Michael K. Jeanes, Clerk of Court
*** Filed ***
04/21/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000016-001 DT 04/18/2014

CLERK OF THE COURT
COMMISSIONER MYRA HARRIS J. Eaton
Deputy

MIDLAND FUNDING L L C
v.
BRANDON COTTER (001)

JENNIFER E WIEDLE

JOHN N SKIBA

HIGHLAND JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2013–033131RC.

Defendant-Appellant Brandon Cotter (Defendant) appeals the Highland Justice Court's determination that granted judgment to Plaintiff Midland Funding LLC for a credit card debt after (1) admitting Plaintiff's documents as self-authenticating; and (2) finding no violations of the hearsay rule. Defendant contends the trial court erred. For the reasons stated below, this Court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

On February 21, 2013, Plaintiff filed a Complaint (1) alleging it owned certain of Bank of America's former accounts, including Defendant's account; and (2) claiming Defendant used a credit card issued by Bank of America but failed to pay the debt he engendered on this account for the purchase of goods, wares, and services. Plaintiff requested the underlying principal amount of $2,545.33 plus interest, costs, and attorneys' fees.

Defendant filed an Answer and the matter went to trial on August 26, 2013. At trial the parties disputed the propriety of admitting Plaintiff's exhibits 1, 2, and 4. In addition, Defendant challenged the testimony of Plaintiff's custodian of records as hearsay. The disputed exhibits included the following:

Exhibit 1

Plaintiff's Exhibit 1 has two copies of a March 2008 Statement from FIA Card services to Plaintiff for an account with the last four digits of 7376. The bottom portion of the page includes Defendant's name and address with the new balance total, the payment due date, and the account number matching the number at the top of the page. The top portion of the page identified a summary of transactions and the new balance total as well as the individual transactions and statements of payments and costs. Page 2 of the Exhibit provides (1) a place for customers to dispute items from the bill; as well as (2) instructions not to mail the form with a payment; and (3) a toll free telephone number to call in the event of a dispute.

Exhibit 2

Plaintiff's Exhibit 2 is a Bank of America Notice of Change in Terms and announcement of merger with MBNA Corporation informing customers the Bank was consolidating its credit card program into FIA Card Services, N.A. effective October 19, 2006. The document notifies the Bank's customers that it—together with the "Supplement To the Notice Of Change in Terms on the enclosed statement [sic.]" is the new credit card agreement and informs customers the change applies if they were granted an account, used the account, maintained the account or "otherwise accepted" the account. The exhibit includes a promise to pay provision as well as notice to the customer that the Bank may sell, assign or transfer the account at any time. The notice about selling the account informs the customer that the person or entity who purchased or is assigned the account—or to whom the account is transferred—shall be entitled to all of Bank of America's rights. In addition, the customers are informed (1) the term "we" or "us" refers to FIA Card Services, N.A. and (2) if the customer(s) believes a bill is wrong or needs more information about the bill, the customer must write to the company and notify it of the alleged error on a separate sheet of paper no later than 60 days after the date when the first bill detailing the charge was sent.

Exhibit 4

Plaintiff's Exhibit 4 includes the Bill of Sale and Assignment of Loans dated June 10, 2010, between Assignor FIA Card Services, N.A. on behalf of Bank of America and Plaintiff. This Bill of Sale sells the loans identified in the Loan Schedule which was attached to the bill of sale. The assignor warranted the loan information was accurate and complete; was the assignor's own business records; and accurately reflected the information in the assignor's database. The bill of sale also stated the loan information was kept in the ordinary course of business; was made at or near the time or from information transmitted by a person with knowledge of the data entered into the FIA Card Services database; and it was the regular practice of FIA Card Services to maintain and compile "such data." The Bill of Sale was accompanied by an "Affidavit of Sale of Account by Original Creditor" from the FIA Card Services N.A. custodian of records and Assistant Vice President of FIA Card Services, N.A., Debra Pellicciaro. The Affidavit was dated July 1, 2010, and was sworn to before a notary public in Delaware. This affidavit attested that FIA Card Services, N.A., sold a pool of charged off accounts and electronic records were transferred to the debt buyer. This affidavit stated the records had been kept in the ordinary course of FIA Card Services N.A.'s business and other records on the individual accounts were transferred to the debt buyer. The last page of this exhibit was a single page sheet identifying the sale amount, account number, date of last payment, charge off balance and name, address, phone number, and last four digits of the social security number for Defendant. This sheet states it was printed from electronic records provided by FIA Card Services N.A. pursuant to the Bill of Sale / Assignment of Accounts dated 6/10/2010 from FIA Card Services N.A. to Plaintiff.

. . . .

. . . .

The Trial

Ms. Walker testified she (1) worked for Midland Credit Management—the account servicer for Midland Funding—; (2) held the account records for Midland Funding; and (3) was familiar with its records retention procedures.[1] She added she was the custodian of records for Midland Credit Management and there was no other entity other than Midland Credit Management that could attest to Plaintiff's records.[2] She added she was familiar with Plaintiff's business retention practices; had complete access to Plaintiff's business records; and had reviewed the documents relating to the litigation at hand.[3] Ms. Walker identified Plaintiff's Exhibit 4 as the chain of title information for the underlying debt and stated the documents were made at or near the time of the sale.[4] Defendant objected based on foundation.[5] Ms. Walker stated (1) Plaintiff acquired the documents in Exhibit 4 because the Bill of Sale was essentially the receipt for the purchase of the portfolio of accounts; (2) the documents were created at the time of the purchase; (3) the documents had been stored and retained in the ordinary course of Plaintiff's business as a regular part of Plaintiff's business; and (4) the documents were a true and accurate representation of what they purported to be.[6] Defense counsel objected based on hearsay and Plaintiff's counsel countered with Ariz. R. of Evid. Rule 803(6) the business record exception rule. After considering the arguments about 803(6), the trial court noted the rule did not refer to a particular business; and did not require personal knowledge or that the business created the record. The trial court admitted the exhibit.[7]

Ms. Walker addressed the contents of Exhibit 4; explained page 1 was the Bill of Sale from Bank of America; identified the loans were in a loan schedule; and said she knew Defendant's account was included in this bill of sale because page 4 (labeled field on the left and field data in the middle) was an extraction of the account information for Defendant's account from the loan schedule.[8] The witness added (1) the loan schedule is an electronic file; (2) if it was to be printed, it would be thousands of pages long; and (3) the field data is a "snapshot" of the account and one is printed for each account in the loan schedule.[9] She added Midland Funding owns the account at issue.[10]

Ms. Walker also spoke about Exhibit 1 and identified it as having been included in the sale file or loan schedule for this account. She stated (1) she relied on this in the ordinary course of business; (2) it was incorporated into Plaintiff's records; (3) it was Plaintiff's practice to keep

[1] Audio recording, August 26, 2013 at 1:53:33–1:54:06.
[2] *Id*. at 1:54:06–26.
[3] *Id*. at 1:54:41–1:55:19.
[4] *Id*. at 1:56:05–1:57:14.
[5] *Id*. at 1:57:14–20.
[6] *Id*. at 1:58:04–2:00:02.
[7] *Id.* at 2:05:26–2:08:00.
[8] *Id.* at 2:09:31–2:10:30.
[9] *Id*. at 2:10:40–2:11:12.
[10] *Id*. at 2:11:57–59.

such records in its ordinary course of business and (4) to the best of her knowledge, the document was made at or near the time of the event it purports to explain.[11] Defendant objected to this document. The witness identified the document as a monthly statement from Bank of America, FIA Card Services, with a March 2008 time period and said this was the final statement showing the ending balance of the account.[12] Ms. Walker continued and said the account number matched the account number on the earlier identified field data sheet—p. 4 of Exhibit 4.[13] She identified the balance due and owing as $2,545.33[14] and said the balance was owed to FIA Card Services; the balance was still owed; and was now owed to Plaintiff.[15]

Ms. Walker also identified Exhibit 2 as having been (1)included in the loan schedule, marked for the current account; (2) incorporated into Plaintiff's business records and kept and relied on by Plaintiff in its ordinary course of business; (3) said that to the best of her knowledge it was made at or near the time of the events it purported to evidence; and (4) it is one of Plaintiff's business activities to maintain such documents.[16] Defendant again raised a hearsay objection. Ms. Walker stated Exhibit 2 was the terms and conditions for Bank of America and explained the relationship between FIA Credit Services and Bank of America.[17] The witness commented on heading #42 of Exhibit 2 re selling the account and said the account can be sold without notice to the consumer at any time and the rights and obligations will be transferred to the new owner.[18] Ms. Walker then summarized her testimony for the court.[19] She added the account holder was Brandon Cotter and she knew this by matching Exhibit 1—the account statement—with the field data sheet Exhibit 4, p. 4.[20]

On cross-examination, Defense counsel confirmed Ms. Walker worked for Midland Credit Management—a separate company from Midland Funding—and never worked for Midland Funding, Bank of America, or FIA Card Services.[21] Ms. Walker agreed the Bill of Sale—Exhibit 4, p. 1—did not refer to Mr. Cotter but she explained the attachment referred to was an electronic copy which would not have been printed out because it was thousands of pages long.[22] When asked if there was one page she could have printed out, Ms. Walker (1) responded the one page was the field data sheet; (2) agreed Midland Credit Management printed the data; but (3) clarified the data could not be changed or altered in any way because the selected fields were auto-

[11] *Id*. at 2:14:08–2:15:25.
[12] *Id*. at 2:16:14–48.
[13] *Id*. at 2:17:16–2:18:01.
[14] *Id*. at 2:18:26–29.
[15] *Id*. at 2.19:32–2:20:49.
[16] *Id*. at 2:21:35–2:23:13.
[17] *Id*. at 2:25:41–2:26:25.
[18] *Id*. at 2:28:00–2:29:15.
[19] *Id*. at 2:29:39–2:30:23.
[20] *Id*. at 2:31:35–2:32:14.
[21] *Id*. at 2:33:10–38.
[22] *Id*. at 2:33:42–2:34:24.

matically populated.[23] She re-iterated the document was "simply printed."[24] Defendant renewed his objection to page 4 of Exhibit 4 and asserted the document was created for litigation and therefore subject to the hearsay rule. Plaintiff's counsel responded the witness did not say the document was created: instead, she testified the document was printed from what had been attached to the loan schedule and was a "redaction" from the loan schedule in the interest of protecting proprietary information for others not connected with the litigation. The trial court read the bottom of the form and overruled the objection based on the language of the form saying it was data "printed" and not data "created."

Defense counsel also questioned the witness about Exhibit 2 and asked how she knew those were the terms and conditions that applied to Defendant's specific account and she testified Exhibit 2 was attached to the account and sent by the original creditor and she relied on the information the original creditor sent stating these were the terms and conditions that applied to the account.[25] Defense counsel also asked if the witness knew when the account was initially opened and she responded the account was opened August 2, 2000 which was listed on the field data sheet.[26]

On redirect Ms. Walker explained Midland Funding LLC did not have any employees and was only a buying entity; and the entity charged with servicing the accounts and maintaining balances was Midland Credit Management.[27]

The trial court determined Defendant was responsible for the debt.

Defendant filed a timely appeal. Plaintiff Midland Funding LLC (Plaintiff) filed a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did Plaintiff Meet Its Burden Of Proof And Demonstrate It Owned The Debt.

Standard Of Review

The appellate court reviews a trial court's evidentiary rulings for a clear abuse of discretion and does not reverse unless unfair prejudice results. *Larsen v. Decker,* 196 Ariz. 239, 995 P.2d 281, ¶ 6 (Ct. App. 2000). Rulings on the admissibility of hearsay are reviewed for an abuse of discretion. *State v. Parker,* 231 Ariz. 391, 296 P.3d 54, ¶ 8 (Ariz. 2013).

> We review a trial court's ruling on the admissibility of evidence under a hearsay exception for abuse of discretion. *State v. Tucker,* 205 Ariz. 157, 165, ¶ 41, 68 P.3d 110, 118 (2003).

Absent an abuse of discretion, the trial court's decision is not changed on appeal *Brown v. U.S. Fidelity and Guar. Co*., 194 Ariz. 85, 977 P.2d 807, ¶ 7 (Ct. App. 1998).

[23] *Id*. at 2:34:24–2:25:50.
[24] *Id*. at 2:25:5–2:26:31.
[25] *Id*. at 2:40:36–55.
[26] *Id*. at 2:41:50–2:42:40.
[27] *Id*. at 2:43:39–2:44:45.

Abuse of Discretion

In addressing the role of the appellate court when determining discretionary conduct the Arizona Supreme Court held:

> Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted).[28]

Where this Court reviews the trial court's actions based on an abuse of discretion standard, this Court will not change or revise the trial court's determination if there is a reasonable basis for the order. A court abuses its discretion when there is no evidence supporting the court's conclusion or the court's reasons are untenable, legally incorrect, or amount to a denial of justice. *Charles I. Friedman, P.C. v. Microsoft Corp*., 213 Ariz. 344, 141 P.3d 824 ¶ 17 (Ct. App. 2006). In determining if the trial court abused its discretion, this Court must consider the standards for an abuse of discretion claim. The Supreme Court of Arizona stated:

> In exercising its discretion, the trial court is not authorized to act arbitrarily or inequitably, nor to make decisions unsupported by facts or sound legal policy. . . . Neither does discretion leave a court free to misapply law or legal principle.

City of Phoenix v. Geyler, 144 Ariz. 323, 328–329, 697 P.2d 1073, 1078–1079 (1985) (citations omitted). Thus, a trial court abuses its discretion if it:

> 1) applied the incorrect substantive law or preliminary injunction standard; 2) based its decision on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction; or 3) applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion.

McCarthy Western Constructors v. Phoenix Resort Corp., 169 Ariz. 520, 523, 821 P.2d 181, 184 (Ct. App. 1991) (citation omitted). Defendants did not demonstrate the trial court made any legal errors.

[28] The Arizona Supreme Court noted in *State v. Benson*, 232 Ariz. 452, 307 P.3d 19 ¶ 66 (July 31, 2013) that a different standard for the abuse of discretion is used in death penalty cases as the legislature enacted A.R.S. 13–756(A) after *Chapple* was decided. Although the case is "red flagged" by Westlaw, nothing in the case suggests it applies to civil matters.

Burden Of Proof

In a contract case, the Plaintiff has the burden of proof, *Yeazell v. Copins*, 98 Ariz. 109, 116-17, 402 P.2d 541, 546 (1965), and must prove its case by a preponderance of the evidence. The phrase "preponderance of the evidence" was defined in *Matter of Appeal in Maricopa County Juvenile Action No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983) where the Arizona Supreme Court stated:

> The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its nonexistence." McCormick on Evidence, § 339, at 794 (2d ed. 1972). Indeed, this court stated long ago that by a preponderance of the evidence "the ultimate test is, does the evidence convince the trier of fact that one theory of the case is more probable than the other." *Cole v. Town of Miami*, 52 Ariz. 488, 497, 83 P.2d 997, 1001 (1938). The United States Supreme Court on several occasions has agreed with this statement of the preponderance of the evidence test. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 787, 102 S. Ct. 1388, 1411, 71 L.Ed.2d 599 (1982) (Rehnquist, J., dissenting); *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 1808, 60 L.Ed.2d 323 (1979); *In re Winship*, 397 U.S. 358, 371, 90 S. Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). Thus, we disagree with the court of appeals' definition of the preponderance of the evidence standard, and hold that that standard requires simply that the trier of fact find the existence of the contested fact to be more probable than not.

According to JCRCP, Rule 137(a) the Arizona Rules of Evidence govern. Ariz. R. Evid. Rule 301, imposes the burden of persuasion on the party who originally had this burden, which, in a civil case, is the Plaintiff. As the Arizona Court of Appeals ruled:

> Because the plaintiff always bears the ultimate burden of persuasion to prove its claim, the plaintiff cannot simply rely on deficiencies in the defendant's response to a motion for summary judgment.

Wells Fargo Bank, N.A. v. Allen, 231 Ariz. 209, 292 P.3d 195, ¶ 1 (Ct. App. 2012). Here, the question is whether Plaintiff proved its case by a preponderance of admissible evidence.

Admitted Evidence Supports Amount Of Debt

Plaintiff provided proof of the amount of the debt by submitting Exhibits 1, 2, and 4. As will be seen in the following sections, the trial court properly admitted these exhibits. The credit card statement reflects the principal amount forming the basis for the claim. Defendant did not demonstrate he ever contested the charges within the 60 days allowed under the credit card agreement.

B. Did The Trial Court Properly Admit Exhibits 1, 2, and 4.

Defendant argued Plaintiff's Exhibits 1, 2, and 4 were all inadmissible hearsay because the business record exception does not apply where the party testifying about these records is not employed by the party creating the records. This position is incorrect.

Ariz. R. of Evid., Rule 803(6) lists exceptions to the rule against hearsay and states records of regularly conducted activity may be admissible provided certain conditions are met. These are listed as:

> **6)** ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:
>
> **(A)** the record was made at or near the time by--or from information transmitted by--someone with knowledge;
>
> **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> **(C)** making the record was a regular practice of that activity;
>
> **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> **(E)** neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Ariz. R. Evid. 803(6). Defendant challenged the use of the records because they alleged Ms. Walker is not a proper custodian of records with first-hand knowledge acquired in the course of a regularly conducted business activity according to Ariz. R. Evid. Rule 803(6).

Custodian of Records or Other Qualified Person

Ariz. R. Evid. Rules 803(6) requires a custodian or other qualified person to certify (1) the record was made near the time of the occurrence or from information provided by a person with knowledge of the matter; (2) the record was made as a regular practice; and (3) the record was kept in the course of regularly conducted activity. The rule requires either a custodian of records or other qualified person.

Persuasively, the Second Circuit Court of Appeals held it was not an abuse of discretion for a trial court to admit documents as business records pursuant to Fed. R. Evid. 803(6) even if the documents were the records of a business entity other than that of one of the parties if there were sufficient indicia of reliability. The Second Circuit determined the foundation for the documents could be laid by a witness who was not an employee of the entity that owned or prepared them provided the records were prepared in the course of the business entity's regular practice. *Saks Intern., Inc. v. M/V Export Champion*, 817 F.2d. 1011, 1013 (2nd Cir. 1987) Arizona's Rule 803(6) parallels the federal rule. Here, Ms. Walker stated she was knowledgeable about how Plaintiff's records are maintained and kept since she worked for Midland Credit Management—the entity charged with keeping the records—and Plaintiff was only a buying entity.

Defendant never objected to the authenticity of the proffered business records. Plaintiff provided a chain of custody tracking the account from Bank of America to FIA Credit Services, N.A. and, in turn, from FIA Credit Services, N.A. to Plaintiff. Plaintiff provided an affidavit contemporaneous with the transfer of electronic records from FIA Credit Services, N.A. to Plaintiff. Plaintiff presented evidence that Ms. Walker was a qualified witness to testify about Plaintiff's record retention policy. In commenting on Rule 803(6) the Arizona Court of Appeals said:

> Rule 803(6) requires either the custodian of records or "other qualified witness" testify that the record was made 1) contemporaneously, or nearly so, with the underlying event; 2) "by, or from information transmitted by, a person with firsthand knowledge acquired in the course of a regularly conducted business activity;" 3) completely in the course of that activity; and 4) as a regular practice for that activity. Portions of the business record that "indicate a lack of trustworthiness" or "lack an appropriate foundation" shall not be admitted. Ariz. R. Evid. 803(6), Stewart testified he was "a supervisor of the security services section" of the Pima County jail, had supervised intake of new inmates at the jail for "maybe a year" during the "eight or nine years" he had been a sergeant, and had actually worked as an "ID tech" for two to three years. He also testified the process for booking inmates was the same, although occurring in a different location, as when he had been supervising intake. He described the process in some detail, including the fact that inmate information was recorded by a jail employee as it was received from the inmate being booked. Finally, Stewart testified he was familiar with arrangements for storing inmate property receipts at the jail, although he had not supervised that process, and such receipts were routinely created as part of the normal course of business at the jail.
>
> Based on this record, we cannot say the trial court abused its discretion in finding Stewart a qualified witness with respect to the jail records. *See Larsen,* 196 Ariz. 239, ¶ 19, 995 P.2d at 285; *Petzoldt,* 172 Ariz. at 275, 836 P.2d at 985. Accordingly, we conclude the trial court did not abuse its discretion in admitting the receipt and statements that he read from the jail admission form under Rule 803(6). *See Tucker,* 205 Ariz. 157, ¶ 41, 68 P.3d at 118; *King,* 213 Ariz. 632, ¶ 7, 146 P.3d at 1277.

State v. McCurdy, 216 Ariz. 567, 169 P.3d 931, ¶¶ 9–10 (Ct. App. 2007). Persuasively, the Third Circuit Court of Appeals established the standard for determining a qualified witness. The Third Circuit ruled:

. . . .

. . . .

. . . .

> Rule 803(6) does not require the foundation evidence for the admission of a business record to be provided by the record's custodian. Instead, the rule authorizes parties to elicit the evidence from any "other qualified witness." Fed. R. Evid. 803(6). We have recognized that the term "other qualified witness" should be construed broadly, and that a qualified witness " 'need not be an employee of the [record-keeping] entity so long as he understands the system.' " *Pellulo,* 964 F.2d at 201 (quoting 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 803(6)[02], at 803–178). Thus, a qualified witness only need "have familiarity with the record-keeping system" and the ability to attest to the foundational requirements of Rule 803(6). *Id.* at 201–02. The foundation requirements to which a qualified witness must attest are:
>
> (1) [that] the declarant in the records had knowledge to make accurate statements; (2) that the declarant recorded statements contemporaneously with the actions which were the subject of the reports; (3) that the declarant made the record in the regular course of the business activity; and (4) that such records were regularly kept by the business.

United States v. Console, 13 F.3d 641, 656-57 (3d Cir. 1993). The Second Circuit also commented on qualified witnesses for purposes of Rules 803(6) and 902(11) and stated/quoted:

> The term, custodian or other qualified witness, in Rules 803(6) and 902(11) is generally given to a very broad interpretation. The witness need only have enough familiarity with the record-keeping system of the business in question to explain how the record came into existence in the ordinary course of business.

U.S. v. Lauersen, 348 F.3d 329, 342 (2nd Cir. 2003). The U.S. District Court for the Eastern District of Virginia reviewed the standards of personal knowledge for an affiant and stated:

> Under the plain text of Rules 803(6) and 902(11), all requirements for admissibility must be met if a document is to be admitted into evidence. Rule 902(11) states that a custodian or other qualified witness must certify in the written declaration that the proffered document meets three requirements which are listed without ambiguity. The fourth element is that which requires the affidavit of a custodian or other qualified witness. The necessity to satisfy all four requirements also finds expression in the decisional law. *See, e.g., United States v. Strother,* 49 F.3d 869, 874 (2nd Cir.1995) (holding that, while "the 'principal precondition' to admissibility is the sufficient trustworthiness of the record, the proffered record must meet all of the requirements of the exception"); *United States v. Atlas Lederer Co.,* 282 F. Supp.2d 687, 696 (S.D. Ohio 2001) (citing *Redken Labs., Inc. v. Levin,* 843 F.2d 226, 229 (6th Cir.1988)) (holding that for a business record to be admissible under Rule 803(6) "the record must satisfy four requirements").

Rambus, Inc. v. Infineon Technologies AG, 348 F. Supp. 2d 698, 706 (E.D. Va. 2004). Most recently, the Arizona Supreme Court discussed the exceptions to the hearsay rule for business records in *State v. Parker*, *id.*, where the bank's fraud investigator testified about the bank's business practices. The Arizona Supreme Court referenced *U.S. v. Adefehiniti*, 510 F.3d 319 (D.C. Cir. 2007), and discussed cases that allowed the business records of one entity to be used as the business record of another if the second entity relies on those record and keeps them in the ordinary course of business. In order to incorporate these records, a witness must testify:

> . . . "that the records are integrated into a company's records and relied upon in its day-to-day operations," and noting that relevant financial statements were completed at bank's request and were of a type that the bank regularly used to make decisions whether to extend credit.

Adefehinti at 510 F.3d at 326. Ms. Walker's testimony met this standard and established the needed degree of reliability to allow the records to be considered self-authenticating.

Although Ms. Walker was not the custodian of records for FIA Card Services, N.A., because Midland purchased and incorporated FIA Card Services, N.A.'s records into its own business records, Ms. Walker could testify about these records provided Plaintiff relied on the records in the ordinary course of Plaintiff's business. *State v. Parker*, 231 Ariz. 391, 296 P.3d 54, ¶ ¶ 31, 33 (2013). This is generically referred to as the adoptive business records doctrine which allows an organization to use the documents as business records where that organization incorporated the records of another into its own and relied on these records in the course of its day to day operation and where, as here, there are other indicia of reliability. See *Air Land Forwarders, Inc. v. U.S.* 172 F.3d 1338, 1344 (Fed. Cir. 1999); *U.S. v. Ullrich*, 580 F.2d 765, 771–72 (5th Cir. 1978). Ms. Walker's testimony established Defendants' FIA Card Services N.A. account was adopted as a business record by Plaintiff.

This Court is cognizant of its need to review a trial court's decision to admit or exclude evidence deferentially. *State v. Petzoldt*, 172 Ariz. 272, 276, 836 P.2d 982, 986 (Ct. App. 1991). After reviewing these Exhibits, this Court finds the trial court did not abuse its discretion when it determined the Exhibits were admissible.

C. Was Ms. Walker's Testimony Impermissible Hearsay.

Although Defendant claimed Ms. Walker's testimony was impermissible hearsay, Defendant did not support this claim with legal authority. As stated above, Ms. Walker was a custodian of records. There is no legal requirement that custodians of records have independent knowledge or have worked with a company for a specific amount of time in order to testify. Nothing in Rule 803(6) mandates the custodian of records or other qualified person have independent knowledge of the contents of the record. As the Arizona Court of Appeals stated:

. . . .

. . . .

> Rule 803(6) requires either the custodian of records or "other qualified witness" testify that the record was made 1) contemporaneously, or nearly so, with the underlying event; 2) "by, or from information transmitted by, a person with first hand knowledge acquired in the course of a regularly conducted business activity"; 3) completely in the course of that activity; and 4) as a regular practice for that activity. Portions of the business record that "indicate a lack of trustworthiness" or "lack an appropriate foundation" shall not be admitted. Ariz. R. Evid. 803(6), Stewart testified he was "a supervisor of the security services section" of the Pima County jail, had supervised intake of new inmates at the jail for "maybe a year" during the "eight or nine years" he had been a sergeant, and had actually worked as an "ID tech" for two to three years. He also testified the process for booking inmates was the same, although occurring in a different location, as when he had been supervising intake. He described the process in some detail, including the fact that inmate information was recorded by a jail employee as it was received from the inmate being booked. Finally, Stewart testified he was familiar with arrangements for storing inmate property receipts at the jail, although he had not supervised that process, and such receipts were routinely created as part of the normal course of business at the jail.

McCurdy, id., at ¶ 9. In *McCurdy* the Court of Appeals determined it could not find the trial court abused its discretion in finding that Mr. Stewart was a qualified witness. Similarly, in the current case, this Court does not find Defendant demonstrated the trial court abused its discretion in finding Ms. Walker was a qualified witness and that her testimony was allowed under the business record exception.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Highland Justice Court did not err.

IT IS THEREFORE ORDERED affirming the judgment of the Highland Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Highland Justice Court for all further appropriate proceedings.

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

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court 041820141345

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.