IN THE

SUPERIOR COURT OF PENNSYLVANIA

3435 EDA 2009

COMMONWEALTH FINANCIAL SYSTEMS, INC.,
Appellant

v.

LARRY SMITH
Appellee

Appeal from the Order date November 12, 2009, in the Court Of Common Pleas of Delaware County, at No. 06-53273

BRIEF FOR APPELLEE

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The Superior Court is an error correcting court and not an error finding court. This court may not substitute its own credibility judgment for that of the trial court. This court must also affirm the lower court's decision if there is any basis to support it on the record.

The admission or exclusion of competent, relevant evidence is within the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion. An “abuse of discretion” means a "... clearly erroneous conclusion and judgment - one [that is] clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party.

Pa.R.E. 803(6) requires the proponent of the evidence to show circumstantial trustworthiness. It then shifts the burden to the opposing party to show that a business record is untrustworthy. Pa.R.E. 902(11) creates an easy way to comply with Pa.R.E. 803(6) by just obtaining a one-page certification. Pa.R.E. 902(11) was enacted to help businesses avoid the requirement of producing a witness with knowledge as to the requirements for admissibility of business records. This certification was never provided in the present case and no explanation as to why was offered.

The account in question relies heavily upon computer records. Computer records are subject to virus, hacking and corruption. The appellant was unable to meet the initial trustworthiness requirement due to lack of competent knowledge about the

account, the prior protection and preservation of computer data, including its backup and hacking protection. The testimony of the sol witness included speculation and broad, unsupported assumptions, inconsistencies and unexplained evidentiary aberrations relating to the contract.

Appellant's sole witness lacks any knowledge at all about the prior handling of the account, including, but not limited to whether it actually was a business record. All of this could have been easily remedies with a simple certification.

Appellant, therefore, never met the burden of initial trustworthiness, and further, the lower court had significant and ample reasons to suspect the trustworthiness of the records. As such, the lower court did not abuse its discretion in refusing admission of the records in question.

Notwithstanding the argument that the refusal to admit the appellant's documents was reversible error and an abuse of discretion, there was no prejudice to the appellant since appellant failed to prove a contract existed between the parties. Thus, there was no reversible error due to lack of prejudice.

The court did not abuse its discretion in not sanctioning the appellee for failing to appear at trial since insufficient notice of the trial was given and the rule's requirement for reasonable notice was not adhered to. Appellant was well able to comply with the rule but chose to wait until the very eve of trial to notify the appellee that the defendant's presence was required.

ARGUMENT FOR APPELLEE

1. A. The lower court correctly exercised its discretion when it disallowed plaintiff's exhibits in evidence based upon a lack of sufficient and competent testimony regarding its foundation and trustworthiness.

All parties in this case are in agreement as to the role of the trial court regarding the entry into evidence of the documents or other evidence. The admission or exclusion of competent, relevant evidence is within the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion. *Catina v. Maree*, 272 Pa. Super. 247, 415 A.2d 413 (Pa. Super. 1979), *Vattimo v. Eaborn Truck Serv.*, 2001 Pa. Super 162, P8 (Pa. Super. Ct. 2001), *Appeal denied*, 568 Pa. 687, 796 A.2d 319, 2002 Pa. LEXIS 299 (2002), *Eichman v. McKeon*, 2003 Pa. Super 185, 824 A.2d 305, 319 (Pa.Super. 2003).

To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party. *Ettinger v. Triangle-Pacific Corp*., 2002 PA Super 142, 799 A.2d 95, 110 (Pa.Super. 2002). It is suggested that the ruling in this case was not prejudicial for reasons that will become apparent later on in this brief.

It is, further, not the role of an appellate court to pass on the credibility of witnesses or to act as the trier of fact, and an appellate court will not substitute its judgment for that of the fact-finder. *Vattimo* at 1165 (Pa. Super. 2001) (citing, *Ludmer v. Nernberg*, 433 Pa. Super. 316, 640 A.2d 939 (Pa. Super. 1994)). In essence, the role of the Superior Court is one of error-correcting, and not error-finding. *Commonwealth v. Wood*, 2003 PA Super 358, 833 A.2d 740, 748 (Pa. Super. 2003),

affirmed, 580 Pa. 561, 862 A.2d 589 (2004). Accordingly, this court must follow the logic of the trial court's evidentiary rulings in its determinations. *Commonwealth v. Walker*, 2008 Pa. Super. 182, P14 (Pa. Super. Ct. 2008). This court should affirm the decision of the trial court if there is any basis on the record to support the lower court's action; this is so even if this court relied on a different basis in its decision to affirm. *Commonwealth v. O'Drain*, 2003 Pa. Super. 255, P15 (Pa. Super. 2003).

In the case at bar Commonwealth Financial's Systems ("CFS") moved the admission of all their exhibits after the close of the trial. Defense counsel objected at that time to all of the CFS exhibits on the grounds that they were not qualified under Pa.R.E. 803(6). (Trial Court Opinion, R. 169). The exhibits included the cardholder agreement and all records of indebtedness relating to the defendant. The trial court sustained the objection and excluded all of CFS's evidence. It is suggested to this court that, besides CFS's lack of foundation under Pa.R.E. 803(6), the trial court possessed multiple valid and legally sound reasons for the exclusion of the evidence which, most of which may not be subject review, since they involve questions of credibility and trustworthiness (which is based upon credibility in part). *See, Vattimo* at 1165 (Pa. Super. 2001).

Pa.R.E. 803 provides:

> The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (6) Records of regularly conducted activity. A memorandum, report,

> record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The official comment to 803(6) provides:

> Pa.R.E. 803(6) places the burden on an opposing party to show that the sources of information or other circumstances indicate that a business record is untrustworthy, and thus does not qualify for exception to the hearsay rule. The statute *places the burden on the proponent of the evidence to show circumstantial trustworthiness*. Emphasis added. *See* also *Commonwealth v. Schoff*, 2006 PA Super 307; 911 A.2d 147; 2006 Pa. Super. LEXIS 3557 (Pa. Super. Ct. 2006).

Although it may be preferable for a party to meet their burden of circumstantial trustworthiness through live testimony, Pa.R.E. 803(6) conveniently permits records of regularly conducted activity to be authenticated by a mere certification. *Schoff*, *supra* 2006 PA Super 307, P17 (Pa. Super. Ct. 2006). That certification is described by Pa.R.E. 902 which states:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> * * *
>
> (11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, verified as provided in Pa.R.C.P. 76, certifying that the record -
>
> (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

* * *

The addition of paragraph (11) is intended to implement the amendment of Pa.R.E. 803(6). Thus, Rule 803(6) and Rule 902(11) permit records of regularly conducted activity to be authenticated by certification. *Schoff, supra*. The court may also exclude business records that would otherwise qualify under Rule 803(6) if the "sources of information or other circumstances indicate lack of trustworthiness." Pa.R.E. 803(6) Comment. *See*, e.g., *Commonwealth v. Carter*, 2004 PA Super 420, 861 A.2d 957 (Pa.Super. 2004) (en banc), appeal granted, 583 Pa. 678, 877 A.2d 459 (2005).

It was, therefore, up CFS to show this initial circumstantial trustworthiness. The question as to whether, and to what extent believe the witness is at the very core of the issue of circumstantial trustworthiness and this question, being basically one of credibility is for the trial court alone. *Vattimo, supra.*

In support of their initial burden to show circumstantial trustworthiness CFS called their one and only witness, Daniel Venditti. (Trial Court Opinion, R.166). Venditti testified that he was responsible for overseeing the company's portfolio collection division. (N.T. 7/16/09, R. 71, 73), (Trial Court Opinion, R. 166). Venditti testified that CFS's sole business was debt purchasing and debt collection and that he had never

been directly employed by Citibank or any other issuer of credit cards. (N.T. 7/16/09, R. 72, 79-80, 92-94). Venditti testified that CFS had purchased defendant's account in a "spread" of accounts from a company called NCOP containing as few as 10 to as many as 5,000 accounts. (N.T. 7/16/09, R. 96-99). The spread contained various items of information about the account including date opened, social security number, charge off date, etc. (N.T. 7/16/09, R. 102-103). Venditti claimed that the account had charged off with an interest rate of 23.99% and a balance of $4,215.01. Venditti referenced the account in their Trial Exhibit P-4, (N.T. 7/16/09, R. 99-103, R. 37), which was an assignment from the seller of the spread to CFS, NCOP. Also proffered was an assignment from the original creditor, Citibank, to NCOP. (R. 35). CFS additionally proffered an affidavit from NCOP as to the account of the defendant (Exhibit P-5, R. 41), stating that the "Company's business records show that as of July 19, 2004, there was due and payable from Account xxxxxxxxxx8465 the amount of $2,780.04. The Company's business records show that this account was opened on 11/1/1989. The affiant states that to the best of affiant's knowledge, information and belief there are no uncredited payments against the said debt." Notwithstanding CFS's efforts to obtain all the foregoing witnesses and documentation, it still for some reason, thought it unnecessary to obtain a certification or affidavit from Citibank complying with the simplistic requirements of Pa.R.E. 902(11). This then, amounted extreme indifference or appalling arrogance.

CFS is a Scranton-based corporation. CFS obviously thought enough of the case to produce their vice president, Mr. Venditti, a truly valiant effort, given the approximately 124 mile distance between Scranton and the Delaware County

Courthouse in Media, Pennsylvania. And yet, notwithstanding the apparent significance of the matter to it, CFS failed to take heed of the incredibly simple requirements of Pa.R.E. 902(11), thus conceding an exceedingly facile solution to its burden of proof respecting "circumstantial trustworthiness," *see* Comment Pa.R.E. 803(6), and ultimately this very appeal. Thus, while hindsight is always golden, so too is a very rudimentary review of the rules of evidence prior to a trial.

It cannot even be argued that CFS was ignorant of the necessity to establish circumstantial trustworthiness, and thus lay a proper foundation for business records admission. To be sure, Exhibit P-5, R. 41, an affidavit purporting to establish regularity, belies this. CFS was therefore, well aware that it needed something more than the testimony of Mr. Venditti to establish admissibility. CFS now argues, in their brief, that it is the mere *incorporation* of the business record(s) of others into CFS's business records that somehow elevates it to a level where it is now in compliance with Pa.R.E. 803(6). (Appellant's Brief at 12). Surely, if this were the case, CFS would not have needed to bother with the its Exhibit P-5, the affidavit of regularity. The only requirement would be Mr. Venditti's testimony that the records had been "incorporated" into its CFS's, and that it had relied upon them. It is submitted, then, that CFS did indeed know that more was required of it to satisfy the mandate of Pa.R.E. 803(6). Why CFS could not get a verified declaration under Pa.R.E. 902(11) was never explained, nor was why the NCOP affidavit (Exhibit P-5, R. 41), deviated from the requirements of 902(11).

To be sure, CFS spends quite a bit of effort in its attempts to convince this court of what it believes is the logic found in *Air Land Forwarders, Inc. v. US,* 172 F.3d 1338,

1342 (Fed Cir 1999)[1] and other cases similar nature. What is not explained by CFS is that *Air Land Forwarders, Inc*., and similar cases still do look to the reliability of the records that are sought to be admitted. Most, if not all of the cited materials are not Pennsylvania cases. It is really not necessary for this court to look to other jurisdictions for guidance, when such guidance is present under Pennsylvania law. The Pennsylvania Rules of Evidence are likewise concerned with reliability and trustworthiness of evidence. It should be noted that nothing in 803(6) *requires* a court to a court to admit any piece of evidence if it finds it untrustworthy.

Further, in an effort to guide the courts, and define what is considered trustworthy, we can look to Pa.R.E. 902(11). Obviously this rule was not instituted for no reason. It is suggested that the very reason the rule came into being was because mere acceptance or incorporation into an assignee's business records is not enough to satisfy the trustworthiness requirements of Pa.R.E. 803(6). Were that the case, there would be no need for Pa.R.E. 902(11). It appears, therefore, that a simple solution to the problem of reliability was gifted to evidentiary proponents throughout the state, so long as they would take the time to read the rule.

If, for argument's sake, CFS would have unable to obtain a 902(11) declaration from the original creditor, Citibank, it might then be suggested that the original creditor did not itself have sufficient faith in their own records to provide one. Although we will never know the back story, we do know that, for some reason, perhaps neglect,

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[1]CFS argues that this case, as well as cases that are similar to it stand for the proposition that a document prepared by third party is properly admitted if the proffering business integrated that document into its records and relied on it.

perhaps unwillingness on Citibank's part, perhaps some third reason, a declaration pursuant to 902(11) was never offered into evidence. Given the ease in compliance with 902(11) that fact alone subjects all of CFS's exhibit's mistrust and questionable reliability. Indeed, one would think that a company, such as CFS, which purchases thousands of accounts at a time, thus conveying a clear benefit to Citibank (or any seller), could, as a part of the bargain, insist upon a blanket declaration under 902(11). One would think that this would have occurred to CFS, given the fact that collection of other's debts is their "sole business" (N.T. 7/16/09, R. 72, 79-80, 92-94). Does this fact then, raise an issue of substantive unreliability? It is suggested that it does, and that CFS has not met its initial burden of circumstantial trustworthiness. *Schoff*, *supra*. Comment, Pa.R.E. 803(6), *supra*. This was also the opinion of the trial court.

It bears repeating that it is well-established in this state that the trial court has considerable discretion and latitude in determining the admissibility of evidence. Indeed, it is axiomatic that a trial court's evidentiary decisions are not to be disturbed absent a clear abuse of discretion or error of law. See, e.g., *Eichman v. McKeon*, 2003 PA Super 185, 824 A.2d 305, 319 (Pa.Super. 2003); *Concorde Investments v. Gallagher*, 345 Pa.Super. 49, 497 A.2d 637, 641 (1985). Therefore, this court must consider whether the lower court's ruling demonstrated a clear abuse of discretion. *Catina, supra.*

An "abuse of discretion" has been defined as a "... clearly erroneous conclusion and judgment - one [that is] clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable

deductions to be drawn from the facts disclosed upon the hearing . . . ." *Espenshade v. Espenshade,* 1999 Pa. Super 108, P11 (Pa. Super. Ct. 1999), *Francisco v. Ford Motor Co.*, 406 Pa. Super. 144, 146, 593 A.2d 1277, 1278 (1991). An abuse of discretion has also been held to mean "a lack of substantial evidence to support the findings." *Ball v. Montgomery Township Bd. of Supervisors*, 143 Pa. Commw. 142, 149 (Pa. Commw. Ct. 1991).

Further, an abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous. *Commonwealth v. Dengler*, 586 Pa. 54 (Pa. 2005), [WL] at *6; *Jordan v. Jackson*, 2005 Pa. Super 208, 876 A.2d 443, 455 (Pa. Super. 2005).

Clearly then, it will take much, much more than a simple disagreement over admissibility to justify reversal. The lower court, having seen the witnesses, is in a better position overall to determine evidentiary questions. *Vattimo, supra.* Therefore, this court must examine the record to determine if the lower court's decision was clearly against all logic, or lacked substantial evidence to support it.

The lower court, considering the testimony, set about to determine circumstantial trustworthiness in its Opinion of January 26, 2010. (Trial Court Opinion, R. 161, et seq.). It carefully considered whether there reason to doubt the circumstantial trustworthiness of CFS's evidence, as well as whether there was a reason (or multiple reasons) to find that sources of information or other circumstances indicated lack of trustworthiness.

The lower court begins its justification for rejection of CFS's exhibits by

describing the evidence (and pleadings) as “maddening[ly] [inexact],” “odd,” leaving unanswered issues, having an “unfocused presentation”[2], “in artful”, “inconsistent,” and “creating unnecessary tensions in resolving the questions as to [the default date].” (Trial Court Opinion, R. 162-163).

The court also noted unresolved and unexplained issues relating to the actual date of default. Although appellee, Smith, filed no cross appeal as to the issue of the statute of limitations, the court noted the inconsistencies in the testimony, labeling them a “conundrum that still needed to be resolved.[3]” (Trial Court Opinion, R. 163, footnote

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[2]Trial Court Opinion, R. 162 footnote 1 states:

> These averments indicate a maddening inexactitude in an inartfully constructed Complaint. In the Complaint, Plaintiff alleged a contracting date for Defendant with Citibank of 1989, but at the trial of this case that took place on July 16, 2009, Plaintiff's counsel stated, apparently for the first and only time, that the Defendant got the Citibank credit card in "1999". (Complaint, ¶3; 7/16/09 N.T. 20). Nevertheless, an affidavit appended as "Exhibit E" to the Complaint and the Plaintiff's own trial witness, Daniel Venditti, testifying about a document listing the particulars surrounding the within debt, gave the date of the opening of this account as "November 1, 1989." (N.T. 44)(emphasis added). Lastly, apparently realizing the mistake, Plaintiff asserted in argument supporting its Post Trial Motion that the date of this contract was in November of 1989. (Plaintiff's Memorandum of Law and subsequently filed Brief in Support of Motion for Post-Trial Relief, pp. 1, respectively). Plaintiff has yet to explain or elucidate how and why it concluded that it was acceptable to pursue a claim in our courts based on a contract the Plaintiff neither saw nor signed. *[So in original. The court is probably referring to the defendant*]
>
> Plaintiff's unfocused presentation of this matter to this Court took an even odder turn with an averment in the Memorandum in Support of its Post-Trial Motion filed July 30, 2009, that Citibank had sold the Defendant's debt to "Unifund CCR Partners", a debt purchasing entity that purportedly then sold the debt to the Plaintiff. (Id., p.2). Here again, having realized the mistake, the name of the first purchaser of this debt was changed to NCOP Capital, Inc. in the above-mentioned subsequently filed Brief in Support of Plaintiff's Post-Trial Motion filed October 9.2009. (Id., p.2).

[3]The record clearly shows inconsistencies between the testimony and the affidavit of Patricia Cobb, in house counsel and the superior of Mr. Venditti (“She’s my boss.” (N.T. 7/16/09, R. 115)). (N.T. 7/16/09, R. 114-118). These inconsistencies were never explained, as noted by the court in its 3rd footnote (r.163), and all the more reason to question the trustworthiness of the evidence. In fact, any reasonable person would likewise question the evidence’s trustworthiness given Venditti’s testimony regarding

(continued...)

3). The court went on to find more inconsistencies with the evidence relating to the authenticity of the card holder agreement, (Trial Court Opinion, R. 163-164)[4] the annual percentage rate, (Trial Court Opinion, R. 164)[5], the attorney's fees claimed (Trial Court Opinion, R. 164)[6], and the inexactitude and inconsistencies in the identity of the actual assignor of the account to CFS (Trial Court Opinion, R. 167, note 5)[7].

Also, unnoted by the court but equally subject to suspicion was CFS's own

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[3](...continued)
Patricia Cobb's contradictory affidavit as to the default date and the default date on the records that were proffered:

> Q. Do you know Patricia Cobb to be a truthful person?
> A. Absolutely.
> Q. Is she thorough?
> A. Absolutely. (N.T. 7/16/09, R.116-117)

The court was left an unanswered question: Should it believe Vendetti's superior, who he admits is "thorough" and "absolutely truthful," or should it believe the Venditti and the proffered exhibits?

[4]Containing numbers that in no way relate to Smith or her account. (Trial Court Opinion, R. 163-164).

[5]The court noted inconsistencies between the proffered agreement, the complaint and the trial evidence. (Trial Court Opinion, R. 164).

[6]See also footnote 4 of the Trial Court Opinion. (R. 164):

> "...Plaintiff asserted in the Complaint that "20% attorney fees" plus costs were warranted in this action to collect upon the Defendant's debt, an amount that later became "reasonable attorney fees" after Plaintiffs counsel apparently determined that no such percentage rate for attorney fees appeared - even in the 1996 Citibank Card Agreement. ..."

[7]CFS's evidence left open questions as to which company sold the account to it. Sometimes referred to as "NCO Portfolio Management, Inc. and sometimes as NCO Capital Inc., the court remarked, "Plaintiff's consistent inexactitude in litigating this action has left open the question as to whether NCO Capital, Inc. is a subsidiary of NCO Portfolio Management, Inc., or vice versa, or whether they are separate business entities altogether." (R. 167, note 5)

Exhibit P3 found at page 35 of the record. This exhibit is the initial assignment between Citibank and NCOP. The assignment clearly states that it is executed "without recourse and *without representations or warranties..."* The assignment merely refers to the "Accounts described in Section 1.2 of the Agreement." Section 1.2 in not a part of this record, nor was it offered as evidence, nor was it part of the complaint. (Trial Court Opinion, R. 165-166). Section 1.2 was discussed by Venditti as the "debt spread" which included Smith, however. Why this is not a part of the record in unexplained and raises further reason to question whether CFS met its initial burden of circumstantial trustworthiness in this case.

The court next examined the testimony of CFS's chief and only witness, Daniel Venditti. Venditti admitted the following:

1. That he had no knowledge as to Citibank's records, or what they did with their records. (N.T. 7/16/09, R. 109).

2. That he had lacked knowledge as NCOP's records. (N.T. 7/16/09, R. 109).

3. That he did not know how NCOP kept their records..

4. That he did not know how NCOP backs up their computers.(N.T. 7/16/09, R. 109-110).

5. That he did not know how the data was protected on NCOP's computers except to say that "NCO is SAS-70 qualified." (N.T. 7/16/09, R. 110) and "[therefore, they have passed a very rigorous examination of their internal technology system in order to protect their data." (N.T. 7/16/09, R. 111).

6. When asked if he had personal knowledge as to whether NCOP's computers were "SAS-70 qualified" or as to the actual veracity of the prior statement, Venditti

responded, “That is the extent of my knowledge” in effect skirting the issue and avoiding the direct question. (N.T. 7/16/09, R. 111). Venditti never stated in answer to any question that he did, in fact, have any personal knowledge respecting any of the above assertions.

Commenting on his testimony, the lower court remarked,

> Mr. Venditti, while emphasizing that he had no such personal knowledge, lamely offered that "NCO [sic] is SAS-70 qualified ... [and has, therefore,] passed a very rigorous examination of their internal technology system in order to protect their data ... [t]hat is the extent of my knowledge." (N.T. 52-54). (Trial Court Opinion, R. 168).
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> * * *
>
> Nevertheless, Plaintiff never showed that Mr. Venditti's reliance upon a fulfillment of this requirement by Citibank and NCOP Capital Inc. was well founded and, indeed, fully justified. The witness said that he never asked, but merely assumed, that the electronically transmitted spreadsheet for the accounts purchased from Citibank and passed on to the Plaintiff by NCOP Capital, Inc. was protected. (N.T. 54-55). (Trial Court Opinion, R. 168).

The lower court further criticized Venditti’s testimony based upon his lack of knowledge as to whether the data was corrupted or inaccurate at any time prior to CFS receiving it, or whether the same was not so when Citibank originally transmitted it to NCOP. The court additionally indicated Venditti could not say whether the entries on the alleged statements were made at or near the time of the events, or whether the data was transmitted by someone with knowledge. (Trial Court Opinion, R. 168). Most strikingly, the court found that Venditti was unable to say whether the card holder agreement offered into evidence *even applied to the defendant* (emphasis added) given its frequent revisions. (Trial Court Opinion, R. 169, 178).

Dismissing Venditti’s explanation of “SAS-70" qualifications as “boilerplate”, the

lower court easily undercut the credibility of Venditti's testimony, quipping, "The limits of Mr. Venditti's knowledge were vast." (Trial Court Opinion, R. 178). CFS, however, asks this court, as well as the lower court to blindly and unquestionably accept their evidence because they have blindly and unquestionably accepted it. Their reason was based upon the suggestion to "just trust us on this one." This, the lower court was not prepared to do, nor was it an abuse of discretion to politely decline the invitation[8].

As long as the authenticating witness can provide sufficient information relating to the preparation and maintenance of the records to justify a presumption of trustworthiness for the business records of a company, a sufficient basis is provided to offset the hearsay character of the evidence. *In re: Indyk's Estates*, 488 Pa. 567, 413 A.2d at 373 (Pa. 1979). The lower court, therefore, was faced with the issue as to whether Venditti knew anything about the preparation and maintenance of the records, as required by *Indyk*.

It is clear that the lower court had many problems with not only the quantum of proof, but with the credibility of the plaintiff's sole witness. The court's liberal use of words and phrases such as "inconsistencies", "conundrums that still [need] to be resolved", "inexactitudes", "never in a position to know", and "boilerplate [testimony]", are simple indications of the lower court's incredulity and complete lack of faith in the one and only witness. What is equally apparent is that the court listened carefully to the

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[8]The lower court noted CFS's claims that "the banking industry is required to adhere to policies of honest, trustworthy and meticulous record keeping," but pointed out that Venditti was not prepared to state whether those requirements had actually been followed. " (Trial Court Opinion, R. 178). If we have learned anything from the previous five years, it is that it is unsafe to assume that financial institutions always do what is correct or legal.

testimony and tried to find something of value to take from it. Unfortunately, this emperor had no clothes.

This court must consider whether the lower court abused is discretion in rejecting the evidence; in other words, whether the court was “clearly erroneous”, “clearly against logic”, and “against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing", *Francisco, supra*.

It is suggested that no reasonable person would conclude that the lower court lacked ample grounds to disregard CFS’s evidence, given the inconsistencies, inexactitudes, unsolved “conundrums”, and utterly unsupported correlations, causations and conclusions in the testimony. The court was well within its right to find that the witness was incredible and his conclusions unsound, which it did in this case. Credibility being for the lower court to decide, the review of the lower court should stop here, but there are several other reasons this court should not disturb the lower court’s opinion. *Vattimo* at 1165.

Even if the court found the testimony *credible*, which it did not, the evidence given would need to be circumstantially trustworthy. *Schoff, supra*, Pa.R.E. 803(6) *comment*. Then, even if circumstantial trustworthiness was shown, the court would still be free to reject the evidence “if sources of information or other circumstances indicate lack of trustworthiness.” We have already seen the sources of information and the circumstances. In short, CFS, simply asks this court to accept the evidence because it happened to purchase this evidence. Why CFS would ever malign its own investment is beyond imagination.

CFS cites numerous cases from other states in its brief. CFS tells this court that

it is necessary to do this since there is little or no available law in this Pennsylvania on the subject, so it is necessary to be guided by the decisions of far-flung state courts. This logic is faulty. While it is true that this may be helpful at times, it is not required where our state courts have available the elemental case law upon which a decision can be built. It is suggested that our own state does indeed possess all the rudimentary case law upon which to base a well-reasoned decision. Notwithstanding, appellee does admit that sometimes, statutes may be similar enough to draw some guidance in certain situations.

This court has already examined issues upon which this case's reasoning can be built. In *Papach v. Mercy Suburban Hosp*., 2005 PA Super 345, P22 (Pa. Super. Ct. 2005), *vacated* and *remanded* on other grounds[9], 590 Pa. 626, 914 A.2d 868, 2007 Pa. LEXIS 3 (2007). In that case, this court overturned the lower court admission of an EMS report that contained a statement of an individual not acting within the regular course of business. This court opined:

> The justification for Rule 803(6)] is that business records have a high degree of accuracy because the nation's business demands it, because the records are customarily checked for correctness, and because record keepers are trained in habits of precision. McCormick, Evidence, § 306 at 720 (2d Ed. 1972). Double hearsay exists when a business record is

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[9]The Supreme Court entered the following order:

PER CURIAM:

AND NOW, this 2nd day of January, 2007, the Petitions for Allowance of Appeal are hereby GRANTED, the order of the Superior Court is VACATED, and the matter is REMANDED to the Superior Court for further proceedings, including remand to the common pleas court for evidentiary hearings if necessary, to determine the responsibility for the absence of the transcripts from the record certified for appeal. See *Commonwealth v. Williams*, 552 Pa. 451, 715 A.2d 1101 (Pa. 1998); *United Nat'l Ins. Co. v. J.H. France Refractories Co*., 558 Pa. 409, 737 A.2d 738 (Pa. 1999) (per curiam). *Papach v. Mercy Suburban Hosp*., 590 Pa. 626, 627 (Pa. 2007)

> prepared by one employee from information supplied by another employee. **If both the source and the records of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6). HOWEVER, IF THE SOURCE OF THE INFORMATION IS AN OUTSIDER, RULE 803(6) DOES NOT, BY ITSELF, PERMIT THE ADMISSION OF THE BUSINESS RECORD**. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have. See: *United States v. Davis, 571 F.*2d 1354 (5th Cir. 1978); 4 D. *Louisell and C. Mueller, Federal Evidence*, § 448 (1980); *McCormick, Evidence* § 310 at 725-726 (2d Ed. 1972); 4 J. *Weinstein & M. Berger, Weinstein's Evidence* P803(6)[04] (1981). (Emphasis supplied).

CFS's witness could not say whether the original source of the information was (1) from an author that had personal knowledge of the matters reported, or (2) that the information he reported was transmitted by another person who had personal knowledge, acting in the course of a regularly conducted activity, or (3) that it was the author's regular practice to record information transmitted by persons who had personal knowledge as required by Rule 803(6). Thus CFS could not meet its initial hurdle to show that Citibank or to a greater extent, NCOP (the transferor of the record to CFS) deserved a "presumption of accuracy that statements made during the regular course of business have." *Papach, supra.*

This court has adopted the standard of the federal courts, which states that, "If any person in the process is not acting in the regular course of business, then an essential link in the trustworthiness chain fails." *Papach, supra*.

Since CFS was unable to offer testimony that all the links in the trustworthiness chain were secure, it instead insisted to the trial court that Venditti was an "insider," and that he was the "source" of the information. Clearly, this argument is fallacious on

many levels. CFS insisted that this was true, notwithstanding the fact that Venditti had never been directly employed by NCOP, Citibank nor by any other issuer of credit cards; that he possessed absolutely no knowledge of Citibank's, nor of NCOP's record keeping schemes and could not personally attest to their trustworthiness, accuracy, freedom from corruption, nor how they were maintained or backed up; and that he could not show whether or not they were protected from corruption or hacking (N.T.7/16/09, R. 111). Venditti's answer to the obvious problems with his assertion of "insider" status was summed up in a totally unsupported presumption that the records were "SAS-70 qualified" without explaining his basis for this leap of faith, inasmuch as he knew nothing besides his own company's business. (N.T. 7/16/09, R. 111). Venditti, therefore merely assumed SAS-70 qualification[10].

The above arguments fall into a type of fallacious reasoning process known as "appeal to authority."[11] *See*, e.g. *University of North Carolina Writing Center* at

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[10]Interestingly, CFS, in their Brief for the Appellant states, "Additionally, and as testified to at trial by the Plaintiff's witness, Citibank and NCOP had been subjected to and passed an SAS 70 Audit, a widely recognized auditing standard...." While it is true that the witness testified as such, it is also true that the witness testified that he had no knowledge as to the workings nor operations of Citibank or NCOP. Naturally, the court dismissed this as incompetent (Trial Court Opinion, R. 168). Appellant stated that "Defendant was unable to prove in any manner that the information was incorrect," however, it was never up to defendant (appellee) to prove a negative, i.e. defendant is not burdened with disproving every unsupported allegation made by plaintiff, especially where the allegation was never proved in the first place.

[11]An Appeal to Authority is a fallacy with the following form:

1. Person A is (claimed to be) an authority on subject S.
2. Person A makes claim C about subject S.
3. Therefore, C is true.

(continued...)

http://www.unc.edu/depts/wcweb/handouts/fallacies.html. *The Nizkor Project*, http://www.nizkor.org/features/fallacies/appeal-to-authority.html. The first fallacy is that Venditti has no idea whether the data is SAS-70 qualified or not because he is not in position to know. Secondly, and perhaps more importantly, where is there evidence that SAS-70 qualification is in fact, of value? Perhaps, there has been an SAS-80 or even an SAS-100, because perhaps SAS-70 was a faulty standard. SAS-70, is, therefore, just an impressive sounding phrase. Simply saying that data is SAS-70 qualified, in and of itself, means nothing and is an "appeal to authority." This carries no more weight than the statement "Four out of five doctors prefer our product." There is no mention as to what kind of doctors they are, nor whether they are even qualified to make the statement.

Pa.R.E. 803(6) is very similar to F.R.E. 803(6)[12]. F.R.E. 803(6) has been

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[11](...continued)
This fallacy is committed when the person in question is not a legitimate authority on the subject. More formally, if person A is not qualified to make reliable claims in subject S, then the argument will be fallacious.

This sort of reasoning is fallacious when the person in question is not an expert. In such cases the reasoning is flawed because the fact that an unqualified person makes a claim does not provide any justification for the claim. The claim could be true, but the fact that an unqualified person made the claim does not provide any rational reason to accept the claim as true.

[12]The Pennsylvania Rule is similar to F.R.E. 803(6), but with two differences. One difference is that Pa.R.E. 803(6) does not include opinions and diagnoses. This is consistent with prior Pennsylvania case law. See *Williams v. McClain*, 513 Pa. 300, 520 A. 2d 1374 (1987); *Commonwealth v. DiGiacomo*, 463 Pa. 449, 345 A. 2d 605 (1975). The second difference is that Pa.R.E. 803(6) allows the court to exclude business records that would otherwise qualify for exception to the hearsay rule if the "sources of information or other circumstances indicate lack of trustworthiness." The Federal rule allows the court to do so only if "the source of information or the method or

(continued...)

interpreted by the federal courts similarly. To qualify for the business records exception, the document must be prepared by someone acting "in the course of a regularly conducted business activity." Fed. R. Evid. 803(6). "If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail." *Rowland v. American General Finance Inc*., 340 F3d 187,(4th Cir. 2003), Fed. R. Evid. 803 advisory committee's notes; see also *Timberlake Constr. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 342-43 (10th Cir. 1995).

The case of *In re Vinhnee*, 336 B.R. 437 (2005) supports the above proposition. In the *Vinhnee* case, a representative of American Express, the creditor, testified, but was still unable to establish a foundation (see page 15, reproduced in the note[13]). The

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[12](...continued)
circumstances of preparation indicate lack of trustworthiness." *Papach v. Mercy Suburban Hosp*., 2005 PA Super 345, P19 (Pa. Super. Ct. 2005)

[13]

Q. You indicated previously that there was a mainframe computer keeping these records; is that correct?
A. Correct.
Q. And is this a - what type of system would this be?
Do you have any -
A. You know, I don't - I couldn't testify to exactly what - what the model is or anything like that. It's - you know, our computer system that we've used for, you know, quite some time to produce the documents, to gather the information, to store the information and then, you know, produce the statements to the card members. And we - you know, it's highly accurate. It's based on the fees that go in. There's no way that the computer changes numbers or so. It's all what is presented to it from the electronic feeds from the service merchants or establishments where the charges were made.
Q. Did the software that this used is - what type of a software is it? Is it accounting software or is it billing software? What kind of software is it?
A. It's - I don't know exactly what it is. I mean, it's a combination of both because it does take the charges as mentioned, electronic files, puts them together in a mode. It sorts them, puts them to the correct account numbers, the correct accounts, and then the billing statements are produced from that.

trial court rejected this testimony as being unsupportive as to the required foundation, and the appellate panel found that:

> We do not perceive error in the trial court's assessment of this testimony as indicating that the records custodian did not seem to know anything "of any consequence either about the software or the hardware." We certainly cannot say that we have a definite and firm conviction that there was a clear error of judgment in rejecting the exhibits based on this testimony. *Vinhnee*, *supra*.

The *Vinhnee* court, compared admission of paper records to computer records. The court noted that in case of paper records, “the primary authenticity issue in the context of business records is on what has, or may have, happened to the record in the interval between when it was placed in the files and the time of trial. In other words, the record being proffered must be shown to continue to be an accurate representation of the record that originally was created.” *See, F.R. E. 901(a)*. The court concluded that the focus is not on the circumstances of the creation of the record, but the *preservation* of the record to assure that no corruption or changes have occurred prior to trial. *Vinhnee at 444.*

Vinhnee further states that electronic record involves a different format of the record presenting a more complicated variation on the authentication problem.

> Ultimately, however, it all boils down to the same question of assurance that the record is what it purports to be. The logical questions extend beyond the identification of the particular computer equipment and programs used. The entity's policies and procedures for the use of the equipment, database, and programs are important. How access to the pertinent database is controlled and, separately, how access to the specific program is controlled are important questions. How changes in the database are logged or recorded, as well as the structure and implementation of backup systems and audit procedures for assuring the continuing integrity of the database, are pertinent to the question of whether records have been changed since their creation.. *Vinhnee at*

445.

The *Vinhnee* court further stated that the above concepts call into question something more than just identification of the computer and programs; all of the record creator's policies and procedures for the use of the equipment, database, and programs become important. How the database is controlled, how changes in the database are logged or recorded, as well as the structure and implementation of backup systems and audit procedures for assuring the continuing integrity of the database, are pertinent to the questions as to whether records are the same as they were when they were created. "The increasing complexity of ever-developing computer technology necessitates more precise focus." *Vinhnee at 445.*

The court also recognized that for example,

> ...digital technology makes it easier to alter text of documents that have been scanned into a database, thereby increasing the importance of audit procedures designed to assure the continuing integrity of the records. See George L. Paul, *The "Authenticity Crisis" in Real Evidence*, 15 PRAC. LITIGATOR No. 6, at 45-49 (2004). This adds an extra dimension to consideration of whether the computer was "regularly tested" for errors. *See* 5 *WEINSTEIN* § 901.11[2] (2005).

The *Vinhnee* court recognized and endorsed Edward J. Imwinkelried's *Evidentiary Foundations* as a standard test for admissibility.

Professor Imwinkelried suggested an 11 step process for admitting computer records when it was first published in 1980. In subsequent editions, Imwinkelried references scholarship on computer record authentication, including the, *Manual for Complex Litigation*[14], explaining that many courts have "been lax in applying the

[14]Fed. Judicial Center. In its 1982 edition, the Manual recommended that, well in (continued...)

authentication requirement to computer records" and have simply applied the traditional Pa.R.E. 803(6) foundation. Imwinkelried's process requires the proponent to show that:

> (1) The business uses a computer.
> (2) The computer is reliable.
> (3) The business has developed a procedure for inserting data into the computer.
> (4) The procedure has built-in safeguards to ensure accuracy and identify errors.
> (5) The business keeps the computer in a good state of repair.
> (6) The witness had the computer readout certain data.
> (7) The witness used the proper procedures to obtain the readout.
> (8) The computer was in working order at the time the witness obtained the readout.
> (9) The witness recognizes the exhibit as the readout.
> (10) The witness explains how he or she recognizes the readout.
> (11) If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact. *Imwinkelried* § 4.03[2].

The facts in *Vinhnee* are strikingly similar to the present case. In *Vinhnee,* it was a representative of the original creditor, American Express, that testified. The appellant here, CFS, is twice removed from that position; it is not the original creditor, it is not the first assignee, it is the second assignee. If there ever was a reason to admit the evidence based upon Rule 803(6), it would have first existed in the *Vinhnee* case, well

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[14](...continued)
advance of trial, courts require that:

1. The offering party demonstrate that the input procedures conform to the standard practice of persons engaged in the business or profession of the party or person from whom the printout is obtained
2. In the case of a printout prepared especially for trial, the offering party demonstrate that the person from whom the printout is obtained relied on the data base in making a business or professional judgment within a reasonably short period of time before producing the printout sought to be introduced
3. The offering party provide expert testimony that the processing program reliably and accurately processes the data in the data base; and
4. The opposing party be given the opportunity to depose the offeror's witness and to engage a witness of its own to evaluate the processing procedure. *Manual* at § 2.716 (5th ed. 1982).

before it would in the present matter.

In the case at bar, we have no testimony whatsoever as to how the records were kept by the original or secondary record keeper. We have no indication as to the operation of their computer systems at all. This court cannot assume everything is in order and all systems are protected and kept valid, uncompromised, and uncorrupted (there is not even evidence of regular backup). This was CFS's burden; a burden that has not been met.

CFS's argument relies in a large part upon the finding in *Air Land Forwarders, Inc. v. US,* 172 F.3d 1338, 1342 (Fed Cir 1999). CFS indicated that in this case, a document was prepared by third party and was admitted where the preferring business "integrated the document into its records" and relied on it. *Air Land* can be differentiated from this case in many ways. First, *Air Land* involved a single record that was not likely to have been challenged as intrinsically unreliable, i.e. a repair estimate, which is essentially a one-time single page document most likely hand-prepared. This kind of evidence can be easily tested with another repair estimate. A repair estimate is unlike the years of billing statements at issue in this case. Nor is a repair estimate prepared by computer. It is generally a reflection of the opinions of one person, and not subject to hacking or data corruption. Estimates are usually simple paper documents. They are nothing like years of financial data containing a great many transactions.

Secondly, *Air Land* was decided prior to the December, 2000 amendments, allowing for authentication of business records by certification under FRE 902(11). It is suggested that if *Air Land* was decided after the December, 2000 amendments, the result would have been different given the above rule change.

The other distinction is that *Air Land* court is acutely cognizant of the reliability issue. The court stated:

> The above cases hold that Rule 803(6) does not require that the document actually be prepared by the business entity proffering the document. Rather, the cases stress two factors, indicating reliability, that would allow an incorporated document to be admitted based upon the foundation testimony of a witness with first-hand knowledge of the record keeping procedures of the incorporating business, even though the business did not actually prepare the document. The first factor is that the incorporating business rely upon the accuracy of the document incorporated and the second is that *there are other circumstances indicating the trustworthiness of the document*. *See*, e.g., *Munoz v. Strahm Farms, Inc*., 69 F.3d 501, 503 (Fed.Cir.1995) ("Reliability is the basis for admitting evidence under the business records exception."). The trial court found both reliance *and additional assurances of credibility to be present in this case.* [Emphasis added]

It is clear that the lower court did not find factors indicating trustworthiness and reliability. In fact, it found just the opposite, i.e. unreliability and untrustworthiness. In *Air Land*, the court affirmed the lower court opinion admitting the records, not so much because that court advocated the absolute "records incorporation" rule, but rather because, "the trial court did not *abuse its discretion* by admitting into evidence repair estimates...." It is suggested that if the trial court had not admitted the repair estimate, that ruling would not have been disturbed either, unless there was an abuse of discretion.

CFS likewise cites a 3d Circuit case seemingly support its position, *United States v. Sokolow*, 91 F.3d 396, 403 (3d Cir.1996). Again, this is a pre-2000 case, and even so, the court held that hearsay would only be admitted provided a foundation is laid by "the custodian or other qualified witness" testifying that:

> (1) [t]he *declarant in the records had personal knowledge to make accurate statements; (2) the*

> *declarant recorded the statements contemporaneously with the actions that were the subject of the reports; (3) the declarant made the record in the regular course of the business activity; and (4) such records were regularly kept by the business. United States v. Pelullo*, 964 F.2d 193, 200 (3d Cir.1992). business records exception may still apply "[i]f the business entity has adequate verification or other assurance of accuracy of the information provided by the outside person." *See United States v. McIntyre*, 997 F.2d 687, 700 (10th Cir.1993), cert. denied, 510 U.S. 1063, 114 S.Ct. 736, 126 L.Ed.2d 699 (1994).

In fact, almost all of the cases cited by CFS are pre-2000 rule change, relating to authentication by certification under FRE 902(11) or cases from other state jurisdictions, that may or may not have similar rules of evidence and case common law. At least one of the cases cited by CFS is a misinterpretation. CFS cites *U.S. v. Moore*, 923 F.2d 910 (1st Cir. 1991) for proposition that courts have declined to require testimony regarding the functioning and accuracy of computer process where, as here, the records at issue are bank records reflecting data entered automatically, rather than manually. In this case, however, the court found,

> ...that the Government did lay an adequate foundation for the records. Its witness, Louise Slattery, testified that she was the head of the bank's consumer loan department, that the records in question were made in the "regular course" of the bank's business, that they were compiled by a "service bureau" connected by phone lines to the bank, and that she and others at the bank could retrieve, and did retrieve, that information from time to time by requesting the information from the bureau. This testimony is more than sufficient to permit the court to find that Louise Slattery was a "qualified witness" (the head of consumer loans is likely to know how loan data are compiled and kept), that the information was kept in the "regular course of business" (she said as much), that they were made on the basis of information transmitted by a person with knowledge (a "service bureau" connected by phone lines to the bank's receiving officials), and that it was the "regular practice" of the bank and bureau to keep such records (she said as much). *See United States v. Catabran*, 836 F.2d 453, 457 (9th Cir.1988).

In the *Moore* case above, persons originally associated with the records who had actual knowledge testified. In the case at bar, Venditti met none of those qualifications.

In Pennsylvania, so long as a witness can provide sufficient information relating to their preparation and maintenance to justify a presumption of the trustworthiness of the business records of a company, a basis is provided to offset the hearsay character of the evidence presented. *In re Estate of Indyk*, 488 Pa. 567, 413 A.2d 371 (1979); *Fauceglia v . Harry*, 409 Pa. 155, 185 A.2d 598 (1962); and *Ganster v. Western PennsylvaniaWater Company*, 349 Pa. Super. 561, 504 A.2d 186 (1986). Although the person making the record which is sought to be admitted is not the record custodian, the authenticating witness must still provide sufficient information relating to the preparation and maintenance of records to justify a presumption of trustworthiness. *Indyk, supra*, 413 A.2d at 373. The trial court properly found that Venditti's admission that he knew knowing nothing regarding Citibank's and NCOP's business records utterly disallowed him from attesting to their trustworthiness. The preclusion of the record from evidence is not, therefore, and such abuse of discretion that it merits invocation of this court's error-correcting powers. Again, the question is not whether this court, if it was sitting as a trial court, would have admitted the records, but whether the trial court's decision was one that is so far removed from reason, that is "against all logic." *Vattimo, supra; Dengler, supra; Jordan, supra.*

The pre-eminent authority on the subject of evidence in Pennsylvania is Professor Edward D. Ohlbaum of Temple University. Professor Ohlbaum teaches us that computer generated records are admissible as records of a regularly conducted

activity if:

1. The entries satisfy the four foundational requirements for business records[15]

2. There is evidence that the computer process produces an accurate result when correctly used and properly operated; and

3. It was used and operated properly with respect to the records presented. *Ohlbaum*, §803.07[18].

Regarding the mere use of another business's records by a secondary or tertiary business, Professor Ohlbaum states that the proponent is obligated to show that both sets of records comply with Pa.R.E. 803(6). Professor Ohlbaum states "The mere fact that a business "uses" the information or data of a second business is not sufficient, without more, to satisfy the business record exception." *Ohlbaum*, §803.07[12][c][iii]. An example of this proposition lies squarely in the Commonwealth Court's decision in *Centennial Station Condo. Ass'n v. Schaefer Co. Builders*, 800 A.2d 379, 2002 Pa. Commw. LEXIS 499 (Pa. Commw. Ct. 2002). In this case, the court disallowed a contractor's estimates, which was accepted as reasonable by a condominium association and placed within their 89 page packet of documents, where neither the sponsoring witness nor the Association's expert, who opined that the estimates were reasonable, was qualified to speak on behalf of the businesses, regarding their business practices. *supra* at 386. It should also be noted that *Centennial Station* is a post 2000 rule change case, and it must be assumed that the court was well aware of

[15].i.e. (1) made in the regular course of business; (2) reflecting regularly conducted business activity; (3) at or reasonably near the happening of the event recorded; and (4) by or from someone within the business having personal knowledge. Ohlbaum, Edward. *Ohlbaum on the Pennsylvania Rules of Evidence* 2008-2009 Edition, §803.07[6]

the relaxed requirements of Pa.R.E. 902(11). The prior decision of *Peled v. Meridian Bank*, 710 A.2d 620, 626 (Pa.Super. 1998), app. den., 556 Pa. 711, 729 A.2d 1130 (1998) found that business records of a bank were inadmissible because the witness did not work for that bank and had no knowledge of the method of preparation and maintenance of its records; yet another instance of a lack of knowledge as to the trustworthiness and reliability yielding an (unreversed) refusal of the trial court's admission of records.

CFS relies on this type of "usage" or "incorporation" of the business records of others, without more, as justification for its argument that the trial court erred, and what's more, abused its discretion in disallowing the evidence of NCOP and ultimately Citibank, the original creditor. Clearly, it is not an abuse of discretion given the supporting authority and similar opinions of other courts, as well as learned treatises on the subject. As such, there is no legally sufficient reason for this court to disturb the trial court's reasonably-considered, and well-reasoned decision.

B. <u>Regardless of any alleged error, the lower court's ruling was not prejudicial since plaintiff failed to prove the existence of a contract between the parties</u>.

As stated above, this court has held that to constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party. *Ettinger v. Triangle-Pacific Corp*., 2002 Pa. Super 142, 799 A.2d 95, 110 (Pa.Super. 2002). In the present case, the lower court correctly held that CFS failed to prove the existence of a valid contract between the parties. This, the court held, was fatal to all other claims of error in this case.

The agreement presented in this case post-dated the original contract by seven years. CFS failed to present a signed (or even unsigned) application for credit. The lower court also found serious discrepancies in the amount of interest charged[16], as well

[16]CFS claimed at trial that the interest rate was 23.99%. The 1996 Cardholder Agreement contained a statement that the annual percentage rate would be raised from 12.9% to an amount "not...lower than 19.8%" in the event of default on the account. The court found that the averment of a flat 23.99% would have denied Smith the benefit of a floating interest rate. This left open to question the proper amount of interest that should have been charged to Smith, an issue that, among other issues, was never resolved. The fact that CFS now alleged that the interest rate was 23.99% was the functional equivalent of grasping proof from thin air. Combining the aforesaid "proof" with the admission that Venditti knew nothing about Citibank nor NCOP nor their practices mocks the concept of proper legal evidence. There would have been nothing to prevent CFS from claiming the interest rate was 30%, 40%, or even 100%. Without knowing the proper amount of interest to be charged to the defendant, the court would be forced to enter a "seat of the pants" judgment based upon nothing more than a guess. It has been held that if the plaintiff in a lawsuit cannot state his damages without having the court resort to guesswork, the court may not award a judgment. *Griffith v. Clearfield Truck Rentals, Inc*., 427 Pa. 30, 39 (Pa. 1967).

as the amount of attorney's fees claimed (see footnote 6, above)[17].

Furthermore, the witness at trial, Mr. Venditti, could offer no evidence that the proffered statements were ever mailed to Smith, nor that she actually received *any* agreement, let alone the first and subsequent agreements. Venditti could neither indicate which agreement was in effect at the time of the alleged default, because, as stated above, he knew nothing of Citibank, nor even the assignee immediately prior to CFS, i.e. NCOP.

CFS, therefore, would have been unable to prove a contract, nor any damages, just by virtue of its lack of any relevant information on the subject. The proffered agreement could not have even been shown to be the agreement in effect at the time of the default, because it was similarly not known to be. The award of damages would have had to based upon guesswork. Therefore, no judgment could have been entered. *Griffith, supra.*

CFS next argues that the contract was somehow shown or supported by the fact that defense counsel was awarded counsel fees. The order awarding counsel fees was previously appealed to this court in this case, but then withdrawn as untimely.[18] The issue as to counsel fees was not raised in this appeal and should not therefore be considered by this court.

CFS further argues that it does not need to produce a signature on a credit card application since it is the use of the card over a 13 year period that proves acceptance

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[17]CFS originally claimed that 20% counsel fees were warranted when the agreement preferred at trial contained no such percentage.

[18]*Commonwealth Financial Systems v. Larry Smith*, 2998 EDA 2009.

of the contract. Notwithstanding same, CFS failed to produce a single charge slip indicating what was purchased during that time period.

The lower court's decision that no contract was proved was based upon the incompetent, unreliable and incredibility of the sole witnesses for the CFS. Given the many unresolved issues, as to the contract itself, and as to the amount of the damages to be awarded, the lower court had good reason to enter a judgment for the defendant without ever reaching the evidentiary questions. Whether this court would have found the testimony persuasive is not the issue, here, since this court will only correct errors and cannot not substitute its judgment for that of the fact-finder." *Vattimo* at 1165 (Pa. Super. 2001), *Commonwealth v. Wood*, 2003 Pa. Super 358, 833 A.2d 740, 748 (Pa. Super. 2003).

For the aforesaid reasons, the lower court's decision must not be disturbed.

2. **THE COURT DID NOT ERR IN FAILING TO REQUIRE THE ATTENDANCE OF DEFENDANT**.

At the inception of the trial, CFS's counsel moved to sanction Smith, pursuant to Pa.R.C.P 234.3 (N.T. 7/16/09, R. 62-68) for failure to abide by CFS's Notice to Appear. The trial record indicates that a faxed notice pursuant to the rule was received by counsel for appellee the day prior to the actual trial date. (N.T. 7/16/09, R. 63). Counsel also indicated on the record that the defendant, Smith, had not appeared at the arbitration (which was noted by the court) so counsel for CFS knew well that the same strategy would likewise been carried forward (N.T. 7/16/09, R. 63); in fact, that is the very reason that the notice to appear was issued in the first place.

Counsel for appellee complained to the court that one-day's notice was insufficient under the rule which states:

> (a) A party may compel the attendance of another party or an officer or managing agent thereof for trial or hearing by serving upon that party a notice to attend substantially in the form prescribed by Rule 234.7. The notice *shall be served reasonably in advance* of the date upon which attendance is required. The notice may also require the party to produce documents or things. *Pa. R.C.P. No. 234.3* [emphasis added]

The obvious question was immediately asked by the lower court, "Why did you wait, Mr. Matzkin?" (N.T. 7/16/09, R. 64). Mr. Matzkin, the attorney for CFS responded: "We received–my office received a telephone call on July the 10th assigning the matter for trial today."[19]

The court responded, stating that Mr. Matzkin knew that he was previously on the June 22, 2009 trial list (N.T. 7/16/09, R. 64), to which Mr. Matzkin replied, "We were

[19]Trial was held six days later on July 16, 2009.

clearly on that list. However the notice to appear...tells the person that they have to appear in such and such Courthouse, such and such Courtroom at such and such time." (N.T. 7/16/09, R. 64).

The court responded, "Well, you can put TDA (sic, probably a transcribing error) in there ... you knew it was going to trial. You wanted him (sic, appellee is female) at trial. You could have written Mr. Rubin a letter saying, 'Please produce your client.' " (N.T. 7/16/09, R. 65). Mr. Matzkin then had the following exchange with the court:

> Mr. Matzkin: Since she did not appear at arbitration, ...I filed a notice pursuant to a rule. I believed based upon the advice of when the matter was going to trial it was timely because Mr. Rubin, in my opinion, should have known that he would have to produce his Defendant, his client to appear at a trial.
>
> The Court: No, he doesn't. It could be his trial strategy that he decides not to produce his client. If you want her there, you should file a notice.(N.T. 7/16/09, R. 67)
>
> * * *
>
> Mr. Matzkin: I just wanted to reassert the fact that he can't testify, not (sic) submit any evidence
>
> * * *
>
> The Court: ... I think in effect you're getting what you asked for because I'm not going to preclude him from producing evidence, but he doesn't have any testimony anyway. I don't know whether he's got documents, but I don't think the notice was timely served. So...

From this point, the discussion as to sanctions ended, and the case moved on. No further objection was heard on the record by counsel for the appellant. The defendant presented no evidence; in effect CFS did get what it wanted, an evidentiary preclusion.

CFS argues that a fax, sent a day before the trial, is enough notice, because the

defendant's attorney, "should know" that CFS's attorney would have wanted her there, and should have prepared in advance for this eventuality. Clearly this is completely unreasonable, especially in light of the fact that CFS knew beforehand that the strategy of the defendant, Smith, was to decline to testify. CFS also knew that Smith did not testify at the arbitration. CFS could have easily inserted a "TBA" in the space for the date and courtroom, or at least, put defense counsel on notice that it was CFS's intention to notice her appearance. Further, it is not up to the defendant's counsel to know what is in the mind of the plaintiff's counsel, nor should he help plaintiff's counsel to prepare his case.

What's more, CFS knew of the trial date six days in advance but still waited for the eve of trial to issue a notice to appear.

A fax, the day of, or even two days before a trial is not "reasonably in advance of the date upon which attendance is required." Plaintiff knew that it needed defendant's attendance when it filed the case initially. Reasonably competent parties plan for this kind of thing; they do not wait until the eve of trial and spring a notice upon the opposing party. The rule states that the notice *shall be served reasonably in advance* of the date upon which attendance is required. It is suggested that "reasonable notice" is the same time a party has to plead to a motion, or about 30 days.

CFS complains that it should not be prejudiced by the fact that counsel did not check-in with his office to see that a fax had come in. The record does not indicate exactly when the fax was sent; perhaps it was sent at 4 or 5:00 pm. It would have then been perfectly normal for counsel to receive and respond to a fax well within a 24 hour period. Even if the fax had been received in the morning, it is still not a reasonable

time, as contemplated by the rule. Anyway, regardless of CFS's opinion of counsel's fax-receiving diligence, this does not explain why CFS's counsel could not have sent the fax when it received the actual trial date, which was a full six days prior to trial. Perhaps if CFS did not itself procrastinate, things might have been different. However, appellee believes that she should have received 30 days notice, given CFS's knowledge as to the age and infirmity.

CFS further says that it would have been impossible for it to send out a "TBA" notice in which the date and the courtroom would be omitted. This might be true if appellee were unrepresented, but even in that situation, some notice would have been much better than no notice. In this case, Smith was indeed represented, and, having received even an incomplete notice, counsel could have still prepared Smith for trial. It is incomprehensible that CFS would not have known this fact.

Clearly, the court did not abuse its discretion in denying CFS's motion for sanctions since it had clear rationale for its decision.

Conclusion

For the foregoing reasons, this court must not disturb the trial court's denial of post-trial motion and affirm the lower court in denying a new trial.

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CERTIFICATION OF SERVICE

I, Lawrence S. Rubin, Esquire, attorney for defendant, do hereby certify service of the foregoing **Brief for Appellee** upon the following parties by regular mail on June 23, 2010:

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