. No evidence has been presented to suggest that Schreck was not the author of the Excel Spreadsheet. Pursuant to Schreck's certification, Schreck was assigned to investigate Savadjian in early 2013. Schreck Cert. at ¶4. His certification states that upon receiving this assignment he created the Excel Spreadsheet, and continued to work on said document, as the investigation progressed. Ibid. at ¶5 and ¶9. Schreck states that the investigation was ongoing and details investigative activities that took place in June 2013. Ibid. at ¶10. Following the forensic analysis of the Excel Spreadsheet, the Respondent's expert conclusively stated that the data captured in the body of the Excel Spreadsheet was populated was populated on or before July 9, 2013. June 2, 2016 Certification of Tino Kryprianou at ¶46. Furthermore, Kryprianou conclusively stated that the Excel Spreadsheet was last modified on July 9, 2013, and that no edits have been made to the Excel Spreadsheet since that date. Ibid. at ¶45. This evidence, read together, indicates that the written statements that appear on the Excel Spreadsheet were made near or at the time of observation by a person with actual knowledge or from information supplied by such a person.

To constitute a business record, it must be established that the writing was made in the regular course of business. I find that this is established by Schreck's certification, which details how he created the spreadsheet to complete his assigned investigation of Savadjian while serving as Manager of CID. Schreck Cert. ¶¶4-11.

The final requirement to find that evidence submitted under the business record exception to the hearsay rule is that it was the regular practice of the business to make the record, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is

not trustworthy. Again, I agree with the Acting Commissioner's finding that Shanley's testimony established that it was the regular practice of the business to make such records. Shanley stated that the CID investigates approximately 200 to 300 cases of fraud for each year Prudential. T1, 9:23–25. He stated that it is typical for an investigator to create a spreadsheet if an investigation deals with numerous phone calls, in order to better organize their data. T2, 9:9-13. Shanley stated that that the investigator has the discretion to create the spreadsheet based on the number of calls. T2, 9:15–20. And Shanley stated that creating such spreadsheets depends on the case. T1, 29:6–12.

As to the final requirement, that the sources of information or the method, purpose or circumstances of preparation indicate that the Excel Spreadsheet is trustworthy, I agree with the Department's assertion that no legitimate issues were raised, outside metadata, which would indicate the Excel Spreadsheet is not trustworthy. As discussed above, the conclusive finding of the Respondent's digital forensics expert states that the Excel Spreadsheet has not been modified since July 9, 2013. Certification of Tino Kryprianou at ¶46. In addition, Shanley's testimony establishes that the written entries contained within the Excel Spreadsheet correspond with the original audio recordings stored in the Verint System. T2, 100:14-101:24. Therefore, any suggestion that the sources of information or the method, purpose or circumstance of preparation of the Excel Spreadsheet would indicate that it is not trustworthy have been invalidated.

In conclusion, I find that the record establishes that the written statements contained in the Excel Spreadsheet meet the business record exception to the hearsay rule, and is admissible pursuant to that exception to the hearsay rule.

3. Application of the Business Records Exception to the CID Report

In the August 29, 2018 Order, the ALJ concluded that Shanley's testimony regarding the CID Report as a business record is deficient as Shanley could not establish that the CID 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. August 29, 2018 Order at 36. The ALJ noted that Shanley could establish that the CID did conduct investigations and that it did write reports, but not he could not establish that the method, purpose, or circumstances surrounding the report was trustworthy. Ibid.

The Department relies on the Acting Commissioner's finding that Shanley can and has established that the evidence at issue, in this case the CID Report, was created in the regular course of business. Respondent's Moving Brief at 28 (citing Order No. A17-105 at 27). The Department argues that while the August 29, 2018 Order concludes that the CID Report cannot be admitted because Shanley does not have personal knowledge, the administrative rules expressly state that a witness may testify to evidence based on personal knowledge obtained through hearsay. Id. at 29 (citing N.J.A.C. 1:1-15.8(c)). This rule is similar to N.J.R.E. 803(c)(6) which does not require the original author to testify to a business record. Ibid. The Respondent argues that the CID Report constitutes inadmissible hearsay and its admission would violate the residuum rule. Respondent's Opposition Brief at 69. The Respondent also argues that the recordings cannot serve as said residuum to admit the CID Report, as the audio recordings have not been authenticated. Id. at 72.

A review of the record indicates that the CID Report meets the business record exception to the hearsay rule pursuant to N.J.R.E. 803(c)(6). As discussed above, business records 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. First, the CID Report details an investigation made into calls to the CSO wherein Savadjian allegedly impersonated six

individuals between December 1, 2011 to June 12, 2013. Patel Cert. at ¶3. Shanley testified that the CID Report was issued regarding John Savadjian in 2013. T2, 11:17–25. Shanley stated that he was informed by an employee of Prudential's legal department that Schreck authored the report. T2, 52:20-53:15. This is permissible, as a witness may testify to evidence based on personal knowledge obtained through hearsay pursuant to N.J.A.C. 1:1-15.8(c). Lastly, a review of the CID Report contains the details of an investigation which are clearly laid out in Schreck's certification. Schreck Cert. at ¶¶5-11.

To constitute a business record, it must be established that the writing was made in the regular course of business. The content of the CID Report details an investigation that is clearly outlined in Schreck's investigation. Schreck was assigned to investigate Savadjian in early 2013. Schreck Cert. at ¶4. The investigation was ongoing until at least June 2013. Id. at ¶4. The CID Report was submitted to the Department with the Consumer Complaint filed against Savadjian, filed by Schreck in 2014. Patel Cert. at ¶4. This establishes that the CID Report was made in the regular course of businesses by Schreck.

The final requirement to find that evidence submitted meets the business record exception to the hearsay rule is a finding that it was the regular practice of the business to make the record. I agree with the Acting Commissioner that Shanley's testimony establishes that the CID Report was made in the regular course of business. Shanley, as the then Director of CID, states that during an investigation it was customary to create a report or closing memo. T1, 10:4–10. 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 and exhibits that support the conclusions reached. T2, 8:21–13. A review of the offered CID Report reflects the description provided by Shanley in his testimony.

As to the final requirement, that the sources of information or the method, purpose or circumstances of preparation indicate that the CID Report is trustworthy and there is no evidence to otherwise. The CID Report was created by a veteran investigator of the CID, who had been Manager of the CID at Prudential since 2009. Schreck Cert. at ¶3. It was in his capacity as Manager that Schreck was asked to investigate Savadjian. Id. at ¶4. The certification explains the investigators thorough process. Id. at ¶¶5-11. Shortly upon completion of this investigation, the employee was promoted to Director of CID. Id. at ¶2. There is no indication that the report was made for an unusual or suspect purpose or by utilizing an untrustworthy method.

In conclusion, I find that a review of the record establishes that the CID Report meets the business record exception to the hearsay rule, and is therefore, admissible.

4. N.J.R.E. 805: Hearsay Within Hearsay

N.J.R.E. 805 reads, "[a] statement within the scope of an exception to Rule 802[13] shall not be inadmissible on the ground that it includes a statement made by another declarant which is offered to prove the truth of its contents if the included statement itself meets the requirements of an exception to Rule 802." In other words, hearsay within hearsay, is admissible if each hearsay statement meets an exception to the hearsay rule.

The Department notes that portions of the CID Report and Excel Spreadsheet contain hearsay within hearsay and may not be admissible or should be given limited weight. However, the entire CID Report and Excel Spreadsheet should not be disregarded. Department's Moving Brief at 30.

[13] N.J.R.E. 802 states: "Hearsay is not admissible except as provided by these rules or by other law."

As set forth above, the Excel Spreadsheet and the CID Report are admissible pursuant to the business record exception to the hearsay rule. However, any statements within those documents should also be examined as to whether they meet an exception to the hearsay rule. For example, in the CID Report, footnote 1 details a conversation between the CID and Fernandez. When the CID informed Fernandez that a caller had impersonated him, Fernandez recalled that he and Savadjian had been working on two life insurance policies together and Fernandez supplied Savadjian with his contract number and PIN because he had been sick and unable to call. Fernandez's statement should be examined as to whether it meets a hearsay exception, or whether a residuum of competent evidence exists if such a hearsay statement is relied upon for an ultimate finding of fact.

The Excel Spreadsheet contains the date and time of the calls, the number from which the call was placed, whether the voice on the call was Savadjian's voice, the authentication information given, policy numbers mentioned, names of clients whose information was sought, and a summary of what was discussed on each call. The final column, which provides summaries of the discussion during each call may constitute hearsay within hearsay, as they appear to describe statements made by the persons on the call. However, an analysis of whether such statements, or other statements, constitute hearsay, whether the truth of the statements therein are competent and/or relevant to proving the charges alleged by the Department in the AOTSC, and whether they should be admitted is beyond the scope of this interlocutory review and are remanded to the Administrative Law Judge.

5. Application of the Residuum Rule

Hearsay evidence that is admitted shall be accorded whatever weight the ALJ deems appropriate taking into account the nature, character and scope of the evidence, the circumstances

of its creation and production, and, generally, its reliability." N.J.A.C. 1:1-15(a). However, there must be some legally competent evidence to support each finding of fact. In other words, "[n]otwithstanding the admissibility of hearsay evidence, 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." N.J.A.C. 1:1-15.5(b). This is often referred to as the residuum rule.

Applying the residuum rule requires identifying the "ultimate finding of fact" that must be supported by a residuum of competent evidence. Matter of Tenure Hearing Cowan, 224 N.J. Super. 737, 750 (App. Div. 1988) (quoting N.J.A.C. 1:1-15.5(b)). "There need not be a residuum of competent evidence to prove each act considered by the Commissioner so long as 'the combined probative force of the relevant hearsay and the relevant competent evidence' sustains the Commissioner's ultimate finding." Id. at 751. The residuum rule does not require that every fact be based on a residuum of legally competent evidence but is concerned with its weight relative to facts material to the case. Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 359 (2013).

The ALJ found that hearsay cannot provide the residuum for an ultimate finding of fact at the OAL and required that a residuum of legal and competent evidence be presented now to support the authenticity of the evidence at issue.

The Department argues that ultimate issue to be determined is if Savadjian violated the Producer Act. Specifically, for Counts 9-60, if Savadjian "contacted an insurance company, lied about his true identity, and fraudulently used the identity of another [person], to collect private and sensitive policy information and data on multiple insurance consumers and policy holders. . . in violation of N.J.S.A. 17:22A-40(a)(2), (8), and (16). This residuum is provided by the audio recordings containing the statement of a party-opponent, John Savadjian. The substantial evidence

of Savadjan's telephone calls provides a dispositive residuum for the ultimate finding because it contains all the information necessary to find that Savadjian violated the Producer Act. The secondary facts in the CID Report and the details contained in the Excel Spreadsheet's columns are supported by the non-hearsay telephone calls. The Respondent argues that as the ALJ held the audio recordings do not meet the business records exception to the hearsay rule, the Department cannot use the audio recordings used as the residuum for facts set forth in the Excel Spreadsheet or CID Report. Furthermore, the Respondent argues that finding the audio recordings fall within the business records exception would not obviate the need to demonstrate their authenticity.

Here, the ALJ recognized that "hearsay cannot provide the residuum for an ultimate finding of fact[.]" August 29, 2018 Order at 29. However, the ALJ then required residuum to support the authenticity of the CD, spreadsheet, and report. Ibid. This was inappropriate because residuum plays no role in the authentication analysis. The residuum rule "only applies to evidence which is inadmissible under the rules of evidence, but is allowed into evidence in an administrative proceeding in which the strict rules of evidence do not apply." In re Scioscia, 216 N.J. Super. 644, 654 (App. Div.), certif. denied, 107 N.J. 652 (1987).

As no ultimate finding of facts are ripe to be made at this time, the ALJ's finding constitutes a misapplication of the residuum rule.

CONCLUSION

For the reasons set forth above, the ALJ's August 29, 2018 Order is MODIFIED. Moreover, for the above reasons it is on the 16th day of October, 2018

ORDERED that:

This matter is hereby remanded to the OAL for continued proceedings in accordance with the ruling herein that Petitioner has satisfied the requirements for authentication and admissibility of

the CID Report and annexed exhibits, including PRU-009042, the Excel Spreadsheet, and embedded audio recordings.

10/16/18
Date

Marlene Caride
Commissioner

Orders/Savadjian Interlocutory Review 101518

Civil Case Information Statement

Case Details: MERCER | Civil Part Docket# L-002210-18

Case Caption: SAVADJIAN JOHN VS CARIDE MARLENE
Case Initiation Date: 10/23/2018
Attorney Name: MATTHEW STEPHEN ADAMS
Firm Name: FOX ROTHSCHILD LLP
Address: 49 MARKET ST
MORRISTOWN NJ 079605122
Phone:
Name of Party: PLAINTIFF : Savadjian, John
Name of Defendant's Primary Insurance Company (if known): Unknown

Case Type: CIVIL RIGHTS
Document Type: Complaint with Jury Demand
Jury Demand: YES - 6 JURORS
Hurricane Sandy related? NO
Is this a professional malpractice case? NO
Related cases pending: NO
If yes, list docket numbers:
Do you anticipate adding any parties (arising out of same transaction or occurrence)? NO

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

Do parties have a current, past, or recurrent relationship? NO

If yes, is that relationship:

Does the statute governing this case provide for payment of fees by the losing party? YES

Use this space to alert the court to any special case characteristics that may warrant individual management or accelerated disposition:

Do you or your client need any disability accommodations? NO
If yes, please identify the requested accommodation:

Will an interpreter be needed? NO
If yes, for what language:

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule* 1:38-7(b)

10/23/2018
Dated

/s/ MATTHEW STEPHEN ADAMS
Signed