In The
Court of Appeals
Of Maryland

September Term, 2013
No. 64

RAINFORD G. BARTLETT,

Petitioner,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Respondent.

Appeal from the Circuit Court for
Baltimore City, Maryland
(The Honorable W. Michel Pierson)

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS, DBA INTERNATIONAL AND ACA INTERNATIONAL IN SUPPORT OF RESPONDENT

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I. IDENTITY OF INTEREST OF AMICI

A. THE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS (NARCA)[1]

NARCA is a nationwide, not-for-profit trade association comprised of attorneys and law firms engaged in the practice of creditor's rights and consumer debt collection. NARCA members include over 700 law firms located in all fifty states who must meet association standards designed to ensure experience and professionalism. NARCA member attorneys are subject to the Codes of Professional Conduct in jurisdictions where they are licensed to practice law. In addition, NARCA has adopted a Code of Professional Conduct and Ethics which imposes standards beyond the requirements of state codes of ethics that govern attorney conduct.

NARCA has twenty (20) Maryland member law firms that employ paralegals who communicate with consumer debtors. Therefore, in addition to being subject to regulation by this Court through its disciplinary process, NARCA members are also licensed as "collection agencies" under the Maryland Collection Agency Licensing Act. *See*, Md. Code Bus. Reg., § 7-102(b)(a).

NARCA has frequently participated as amicus in Federal and State appellate courts cases considering issues involving the impact of Federal and State regulation on the litigation of consumer debts and its Amicus Brief in *Jerman v.*

[1] This Court granted NARCA's motion to file an amicus brief on October 1, 2012.

Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 130 S. Ct. 1605 (2010) was cited three times in the Supreme Court's majority opinion. *Id*. at 588, 596, 598.

B. DBA INTERNATIONAL[2]

DBA International (DBA) is the nonprofit trade association that represents the interests of companies such as the Respondent, Portfolio Recovery Associates that purchase distressed asset portfolios on the secondary market from originating creditors. Founded in 1997 by a small group of companies to provide a forum to advance best practices within the industry, today DBA has grown to represent over 625 companies across the nation. DBA provides its members with networking, educational, and legislative advocacy opportunities through an annual conference, an executive summit, regional seminars, state and regional committees, newsletters, webinars, teleconferences, and other media. DBA maintains a code of ethics with which member companies must comply and launched a national certification program in February 2013 designed to promote uniform industry standards based on best practices.

DBA is headquartered in Sacramento, California. DBA has participated in numerous amicus briefs on State and Federal issues.

[2] DBA is participating in this Brief with the consent of all parties pursuant to Rule 8-511, effective January 1, 2014.

C. ACA INTERNATIONAL[3]

ACA International (ACA), the Association of Credit & Collection Professionals, is a Minnesota nonprofit corporation with offices in Washington, D.C., and Minneapolis, Minnesota. Founded in 1939, ACA brings together nearly 5,000 members worldwide, including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers. Respondent, Portfolio Recovery Associates is a member of ACA International. The decision in this case will not only affect Portfolio Recovery Associates, but will also likewise affect many other ACA members including: (1) ACA's approximately 45 Maryland based third-party collection agency members who impact Maryland's economy by providing over 3000 jobs with close to $125 million in payroll and payment of over $24 million in federal, state and local taxes, (2) other ACA members located in Maryland and (3) ACA members located throughout the United States who collect debt owed by consumers who reside in Maryland.

[3] ACA is participating in this Brief with the consent of all parties pursuant to Rule 8-511, effective January 1, 2014.

II. STATEMENT OF FACTS

Respondent, Portfolio Recovery Associates ("PRA"), as assignee of Chase Bank ("Chase"), sued Petitioner Rainford Bartlett ("Bartlett") in the District Court of Maryland for Baltimore City seeking to recover Bartlett's defaulted credit card debt. As the purchaser of a consumer debt, PRA filed suit using the required "Complaint – Assigned Consumer Debt" form. (E. 4-7). Bartlett was served and filed a Notice of Intention to Defend. (E. 22). The District Court conducted a merit trial and entered a judgment in favor of PRA. (E. 2-3, 242). The Petitioner filed an appeal to the Circuit Court which heard the matter de novo on April 24, 2013.

During the Circuit Court trial, the Petitioner confirmed that he received account statements from Chase and acknowledged his debt with Chase. In the Circuit Court Judge's view the amount Mr. Bartlett conceded he owed was "something like what was claimed here today." (E. 412). At the close of evidence, the Court entered judgment in favor of PRA, determining that PRA established its ownership of the obligation and was entitled to recover on the debt. (E. 415). In evaluating the testimony and evidence presented in this small claims action, Judge W. Michel Pierson, now Administrative Judge of the Circuit Court for Baltimore City, explained that because the case was filed as a small claims matter, the case

was governed by Maryland Rule 3-701 which provides that "strict adherence to the Rules of Evidence in a small claims case" is not required. (E. 412).

Mr. Bartlett petitioned this Court for a review of the Circuit Court's judgment. This Court granted the petition to consider the question of: "Whether the trial court erred in admitting hearsay evidence and testimony from a witness who did not have personal knowledge of the matters which he testified given that the legislative history of Rule 3-306 provides that a debt buyer must prove its case with evidence that would past muster under the business records exception to the hearsay rule?"

III. ARGUMENT

A. BOTH TRIAL JUDGES WHO HEARD EVIDENCE IN THIS CASE DETERMINED THAT PRA, THE PRESENT OWNER OF THE DEBT, WAS ENTITLED TO A JUDGMENT AGAINST MR. BARTLETT

The invectives launched against the debt buying industry by the Petitioner and his Amicus conveniently deflect attention to the fact that Mr. Bartlett admitted he owed a debt, suggesting that somehow the debtor should get away without paying the obligation simply because the claim is now owned by a third party. In fact the record in this case includes Mr. Bartlett's admission of the debt he incurred with Chase which establishes beyond a reasonable doubt Mr. Bartlett's obligation. Numerous credit card statements issued by Chase Bank, the original creditor are included in the record. (E. 250–285). Later when Mr. Bartlett received a letter

from PRA explaining that it now owned the Chase account, he never disputed the debt he incurred. (E. 382).

Additionally, Mr. Bartlett's sworn testimony at trial (E. 377-378) conceded his receipt of the statements and his unfortunate inability to continue to make payments on the debt:

> Q: So, when you stopped making payments, when you weren't working and you weren't able to make payments, you still owed money on the card, right?
> A: Yes.

(E. 378) (emphasis added).

B. THE SALE AND PURCHASE OF DEBTS IS A LEGITIMATE BUSINESS ACTIVITY

The Petitioner's Brief, as well the Amicus Briefs of the Attorney General and the Legal Aid Bureau, focus significant attention on media publications and government studies about businesses that purchase delinquent consumer debt obligations from original creditors. *See*, *e.g*., Brief of Petitioner at pgs. 24-26 and Amicus Brief of Attorney General at 5-16. The anecdotal arguments advanced by Petitioner and his Amicus are replete with histrionics and hyperbole best suited for position papers addressed to legislatures and public policy makers. However, to the extent that there is a "debate" in this case, it is not about the relative merits of debt buying as a business activity. Instead, the issue joined concerns the interpretation of well established rules of evidence in the context of a small claims

action filed in the District Court. Nonetheless, NARCA, DBA and ACA, on behalf of their Maryland members, is compelled to respond to this slanted and biased portrayal of debt buyers in order to provide this Court with the "rest of the story."[4]

The more complete picture demonstrates that the purchase of delinquent consumer debts is a legitimate business activity that contributes to the well being of financial institutions as well as to the overall economy in general. Both the executive and judicial branches of the Federal government have commented on this economic benefit. Alan Greenspan, former Chair of the Federal Reserve Board, explained in a September 2002 speech at the Lancaster House in London that "despite significant losses" in the wake of the "tragic events of September 11, 2001 . . . no major U.S. financial institution was driven to default." He elaborated that "a major contributor to the dispersion of risk (to financial institutions) has been the wide-ranging development of markets in securitized bank loans, credit card receivables, and commercial and residential mortgages"[5] (emphasis added).

The United States Court of Appeals for the Seventh Circuit likewise recognized this economic benefit by explaining why a debt buyer who stands in the

[4] "The Rest of the Story" was a daytime radio program hosted by the late Paul Harvey, Jr., an award winning journalist that presented forgotten or overlooked facts on a variety of subjects in the public interest.

[5] The Federal Reserve Board, remarks by Chairman Alan Greenspan at Lancaster House, London, U.K. September 25, 2002, www.federalreserve.gov/BoardDocs/Speecher/2002/200209253/default.htm.

shoes of its assignor was exempted from Illinois lending regulations that exempted the original creditor. The Court explained:

> [A]dopting the Plaintiff's interpretation of the Illinois Interest Act would push the debt buyers out of the debt collection market and force the original creditors to do their own debt collection. Borrowers would not benefit on average, because creditors, being deprived of the assignment option as a practical matter (the statutory rates being far below the market interest rates for delinquent borrowers), would face higher costs of collection and would pass much of the higher expense on to their customers in the form of even higher interest rates. It might be thought that assignees, since the debtors are not their customers, are more ruthless in collection than the original creditor, who might not want to offend their customers would be. But once a customer defaults, he is no longer a valued customer that the creditor is likely to want to coddle. And if the creditor does want to coddle his defaulting customers – maybe to reassure his other customers – he will either not assign the debt or assign it to a coddler.

Olvera v. Blitt & Gaines, P.C., 431 F.3d 285, 288 (7th Cir. 2005).

To the extent this Court is inclined to weigh the arguments relating to the purchase of consumer debts as a business model, based upon the authorities cited above, this Court should expressly state that the assignment of consumer debts is a legitimate business activity and that suits on assigned debts should be examined and evaluated based upon long standing and well accepted legal principles relating to assignment of contracts.

C. IN 2011, THIS COURT ADDED NEW RULES ADDRESSING LAWSUITS BY DEBT BUYERS, BUT REJECTED SUGGESTED CHANGES TO THE RULES OF EVIDENCE

The incessant disapproval of the business of debt buying permeating the arguments of the Petitioner and his Amicus have all the earmarks of a request for a "do over." In essence, Petitioner is asking this Court to engage in its rule making function by seeking to revisit the Order approving the 171st Report of the Standing Committee on Rules of Practice and Procedure. This Order adopted extensive amendments to District Court Rules 3-306, 3-308 and 3-509. These new rules apply to affidavit judgment and default judgment procedures in suits filed by assignees of consumer debts and were "designed to address a problem that has received national attention and has generated concern in Maryland by the Commissioner of Financial Regulation, the Office of the Attorney General, and the District Court." 171st Report at p. 6.

In fact, the Rules Committee Report recommending these amendments focused on the same Federal Trade Commission Report relied upon by Mr. Bartlett and his Amicus. The Committee Report noted that "the major thrust of the proposed amendment is in new section, 3-306(d), which deals specifically with claims arising from assigned consumer debt." *Id*. at 8. The Report went on to explain that the more detailed requirements for obtaining an affidavit judgment on purchased debt claims were drafted with "the general concurrence of the District

Court, the Assistant Attorney General representing the Commissioner of Financial Regulation, the Maryland Bankers Associations, and the major debt buyers." 171st Report at pgs. 6, 8-9.

In is clear from the Reporter's Note that the amendments were directed only to District Court affidavit and default judgment procedures, and the provisions of Title 5 were not effected by the amendments. In fact, the Reporter explained that "proposals concerning Rule 5-902 (relating to certification of business records) had been referred to the Committee's Evidence Subcommittee." *Id.*

The distinction between the enhanced District Court filing requirements for purchase debt claims as contrasted with the rules of evidence applied at trial is analogous to the filing requirements imposed on a medical malpractice plaintiff and subsequent proof of malpractice at trial. This Court has held that Maryland law requires a medical malpractice claimant to file a certificate of merit by a qualified medical expert as a condition precedent maintaining an action. *See, Breslin v. Powell,* 421 Md. 266, 288 (2011) (interpreting Md. Code. Cts. and Jud. Procs. § 3-2A-04(b) as requiring dismissal, without prejudice, as a sanction for failure to file a certificate of qualified expert). At trial however, a Plaintiff can establish the defendant's negligence without producing expert testimony. *See, e.g., Thomas v. Corso,* 265 Md. 84 (1972) (proof of negligence of physician who failed to attend to patient hit by automobile with possibly life threatening injuries

established without expert testimony) *and Suburban Hosp. Ass'n Inc. v. Hadary*, 22 Md. App. 186 (1974) (expert testimony not required to demonstrate that physicians and hospitals should not use non-sterile needle to perform biopsy).

The analogy illustrated in the filing requirements of a malpractice action as juxtaposed with the proof requirements at trial should persuade this Court that the new rules addressing information that must be included a debt buyer suit in the District Court does not carry over to the trial. Accordingly, proof of the assigned debt can be made without specific reference to the information required to be included in the initial affidavit judgment filing.

Having recently adopted amendments to the Maryland Rules, this Court should not impose a "strict adherence" requirement upon parties to one category of small claims actions, but rather should reaffirm the practice that goes back over forty (40) years since the creation of the District Court in 1971. *See*, Rule 3-701(f). There is no doubt that Petitioner and his Amicus would have this Court change what has worked in small claims actions since the beginning of the District Court, by seeking to disturb the carefully drafted evidence rules as they apply to only one particular kind of case, i.e., a small claims suit by a debt buyer. If this change is undertaken, the change should be made pursuant to this Court's rule making processes and not by a judicial decision. A judicially created mandate that would modify rules of evidence as to only a particular type of small claims action

would undeniably have a snowball effect on the entire District Court. Any ruling requiring strict adherence to the Title 5 Rules in a small claims case would undoubtedly encourage litigants in small claims cases to pursue arguments to District Court judges suggesting an expansion on this ruling by making objections based on all provisions of the Title 5 in any of the 54,592 contested trials held in the District Court last year.[6]

This result is clearly not what was intended by the recent amendments to the District Court Rules governing affidavit judgment and default judgments. For this reason, the arguments advanced by Petitioner and his Amicus suggesting an unprecedented change to trials in small claim actions should be rejected by this Court.

D. FOR CENTURIES, THE LAW HAS RECOGNIZED THE PRINCIPLE THAT CONTRACTS MAY BE ASSIGNED AND THAT AN ASSIGNEE MAY PURSUE COLLECTION OF AN ASSIGNED DEBT

The concept that parties are able to structure their own affairs by making legal and enforceable promises lies at the heart of the freedom of contract. *See, e.g.*, *Mayor and City Council of Baltimore v. Clark*, 404 Md. 13, 20 (2008). This

[6] The District Court of Maryland Civil Case Activity Report for Fiscal Year of 2012's lists a total of 54,592 contested trials. The Court's statistics do not break down the number of trials by small claim and/or large claim. However, the proportion of on the record appeals (577) with appeals *de novo* (868) suggests that a majority of the contested trials were cases filed within the small claims jurisdiction of that Court.

principle applies with equal force to agreements where a party assigns contract rights to a third party. *See*, *Bimestefer v. Bimestefer*, 205 Md. 541, 546 (1954), citing Restatement, Contracts § 151 (assignment of contracts allowed except it precluded by an express contract prohibition).

As early as the mid 1800s, the rights of an assignee to collect on defaulted debts was recognized by this Court. In *Price v. De Ford*, 18 Md. 489, 495 (1862), the validity of an assignment for the benefit of creditors was challenged because the assignment included the power to compromise debts. This Court overruled the objection, explaining that the power to settle debts "is not inconsistent with the interest of creditors entitled to the benefit of the deed [and that] the interest of those entitled to claim under the deed [of assignment] would be subserved by avoiding the delay incident to the recovery of doubtful debts, and by effecting a more speedy realization and distribution of assets." *Id*.

Almost fifty years later, this Court in *Lyell v. Walbach*, 111 Md. 610 (1909), reversed the dismissal of a suit by an assignee who acquired title to a debt for groceries purchased by a consumer. The debt passed through an initial assignment and ultimately was transferred to a trustee for the benefit of the creditors. This Court held that the Complaint and Bill of Particulars stated a cause of action on an account stated theory of liability, ruling that the assignee was not required to plead the specific items of the account in order to proceed on its suit against the debtor.

More recent decisions confirm the rights of an assignee to sue to enforce debts. An assignee's right to demand payment from the State of Maryland on an account pledged as collateral for a loan subject to the Uniform Commercial Code was recognized in *University Systems of Maryland v. Mooney*, 407 Md. 390, 393 (2009), a case involving the doctrine of sovereign immunity. In *Bacon & Associates, Inc. v. Rolly Tasker Sails (Thailand) Co.*, 154 Md. App. 617 (2004), the Court of Special Appeals rejected a contention that an assignee's failure to allege its standing was a fatal procedural bar to its claim. The obligor challenged evidence submitted to the trial court of intercompany assignments of the accounts, arguing that the failure to allege the prior assignments was fatal to the assignee's claim. The Court rejected the argument, explaining that Maryland Rule 2-201 permits an action to be prosecuted in the name of a real party in interest, i.e., an assignee. The Court also overruled the objection as to the failure to plead the assignment on the basis that documents presented in discovery established the existence of the assignment.

These decisions, spanning over 150 years, recognize the validity of claims on assigned debts in a variety of commercial and business settings. The recently adopted rules governing affidavit judgment and default judgments on assigned debts in the District Court were consistent with the principle that assigned debts are subject to legal action for collection. The amendments did not vary the rules in

small claim trials and Petitioner's effort to apply the strict rules of evidence to a particular kind of small claim trial should be rejected.

E. EVEN IF THE RULES OF EVIDENCE APPLIED IN THIS CASE, THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE ALLOWS AN ASSIGNEE TO OFFER INTO EVIDENCE DOCUMENTS GENERATED BY ITS ASSIGNOR'S BUSINESS

Petitioner and his Amicus support their argument for reversal of the Circuit Court's judgment on a too narrow reading of the business records exception to the hearsay rule. They posit that an assignee of a debt cannot introduce business records prepared by the assignor. However, "this argument is unavailing as a debt buyer can authenticate a creditor's records in a collection action. Under the adoptive business records exception to the hearsay rule, defendant would have been able to admit the records it relied upon without introducing testimony of the original creditor." *Clark v. Main Street Acquisition Corp.*, 2013 WL 2295879 *5 (S.D. Ohio May 24, 2013) (internal citations omitted).

The adoptive business records doctrine involves layered (double or multiple) hearsay. This form of hearsay appears in the common situation in which one person makes a business record on the basis of data supplied by another. "Often many people are involved in transmitting data, sometimes by word of mouth but more often in a series of records (or entries or inputs) to someone who makes yet another record (or entry of input) that is ultimately offered in evidence. If both

source and recorder act in the regular course of their business, and everyone in the chain of transmission does likewise, the message of [Rule 803(6)] is that the fact of layered hearsay does not matter." Mueller and Kirkpatrick, 4 Fed. Evid. § 449 (2d Ed., July 2006). Therefore, the fact that a debt buyer did not create the document that it seeks to introduce as a business record does not preclude admissibility of the document prepared by a third party "if the [debt buyer] integrated the document into its records and relied upon it." *Air Land Forwarders, Inc. v. U.S.*, 172 F.3d 1338, 1342 (Fed. Cir. 1999).

The cases addressing admissibility of documents prepared by third parties as business records stress two factors: "[t]he first factor is that the incorporating business relied upon the accuracy of the document incorporated and the second is that there are other circumstances indicating the trustworthiness of the document." *Air Land Forwarders, Inc.*, 172 F.3d at 1343. In *Air Land Forwarders*, the Federal Circuit of Appeals affirmed a judgment for damages in favor of government contractors based on personal property damage claim forms submitted by United States military personnel to private transportation contractors that shipped household items for the servicemembers. The shipper's records were supported by estimates from third party repair shops. The Court found that the repair estimates were regularly relied upon by the military in its claim adjudication process. The Court also determined that there were other assurances of reliability in the third

party estimates because servicemembers filing claims were subject to fines and/or penalties for submitting false claim documentation. The court allowed the claim forms prepared by third parties into evidence to support the suit by the transport companies for reimbursement of claims paid.

Other cases cited in *Clark* allowing the introduction of business records on the adoptive records theory involved criminal prosecutions. In *U.S. v. Childs*, 5 F.3d 1328, 1334 (9th Cir. 1993), the Ninth Circuit held that documents, including purchase orders, certificates of title and odometer statements prepared by third parties and integrated into the records of an automobile dealership were properly admitted into evidence in a prosecution for possession of stolen automobiles, where the dealership relied upon the accuracy of the documents in its day-to-day business activities. *U.S. v. Jakobetz*, 955 F.2d 786 (2d Cir. 1992) was an appeal of a rape and kidnapping conviction. The prosecution needed to establish that the defendant was in the same area where his victim was freed after a harrowing four hour confinement in the rear of the Defendant's truck. In order to prove the defendant's location, the prosecutor needed to establish that the driver/defendant reached a toll bridge at a certain time. A toll receipt that was incorporated into the expense records of the construction company that employed the Defendant was offered into evidence. The Second Circuit affirmed the conviction, holding that the trial judge properly overruled an objection that the toll record was inadmissible

because the original keeper of the document, i.e., the toll authority, did not authenticate the receipt.

A number of other cases follow the principles set out above. *See*, *MRT Construction, Inc. v. Hardrives, Inc.*, 158 F.3d 478, 483 (9th Cir. 1998) (government contractor's records of its attorney fee bills are admissible under Rule 803(6) where the contractor relied on the statement of fees and retained the bills in their files); *U.S. v. Duncan*, 919 F.2d 981, 985-987 (5th Cir. 1990), *cert. den.*, 500 U.S. 926 (1991) (hospital records contained in files of an insurance carrier properly admissible in prosecution for insurance fraud where the insurance company included medical records in their claim files, noting that there is "no requirement that records be created by the business having custody of them"); *U.S. v. Hutson*, 821 F.2d 1015, 1019-1020 (5th Cir. 1987) (computer records of bank transactions made from business records of other financial institutions allowed over hearsay objection); *Matter of Ollag Constr. Equipment Corp.*, 665 F.2d 43, 46 (2d Cir. 1981) (financial statements prepared by borrower admissible under the hearsay exception because the records were integrated into bank's records and relied upon in its routine operations, explaining that "Rule 803(6) favors admission of evidence rather than its exclusion if it has any probative value at all"); *U.S. v. Bueno-Sierra*, 99 F.3d 375, 378-379 (11th Cir. 1996), *cert. den.*, 520 U.S. 110 (1997) (prosecutor's introduction of Port of Miami's business records that included a berth

request for unloading a cargo ship to prove cocaine was smuggled into the United States from overseas allowed over objection that the berth request form was inadmissible hearsay stating: "Rule 803(6) does not eliminate double hearsay problems, rather it commands that each link in the chain of possession must satisfy the business record exception") and *U.S. v. Doe*, 960 F.2d 221, 223 (1st Cir. 1992) (in prosecution for possession of firearms transported in interstate commerce, invoice from out-of-state telemarketing firm admitted, as a business record of the gun shop owner that acquired the firearm, to prove that the gun was transported through interstate commerce: "the fact that the invoice . . . had earlier been the record of a different business . . . is irrelevant because it was . . . integrated into the record of the sport shop").

The adoptive business records doctrine applies where a debt buyer offers the account records of the original creditor and the assignment of the debt to prove the existence of the obligation. Debt buyers are deemed "debt collectors" under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(6)(F)(iii) (FDCPA). *See, e.g., Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480 (M.D. Ala. 1987); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534 (7th Cir. 2003). The need for accuracy of the records of the assignor is paramount to the debt buyer's business because the FDCPA, a strict liability statute, imposes liability on debt collectors who attempt to collect amounts not allowed by the agreement creating the debt.

See, 15 U.S.C. § 1692f(1). Therefore the debt buyer's operation is dependent upon the integration of business records of the original creditor into its own records and the debt buyer must primarily rely upon the accuracy of the documents in pursuing collection of the accounts.

Moreover, as debt collectors under the FDCPA, debt buyers are required to provide a validation notice (15 U.S.C. § 1692g) to the debtor. The notice must disclose that a debt buyer is required to furnish verification of the debt upon receiving a timely written demand from the debtor. The verification process requires the debt buyer provide documentation that the amount being demanded is what the creditor claims is owing. *See*, *Chaudhry v. Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999) and *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162 (9th Cir. 2006). The FDCPA also requires a debt collector, upon timely demand of a debtor, to provide the name and address of the original creditor. These additional requirements evidence the fact that a debt buyer must integrate into its business the account records of the original creditor and must rely on the accuracy of those records in its business operations in order to satisfy its obligations under the FDCPA.

The adoptive business records doctrine has been applied in a number of recent rulings involving claims by debt buyers. *See, Ohio Receivables, LLC v. Dallariva*, cited in *Clark*, 2012 WL 2859923 at *8 (Ohio App. 10 Dist., July 12,

2012) (records prepared by predecessor in interest and attached to affidavit of debt buyer's records custodian admissible to support summary judgment under adoptive business records hearsay exception doctrine); *Hickman v. Alpine Asset Management Group, LLC*, 2012 WL 4062694 at *7 (W.D. Mo. September 14, 2012) ("while the affidavits are not directly from the original creditor, they are provided by company persons who have knowledge of company processes and relationship with the original creditors, and how charged-off receivables are sold and purchase from original creditors . . . this will fill the elements of the business records exception set forth in Federal Rules of Evidence "). *See also, Beal Bank, SSB v. Eurich*, 444 Mass. 813, 819, 831 N.E.2d 909 (Mass. Sup. Ct. 2005) ("the bank need not provide testimony from a witness with personal knowledge regarding the maintenance of the predecessors of business records. The bank's reliance on this type of record keeping by others renders the records the equivalent to the bank's own records. To hold otherwise will severely impair the ability of assignees of debt to collect the debt due because the assignee's business records of the debt are necessarily premised on the payment records of its predecessors") and *Simien v. Unifund CCR Partners*, 321 S.W.3d 235 (Tex. App.-Houston [Dist.] 2010) (affirming judgment based on certification provided by debt buyer of card issuer's account statements).

The adoptive business records exception doctrine has also been recently recognized by two well respected Circuit Court Judges on the record appeals of District Court judgments entered in favor of debt buyers. *See*, *David L. Meyer v. S&G Funding, LLC* (Circuit Court for Washington County, Case No. 21-C-13-465660 (Add. 1-5) and *Parker v. Pasadena Receivables, Inc.* (Circuit Court for Howard County, Maryland, Case No. 13-C-12-092956 (Add. 6-24).[7] In each opinion, the Circuit Court relied on Maryland cases interpreting the business records exception to the hearsay rule in support of its determination that business records of a debt buyer may be admitted into evidence even if the witness does not have firsthand knowledge of the records but instead relied upon the predecessor's record keeping processes and incorporated those records into its business operations. *See, e.g.*, *Davis v. Goodman*, 117 Md. App. 378, 417 (1997), citing *Killen v. Houser*, 251 Md. 70, 76 (1968). In *Davis*, the Court of Special Appeals cited Professor McLain's treatise to the effect that "the foundation requirements for this (hearsay) exception need not always be met by testimony or evidence. In some cases the Court may properly conclude from the circumstances and the nature of the documents involved that (the record) was made in the regular course of business." 6 McLain, Maryland Evidence § 803(b).1 at 379 (1987).

[7] The *Parker* case involved two appeals. On the second appeal, the Circuit Court Judge incorporated by reference the Memorandum Opinion in the first appeal and that opinion has been appended to Exhibit 3.

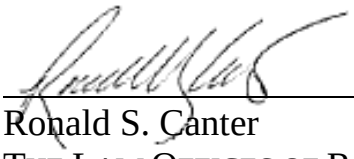
Beach v. State, 75 Md. App. 431 (1988), an opinion authored by Judge Wilner when speaking for the Court of Special Appeals, is also instructive. In *Beach*, a nine year old letter written by an Intake Counselor from a drug treatment program to the Department of Parole and Probation was admissible under the hearsay exception set out in Rule 5-805 to establish that the Defendant absconded from the treatment program. The Court cited *United States v. Veytia-Bravo*, 603 F.2d 1187, 1191 (5th Cir. 1979) to the effect that the Federal counterpart to Maryland Rule 5-803(6) "does not require that the records be prepared by the business which has custody of them where circumstances indicate that the records are trustworthy, (and) the party seeking to introduce them does not have to present the testimony of the party who kept the records or supervised its preparation." 75 Md. App at 438.

Accordingly, relevant Maryland decisions are entirely consistent with the multitude of cases that apply the adoptive business rules record in a variety of circumstances including criminal prosecutions as well as suits by debt buyers. For this reason, even if the formal rules of evidence would have applied in this case, the Circuit Court Judge would have been entitled to consider those business records in entering judgment against Mr. Bartlett. For this additional reason, NARCA, DBA and ACA submit that the Circuit Court judgments should be affirmed.

IV. CONCLUSION

For the reasons set out herein, NARCA, DBA and ACA respectfully ask this Honorable Court to affirm the judgment of the Circuit Court for Baltimore City.

Respectfully submitted,



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STATEMENT OF FONT USED AND TYPE SIZE

Pursuant to Rule 8-504(a)(8), this brief was prepared using Times New Roman 14-point font.

CERTIFICATE OF SERVICE

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ADDENDUM

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IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

*

DAVID L. MYERS,

*

Appellant.

*

vs. CASE NO. 21-C-13-46566

*

S & G FUNDING LLC,

*

Appellee.

*

* * * * * * * * * * * *

Opinion

Appellant David L. Myers appeals the decision of the District Court which found him liable to Appellee S&G Funding LLC in the amount of $5,885.31. Appellant had opened a credit card account with Chase Bank, and in 2011 Chase sold the account to a third party. After a chain of transactions between various financial groups, Appellee came into ownership of the account and attempted to collect on the debt.

In the District Court, Appellee, through the testimony of S&G Funding's managing partner Michael Fradkin, sought to introduce records of the account as business records qualifying as a hearsay exception under MD. R. 5-803(b)(6). Mr. Fradkin testified that the Chase Bank originated the loan and created the records, which had passed through the ownership of various parties before being bought by S&G Funding. Appellant objected that Appellee did not create the records nor did he have any knowledge of the records as they were created. The District Court agreed with Appellee and allowed the records into evidence. That evidentiary decision is the basis for the appeal. This appeal is heard on the record under MD. R. 7-102(b) as the amount in controversy is over $5,000.

Standard of Review:

Appellee urges this court to apply a "clearly erroneous" standard in reviewing the District Court's decision. According to MD. R. 7-113(f), the Circuit Court hearing an appeal on the record will not set aside the judgment unless it is "clearly erroneous." Such a standard "require[s] that appellate courts accept and be bound by findings of fact of the lower court unless they are clearly erroneous." *Ryan v. Thurston*, 276 Md. 390, 392 (1975).

Appellee forgets that whether evidence qualifies as hearsay or an exception to hearsay is a question of law entitled to no deference. The Maryland Rules of Evidence require that "hearsay must be excluded as evidence at trial unless it falls within an exception to the hearsay rule. Thus, a trial court's decision to admit or exclude hearsay ordinarily is an issue of law." *Hall v. University of Maryland Medical System Corp.*, 398 Md. 67, 82-83 (2007); *see also* MD. R. 5-802. Appellate courts "generally review the trial court's ruling de novo" regarding pure questions of law. *Bern–Shaw Ltd. Partnership v. Mayor and City Council of Baltimo*re, 377 Md. 277, 291 (2003).

Analysis:

Maryland evidentiary rules allow certain business records to be admitted as evidence if certain conditions are met:

> (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular

practice of that business was to make and keep the memorandum, report, record, or data compilation.

MD. R. 5-803(b)(6). This rule is often paired with MD. R. 5-902(b) which allows the custodian of the records, or another qualified individual, to authenticate the records by written certification.

In the District Court, Mr. Fradkin confirmed that S&G Funding routinely receives records such as those relating to Appellant's account when S&G Funding purchases accounts. Tr. 12. Mr. Fradkin also agreed with the characterization that S&G Funding "integrates [the records] into their own business dealings" after purchasing an account. Tr. 12. Mr. Fradkin added that the records demonstrate a "chain of title" regarding the account as it was sold and resold by third parties, ultimately ending in the possession of S&G Funding. Tr. 15. The records also showed that Appellant was actively using the account. Tr. 18.

Appellee asserts that the custodian of the records for S&G Funding may testify that the records qualify as business records for S&G's purposes, despite having no hand in creating them, because the records became S&G's records when S&G bought the debt. Appellant claims that the proponent cannot authenticate business records in their possession if they did not create the records and had no knowledge of the act of creation. This court believes that the weight of precedent goes against Appellant's position.

In *Killen v. Houser*, 251 Md. 70 (1968), the Court of Appeals ruled that corporate records could be introduced by someone who purchased the corporation and had been in control of the records since purchase. *See Killen v. Houser*, 251 Md. 70, 76

(1968)(finding that it was not error for the proponent to "testify from the corporate books and records without showing they were kept in the ordinary course of business.") The Court also stated that "does not specify that the custodian of the record be he who was such at the time the record was made. If it did, it would lose much of its utility and effectiveness." *Id.*

In *Beach v. State*, 75 Md.App. 431 (1988), the Court of Special Appeals found "no clear error" in a judge relying upon a letter to the judge printed on business stationery, stamped as received by the court, and purporting to be from a third party, despite the fact that no one from the third party authenticated the document. *See Beach v. State*, 75 Md.App. 431, 436 (1988). The Court went on to characterize the letter as having a "kind of generic reliability" based on the setting in which the letter was found. *Id.* Those facts, *sans* any indicia of deception or fabrication, meant that the letter could be introduced on two independent grounds, either as a business record or as a "reasonably reliable" record exempt from hearsay objections. *Id.*

The Court of Special Appeals reaffirmed the reasoning of *Killen v. Houser* and of *Beach v. State*, in the case *Davis v. Goodman*, 117 Md.App. 378, 417 (1997). In that case, the appellants argued the business records should not have been admitted because the witness was not employed by the business when the records were made, indicating the witness had no first-hand knowledge of the act. *See Davis*, 117 Md.App. at 417. The appellate court found that the witness's knowledge of how the business kept records in the ordinary course, plus the dates listed on the records, were "sufficient to indicate the trustworthiness of the documents and to meet the requirement that records must be made at or near the time of the act or event recorded." *Id.*

This court can glean the following principle from the above cases: so long as the witness is custodian of the records and there are no indicia of deception or fabrication, the witness's lack of personal knowledge of any aspect of the origin of the records will not be an adequate reason to exclude the records. Any lack of personal knowledge by the testifying witness would affect only the weight accorded to the records. Accordingly, the District Court did not err in this case in allowing the business records into evidence.

Order

The Memoranda of the parties having been read, the arguments of counsel having been considered, the transcript having been read, and for the reasons contained in this Opinion, it is this 24th of October 2013, by the Circuit Court for Washington County, Maryland,

ORDERED that the Judgment of the District Court is **AFFIRMED**.

M. Kenneth Long, Jr.
Administrative Judge

Cc: Jason R. Weber, Counsel for Appellee
Douglas B. Bowman, Counsel for Appellant

PASADENA RECEIVABLES, INC.,	*	IN THE
Appellant.	*	CIRCUIT COURT
v.	*	FOR
	*	HOWARD COUNTY
LOREN W. PARKER,	*	13-C-10-084673
Appellee.		

* * * * * * * * * * * * *

MEMORANDUM OPINION

This matter came before the Court for a record appeal of the decision of the District Court of Maryland for Howard County, in District Court Case Number: 100100065172009. On June 21, 2010, the District Court entered judgment in favor of Loren W. Parker (hereinafter "Parker" or "Appellee"). On July 16, 2010, Pasadena Receivables, Inc. (hereinafter "Pasadena" or "Appellant") filed its Notice of Appeal. This Court heard oral arguments on the appeal of the District Court's decision on March 31, 2011. For the reasons set forth herein, the judgment of District Court shall be reversed and the case remanded to the District Court of Maryland for Howard County for a new trial.

BACKGROUND

Appellant Pasadena Receivables is a Maryland corporation, located in Pasadena, Maryland.

Appellee Loren Parker is a resident of Laurel, Howard County, Maryland.

Pasadena Receivables is a corporation engaged in the business of purchasing "charged off portfolios of debt, mostly credit card debts" for collection. (Tr. 9, June 21, 2010). A third party, Turtle Creek Assets, Limited, had previously purchased portfolios of credit card debts including

some from Chase Bank USA ("Chase"). (Tr. 15 – 16, June 21, 2010.[1] In July of 2009, Turtle Creek Assets, Limited began assigning certain portfolios of credit card debts to Appellant Pasadena Receivables. [2] (Tr. 13 – 18, June 21, 2010). In September of 2009, Turtle Creek assigned a third portfolio of credit card accounts to Pasadena Receivables, which included Appellee Parker's credit card account with Chase Bank. (Tr. 20, June 21, 2010).

Thereafter, on November 10, 2010, Pasadena filed suit in the District Court for Howard County, Maryland, as the assignee of Chase Bank USA, ("Chase") against Defendant Parker. Pasadena's Complaint in District Court alleged that Mr. Parker owed a balance of $6,242.10 on a defaulted credit card obligation, originally incurred with the credit card lender, Chase. Prior to the trial date, Pasadena propounded pretrial interrogatories on Parker. On January 12, 2010, the Appellant filed a Maryland Rule 5-902(b) Notice of Intention to Rely on Certified Records maintained in a regularly conducted business activity. The Appellee did not file a written objection to the notice within five days after the service of the notice on the ground that the sources of information or the method or circumstances of preparation indicated a lack of trustworthiness as required by Maryland Rule 5-902(b)(1).

Trial proceeded in the District Court on three separate dates: April 12, 2010, May 10, 2010, and June 21, 2010. At the beginning of the District Court's hearing on April 12, 2010, counsel for Pasadena moved to introduce the records that were the subject of the Rule 5-902(b) notice: "a copy of the bills of sale from the original creditors through to Pasadena Receivables, the entire account history of the Chase account [referring to Defendant's Chase account] from first use to the last, as well as Pasadena Receivables' account summary, the card member's terms

[1] Chase Bank is a credit card company providing credit cards to clients.
[2] Through a contract dated July 16, 2009, Pasadena Receivables purchased a batch of 306 defaulted credit card accounts from Turtle Creek Assets as part of a Forward Flow Agreement for the months of July, August and September of 2009. (Lagana Test. Tr. 15, June 21, 2010).

and conditions and a redacted copy section of the accounts purchased by Pasadena Receivables from Turtle Creek." (Tr. 3 – 4, April 12, 2010). Both counsel presented Judge Reese with lengthy arguments as to whether the business records would therefore be under Rule 5-902(b)(1).[3] Appellee's position was that the validity of the records under 5-803(b)(6) must be demonstrated as a pre-requisite to admissibility under 5-902(b). (Tr. 5, April 12, 2010). Appellee further asserted the record had to be actually made by the business that certified the record. (Tr. 5, April 12, 2010). Appellee finished by arguing that since Appellant is the business certifying the records, but not the business that created the records, the records cannot be valid under 5-803(b)(6) and therefore inadmissible, the Appellant's compliance with 5-902(b) notwithstanding. Appellant responded by arguing that Appellant had followed 5-902(b) as required and no written objection was made by the Defendant. Therefore, argued Appellant, the requirements of 5-803(b)(6) were deemed satisfied and the records must be admitted. The Appellant also asserted, as per *Killian v. Houser*, that the records are records used in the course of the Appellant's business and as such are admissible even though created by another business.[4] The Appellant concluded by arguing that the records in question were bank records and as such were deemed by law to have a higher degree of reliability.[5] (Tr. 6 – 9, April 12, 2010). Judge Reese denied the admission of Pasadena's business records on the basis that the Plaintiff's business records certification (which had been submitted in the form required by 5-902(b)(2)) did not meet "the business records requirements under 5-803 that would therefore be admissible under 5-902(b)". (Tr. 27, April 12, 2010).

[3] There was no dispute that the appropriate notice was filed by the Appellant and no written objection filed by the Appellee pursuant to 5-902(b)(1). There was also no dispute that the written form of certification of the records by the Appellant conformed to 5-902(b)(2).
[4] 251 Md. 70 (1968).
[5] Appellant cited to *Chapman v. State*, 331 Md. 448 (1993).

After the close of Pasadena's case on June 21, 2010, Parker moved for judgment in favor of the Appellee, which the Court subsequently denied. (Tr. 43, June 21, 2010). Parker did not present any witnesses, and the trial moved to closing argument. After argument, the District Court entered judgment in favor of the Appellee, holding the Appellant had failed to prove "the chain of title" by a preponderance of the evidence and thereby failed to prove the Appellee owed the Appellant the debt. (Tr. 46, June 21, 2010) The Appellant filed a motion to reconsider, which was denied. The Appellant timely appealed.

DISCUSSION

A. SCOPE OF REVIEW

Maryland Rule 7-113 governs the standard of review for an on the record appeal to the Circuit Court. For an appeal of a District Court judgment, the Circuit Court is required to review the case on both the law and the evidence.[6]

For factual findings, the appellate court will not substitute its judgment for that of the trial court unless the factual findings are clearly erroneous in light of the total evidence.[7] Under the clearly erroneous standard, the Circuit Court must consider evidence produced at the trial in a light most favorable to the prevailing party, and if substantial evidence was presented to support the trial court's determination, that decision is not clearly erroneous and cannot be disturbed.[8] Further, the Court of Appeals has determined that when there is "solid evidence which tends to support the disputed factual allegations of each party," then "under these circumstances . . . rules

[6] Scope of Review. The circuit court will review the case on both the law and the evidence. It will not set aside the judgment of the District Court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the District Court to judge the credibility of the witnesses. MD. R. 7-113(f).
[7] *Ryan v. Thurston*, 276 Md. 390, (1975).
[8] *Id.* at 392.

of procedure, and particularly," responsibility for resolving such a conflict is placed with the trial court.[9]

On the contrary, the same presumption of correctness for review of factual findings does not apply to the legal findings of the District Court. The Court of Appeals has stated that for cases applying Rule 886 [the predecessor to Rule 7-113], the 'clearly erroneous' standard does not apply to *legal* determinations of the District Court.[10] The lower court's interpretations of law enjoy no presumption of correctness on review. Instead, the Circuit Court must apply the law, as it understands it to be.[11]

B. QUESTIONS PRESENTED FOR REVIEW

1. DID THE DISTRICT COURT COMMITT REVERSIBLE ERROR WHEN IT REQUIRED PASADENA TO ESTABLISH ITSELF AS THE LAWFUL ASSIGNEE?

The Appellant argues that the District Court should not have required the Appellant to establish itself as the lawful assignee because Appellee, at no time prior to trial, raised any issue as to Pasadena's capacity to bring suit as an assignee. Appellant argues that under Maryland Rule 3-308, if there was an issue as to the capacity of a party to sue or be sued, the Appellee was required to make a specific demand for proof at any time prior to the conclusion of the trial. Appellant argues that in the absence of this specific demand for proof, the Appellant's capacity should have been admitted for the purpose of the litigation.

Appellee Parker argues that the Appellant's argument conflates the issue of capacity under Rule 3-308 with the issue of standing to sue. Appellee argues that the issue is not whether the assignment conferred capacity to sue, but whether the assignment conferred standing to sue.

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[9] *Kowell Ford, Inc. v. Doolan*, 283 Md. 579, 548 (1978).
[10] *Rohrbaugh v. Stern*, 305 Md. 443, 446, (1986).
[11] *Id.*

Appellee is correct. Maryland Rule 3-308 is inapplicable, and the correct issue is whether the Appellant had standing to bring the suit against Appellee. Maryland courts have held that legal capacity involves the "litigant's power to appear and bring its grievance before the court. Legal capacity to sue, or lack thereof, often depends purely on the litigant's status, such as that of an infant, and adjudicated incompetent, a trustee."[12]

A Maryland corporation has the capacity to sue or be sued in all courts.[13] It has not been contested that Appellant Pasadena is a Maryland corporation and thereby has the capacity to sue Appellee Parker.[14]

Standing to sue is a party's right to make a legal claim or seek a judicial enforcement of a duty or right. The Court of Appeals has stated that, "the doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present the court with a dispute that capable of judicial resolution. The most critical requirement of standing . . . is the presence of 'injury in fact- an actual legal stake in the matter being adjudicated.'"[15] An assignment of a debt confers standing since the assignee now has an interest that can be impaired. Without a valid assignment, then the party that brings a suit has no standing.

In the instant case, there was no direct contractual relationship between the Appellee and the Appellant from which the Appellee would owe a debt to the Appellant. The question of whether the Appellant had standing to sue wholly depends on whether there was a valid assignment of the Appellee's debt to the Plaintiff. Appellant bears the burden to establish by a

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[12] *Hand v. Manufacturers*, 405 Md. 375, 399 (2008) (citing *Security Pacific Nat. Bank v. Evans*, 31 A.D.3d 278, 820 N.Y.S.2d 2, 3 – 4 (2006)).
[13] MD. CORP. & ASS'N. 2-103(2).
[14] To the contrary, Michael Lagana testified that he was a vice president of the Appellant corporation and that it was, in fact, a Maryland corporation. (Tr. 9, June 21, 2010)
[15] *Hand*, 405 Md. at 398 (quoting *Security Pacific Nat. Bank v. Evans*, 31 A.D.3d 278, 820 N.Y.S.2d 2, (2006))

preponderance of the evidence that a valid assignment has been made thereby establishing standing.

2. DID THE DISTRICT COURT COMMITT REVERSIBLE ERROR BY NOT ADMITTING PASADENA'S CERTIFIED BUSINESS RECORDS UNDER MARYLAND RULE 5-902(11)?

As stated earlier, the Appellee maintains the position that the validity of the proffered record under Rule 5-803(b)(6) must be established before the proffered record is admissible under 5-902(b). Appellee states, further, that the only business that can certify a record under 5-902(b) is the business that generated the record. The Appellant's response is that Appellant's compliance with 5-902(b), in absence of a written objection by the Appellee, renders the record admissible and immune from a challenge under 5-803(b)(6).

Maryland Rule 5-803(b)(6) establishes the business records exception to the hearsay rule.[16] In doing so, it states the characteristics that must be present in a record before it can be properly established as a business record and thereby be an exception to the hearsay rule.

Rule 5-803(b)(6) does not establish a method of laying the proper foundation for entering the record into evidence.[17] The Rule does not establish the ability of a custodian to testify in court, but that certainly is possible as per the development of the case law.[18] Further, it does not establish the ability of the custodian to create a "certification" to be used instead of testimony by the custodian. As stated

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[16] "In order to qualify under the pre-Title 5 business records exception to the hearsay rule, documents had to comply with section 10-101 of the Courts and Judicial Proceedings Article of the Maryland Code. . . . The Maryland Statute, now 'trumped' by the subsequent adoption of Rule 5-803(b)(6) to the minor extent that it is inconsistent with section 10-101, was but one incarnation of the business records hearsay exception that has broadened significantly over the centuries since its inception as the 'shop book rule.'" Lynn McLain, *Self-Authentication of Certified Copies of Business Records*, 24 U. BALT. L. REV. 27, 45-46 (1994-95).

[17] "The modern Maryland cases, codified by Rule 5-803(b)(6), are both flexible and lenient with regard to how the foundation for business records can be established." *Id.* at 46.

[18] ". . . [T]he drafters of Maryland Rule 5-803(b)(6) omitted the federal rule's phrase: 'as shown by the testimony of the custodian or other qualified witness.' The intent behind the Maryland Rule was to codify the pre-Title 5 Maryland case law." *Id.* at 48.

before, the rule merely lists what needs to be demonstrated in order to establish a record as a business record and, therefore, excepted from the hearsay rule.[19]

A business record may be admitted into evidence by two methods: extrinsic evidence, through Rule 5-803(b)(6), or self-authentication, pursuant to Rule 5-902.[20] If testimony from a custodian is utilized, the custodian must be capable of testifying that he or she maintains the records and that they have not been altered or changed from the time that they were created. Additionally, the custodian must be able to testify, with some knowledge, that the person who made the record did so at or near the time of the event, had knowledge of or was given the information by a person with knowledge of the actual event, that the record is the type of record that is made in the regularly conducted course of business (as opposed for litigation), and that it was regular practice of the business to make and keep the record. The custodian is stating a familiarity not only with the business practices of the company but also that the records that are generated by and during the business practices of the company.[21] Records that are kept by a business, in conformity with the requirements of 5-803(b)(6), are considered reliable and trustworthy for the court.

To be self-authenticating, the proponent of a business record must satisfy the two prongs of 5-902(b): notice and certification.[22] The rule was established for the purpose of creating a procedure to

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[19] Rule 5-803(b)(6) requires the business record (A) be "made at or near the time of the act, event, or condition or the rendition of the diagnosis," (B) be "made by a person with knowledge or from information transmitted by a person with knowledge," (C) be "made and kept in the course of a regularly conducted business activity," and (D) the "regular practice of that business" was to make and keep the business record. MD. R. EVID. 5-803(b)(6)..

[20] "There are two ways that the necessary evidentiary foundation for admitting business records may be established: by extrinsic evidence (usually live witness testimony) regarding the four requirements of Rule 5-803(b)(6) or by 'self-authentication' pursuant to Rule 5-902(a)(11)." *State v. Bryant*, 361 Md. 420, 426 (2000).

[21] "The rationale underlying the business records exception is that because the business relies on the accuracy of its records to conduct its daily operations, the court may accept those records as reliable and trustworthy. *See Chapman v. State*, 331 Md. 448, 459, 628 A.2d 676, 681 (1993); Hon. Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 804, at 418 (2d ed. 1993). Moreover, the recorder, who has no motive to falsify or record inaccurately, is under a business duty to make an honest and truthful report that can be relied upon by the business. *See State v. Garlick*, 313 Md. 209, 217, 545 A.2d 27, 30-31 (1988); *Aetna Casualty & Surety v. Kuhl*, 296 Md. 446, 454, 463 A.2d 822, 827 (1983)." *Department of Public Safety and Correctional Services v. Cole*, 342 Md. 12, 30-31 (1996).

[22] "A record of regularly conducted business activity, to be admissible as a self-authenticating document under Rule 5-902(a)(11), must satisfy the notice requirement of the rule and contain a certification that it falls within the scope

allow the self-authentication of specified types of evidence, thereby eliminating the need to bring in custodians to authenticate records that are not in dispute.[23] Maryland Rule 5-902 did not require that an objection be filed until relatively recently.[24] The change in 5-902 reconstructed the portion of the rule dealing with business records by removing business records from 5-902(a) and creating 5-902(b). The change included a requirement that the opposing party file a notice of objection to the records on the grounds that the records lack trustworthiness.[25] The amendment to the rule requiring that the adverse party file an objection to the certification resolved the dilemma faced by courts when the adverse party waited until the day of trial to make objections related to authenticity and/or trustworthiness.[26]

Ultimately, Maryland Rule 5-902 is designed to expedite the process by which certain documents may be admitted.[27] The argument that 5-803(b)(6) must be satisfied at each instance, even when 5-902(b) notice has been given and there has been no objection filed by the adverse party, would render 5-902(b) meaningless. The form of the certification in 5-902 includes the precise conditions precedent that are listed in 5-803(b)(6).[28] The corresponding language of Rule 5-902(b)(1) and Rule 5-803(b)(6) indicate that Rule 5-902(b)(1) provides the adverse party with

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of Rule 5-803(b)(6)." *Bernadyn v. State*, 390 Md. 1, 19 (2005); "Counsel may now satisfy the 'authentication' requirement with a certification that contains the information traditionally supplied from the witness stand. This benefit is available, however, only when the party who intends to use the certifications procedure gives timely notice to the adverse party." Hon. Joseph F. Murphy, Jr., *Maryland Evidence Handbook*, §1104 at 542 (4th ed. 2010).

[23] See *State v. Bryant*, 361 Md. 420 (2000) ("Md. R. Evid. 5-902(a)(11) creates an alternative method for authenticating business records without requiring the live testimony of the records custodian. It allows proof, by certification, of the same facts to which a witness would have been required to testify in court to lay the foundation for the hearsay exception at trial.") *Id.* at 427.

[24] Maryland Rule 5-902 was amended November 8, 2005, effective January 2, 2006.

[25] ". . . [T]he adverse party . . . filed . . . written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness." MD. R. EVID. 5-902(b)(1).

[26] "Md. Rule 5-902 has been amended in order to avoid 'objection by ambush.'" Hon. Joseph F. Murphy, Jr., *Maryland Evidence Handbook*, §1104 at 542 (4th ed. 2010).

[27] ". . . Maryland Rule 5-902 as a whole is designed to eliminate the need to call foundation witnesses for evidence that is so likely to be authentic that a requirement of testimony to sufficiently show authenticity to justify admission would squander judicial time and litigants resources." Lynn McLain, *Self-Authentication of Certified Copies of Business Records*, 24 U. BALT. L. REV. 27, 32 (1994-95).

[28] "Maryland Rule 5-902(a)(11) . . . makes copies of originals of business records self-authenticating if they are certified as such by 'either the custodian or another qualified individual.' This process of certification essentially tracks the requirements for the business records exception to the hearsay rule, codified in Maryland Rule 5-803(b)(6)." Lynn McLain, *Self-Authentication of Certified Copies of Business Records*, 24 U. BALT. L. REV. 27, 34 (1994-95).

the proper procedure to object to a business record exception.[29] Failure to file an objection establishes the validity of the provisions contained within the certificate and constitutes a satisfaction of 5-803(b)(6).[30] To require the offering party to prove the conditions precedent in 5-803(b)(6), absent an objection to the 5-902(b) certification, would nullify 5-902(b). Failure by the adverse party to file a notice of objection constitutes a waiver of the right to raise objections to the admission of the record on grounds of authenticity or trustworthiness.

The record of the District Court is clear that the Appellant complied with the notice and certification requirements of 5-902(b). The record of the District Court is equally clear that the Appellee failed to file a written objection based on lack of trustworthiness as required by 5-902(b)(1). By failing to file a written objection based on the lack of trustworthiness of the proposed business records, the Appellee's objections at trial to the trustworthiness of those same business records based on Rule 5-803(b)(6) were waived. The District Court erred in excluding the records.

3. ARE THE BUSINESS RECORDS OF A CREDIT CARD ISSUER ADMISSIBLE WHEN PROFFERED BY THE ASSIGNEE OF THE CREDITOR WHO HAS INCORPORATED THE ISSUING CREDITOR'S RECORDS INTO ITS BUSINESS RECORDS?

[29] There is a clear similarity in the use of certain language between Maryland Rule 5-902(b)(1) and Maryland Rule 803(b)(6). In particular, the language in Rule 5-902(b)(1) that states that an adverse party may file a "written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness," directly corresponds with the language in Rule 5-803(b)(6), which states that "a record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness."

[30] "Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803 (b)(6) that has been certified pursuant to subsection (b)(2) of this Rule," provided certain requirements are met. MD. R. EVID. 5-902(b)(1).

As previously stated, Appellee's failure to object to the business records under Rule 5-902 (b) removes the issue of authentication of the business records. However, assuming *arguendo* that the Appellee's objection had merit, or that the Appellee had made a timely objection under Rule 5-902(b) to Pasadena's Notice of Intention to Rely on Certified Record, the Appellant's business records would still be admissible under Rule 5-803(b)(6), as records of a regularly conducted business activity.

Appellee Parker argues that the Appellant failed to properly certify the records because the records do not fall under the business records exception. Since the records were not made in the regular course of business of the Appellant, Parker argues that Pasadena's custodian, Mr. Lagana, was too far removed from the records to testify effectively. Therefore, he was unable to certify the records were made at or near the time of the matters at issue or kept within the course of regularly conducted business activity. Further, Appellee claims that there was no evidence that the purported business records of Chase were in fact incorporated into, or became a part of, Appellee's business records. Instead, Appellee argues that the business records at issue are the separate and distinct records of another business, not the Appellant's business.

Appellant Pasadena argues that as the assignee of the debt, it can properly testify as to the business records generated by the original assignor, Chase Bank. Pasadena reasons that Appellant can testify to the proposed business records because the assignor's records were incorporated into the assignee's business records.

Maryland has long held that a testifying custodian of a business record does not have to be the person "who was such at the time that the record was made."[31] Further, the lack of knowledge of a maker of a written notice (such as the notice required under 5-902(b)) "may be

[31] *Killen v. Houser*, 251 Md. 70, 76 (1968).

shown to affect the weight of the evidence but not its admissibility."[32] Business records are admissible pursuant to Courts and Judicial Proceedings 10-101(b), even when they are "hearsay in nature," when the entry meets tests of necessity and circumstantial guarantee of trustworthiness.[33]

In the instant case, the Appellant called Michael Lagana to testify on June 21, 2010. Mr. Lagana testified that he was "vice president of acquisitions" and that his job was to purchase "charged off portfolios of debt". (Tr. 9, June 21, 2010). Mr. Lagana provided testimony as to the Appellant's business of purchasing "charged off debt" and as to the nature of the debt collection industry. (Tr. 9 – 11, June 21, 2010). He further testified that he alone, on behalf of the Appellant, negotiated and completed the purchase of the debt from Turtle Creek Assets Limited that is the focus of the instant case. (Tr. 13, June 21, 2010). Mr. Lagana identified the "Credit Card Purchase Agreement" dated July 16, 2009 between Turtle Creek and the Appellant, and specifically noted that Turtle Creek warranted that "good and marketable title" of each "Charged-off Account" (including Chase) is being transferred to the Plaintiff by the agreement. (Tr. 16, June 21, 2010). Mr. Lagana then identified a "Bill of Sale" between Chase and Turtle Creek that was delivered to the Appellant after the "funding of the deal". (Tr. 21 – 22, June 21, 2010). The "Bill of Sale" between Chase and Turtle Creek was delivered to the Appellant as part of the business transaction between the Appellant and Turtle Creek and contained the records relevant to the debt that is the focus of the instant case. The Appellant offered the aforementioned documents as exhibits and the Appellee objected on grounds of hearsay. The District Court ruled that the testimony amounted to the payment of a certain amount of money to

[32] Cts and Jud Proc §10-101(d). Courts and Judicial 10-101 applies to records of all businesses of every kind. *Bethlehelm-Sparrows Point Shipyard, Inc. v. Scherpenisse*, 187 Md. 375 (1946). The section permits the introduction of business records as an exception to the hearsay rule when tests of necessity and trustworthiness are met. *Smith v. Jones*, 236 Md. 305 (1964).

[33] *Mattvidi Assoc. Ltd. Partnership v. NationsBank of Virginia*, 100 Md. App. 71, 87 (Md. Ct. Spec. App. 1994).

Turtle Creek for "a stack of papers," and to the extent the exhibits accurately reflected the papers purchased, the exhibits would be admitted to show nothing more than a "stack of papers" was purchased. (Tr. 25, June 21, 2010). The District Court, however, did not accept into evidence "any hearsay" that may be in the "stack of papers." (Tr. 25 – 26, June 21, 2010).

In *Morrow v. State*[34], the Court of Appeals was asked to determine if a copy of a receipt for the purchase of spark plugs from a garage was admissible in the absence of the testimony of the maker of the receipt (the garage owner). The witness testifying in support of the receipt was the person who conducted the transaction at the garage and received the receipt from the garage owner. The Court of Appeals noted that the receipt was the unsworn statement of an out of court declarant and was hearsay. The appellant's argument was that the receipt was a business record pursuant to the precursor to Courts and Judicial Proceedings 10-101 and, therefore, an exception to the hearsay rule. The Court of Appeals ruled in favor of the appellant and held that the trial court erred in excluding the evidence.[35] In the instant case, the import of Mr. Lagana's testimony was not that he negotiated the purchases of unspecified stacks of paper, but that he negotiated the purchase of what the papers represented, and what the papers represented was the assignment of the authority to collect debts, including the debt from Chase. Just as the receipt in *Morrow* was admissible to corroborate the location of the defendant on the date and time indicated on the receipt, the exhibits in the instant case were admissible to show the purchase of an assignment.

The Court is mindful that the objection of the Defendant is not necessarily to the papers and the words and numbers on the papers, but to the hearsay nature of those records that Turtle Creek received from Chase. The question for the Court, however, is whether the records qualify

[34] 190 Md. 559 (1948).
[35] The opinion is unclear if the intent of the opinion was to limit the discussion of the business record argument to permitting the evidence for corroborative purposes, or if the opinion was broader.

as business records and are therefore admissible, not whether the fact finder will give them weight. Again, Courts and Judicial Proceedings 10-101(d) plainly states that the lack of personal knowledge of maker of the written notice, or in this case the witness Mr. Lagana, does not bar admissibility, but can be considered by the fact finder in weighing the evidence.

Mr. Lagana's testimony also generated the question of whether "incorporated business" records are admissible under 5-803(b)(6), unless the objecting party can show that the record lacks trustworthiness. Mr. Lagana was the proper witness to present all of the necessary testimony expected from a custodian of Appellant's business records. In fact, Mr. Lagana went one step further in that he participated in the events and the creation of the records. Mr. Lagana clearly testified as to the nature of the Appellant's business and the integral and necessary role that the disputed records play in the conduct of the Appellant's business. The business records that the Appellant seeks to admit in the trial court are those that credit card companies typically keep in the regular course of business activity, and are also the type of records that are typically produced when debts are assigned to another company. The Appellee did not produce any specific evidence that records, or portfolios, of the credit card debts had been altered or modified, or that they were not the same account records, as they passed through the chain of possession from Chase to Turtle Creek, and then later from Turtle Creek to Pasadena.

The United States Court of Appeals, Second Circuit, was presented with a similar scenario in *U.S. V. Jakobetz*,[36] in which the defendant was convicted of kidnapping. The defendant claimed that the trial court committed error by permitting into evidence a toll receipt that was important to the prosecution because it showed defendant's location on a date and at a time consistent with the testimony of witnesses. The defendant was a trucker, and the custodian of the employing trucking company records testified that the toll receipt was turned in by the

[36] 955 F. 2d 786 (1992).

defendant at the end of the trip, as per company policy, and that in reliance on the receipt the company reimbursed the defendant for the cost of the toll. The Court of Appeals reviewed Federal Rule of Evidence 803(6) to determine if the trial court committed error.[37] The Court of Appeals found that based on the testimony of the custodian, the toll receipt had been integrated into the trucking company's records and relied on in the day to day operations of the truck company. The Court therefore held that the toll receipt was admissible as a business record of the truck company.

Mr. Lagana's testimony was sufficient to demonstrate that the disputed records had been integrated into the Plaintiff's company records and were relied on as a critical part of the day to day operations of the Plaintiff company's business. His testimony was also sufficient to demonstrate that the Appellant business relied on the accuracy of incorporated documents. Finally, Mr. Lanaga's testimony was sufficient to establish additional circumstances indicating the trustworthiness of the records. The records, therefore, are business records of the Appellant and it was error to refuse to admit without restrictions.

C. CONCLUSION

Having held that the District Court erred in permitting the disputed records into evidence pursuant to Maryland Rule 5-902(b), or in the alternative as having satisfied Maryland Rule 5-803(6) for the reasons stated above, the next question is whether the error was harmless. The District Court tried the case to a verdict on its merits. In finding that the Appellant had failed to

[37] Federal Rule of Evidence 803(6), as constituted when the decision was handed down, was identical in substance to Maryland Rule 5-803(6).

meet his burden of proof, the District Court specifically cited what it viewed as deficiency of evidence in the "chain of title". (Tr. 46, June 21, 2010). The disputed records go directly to the issue of the assignment, or as stated by the District Court the "chain of title," and while the admission of the records may not carry sufficient weight with the fact finder to change the verdict, the error is not harmless and a new trial is warranted.

For the reasons set forth herein, it is this 27 day of September, 2011, by the Circuit Court for Howard County,

ORDERED, that the decision of the District Court is reversed and remanded for a new trial.

Richard S. Bernhardt
Judge, Circuit Court for Howard County

09-58789

LOREN W. PARKER	*	IN THE
Appellant	*	CIRCUIT COURT
v.	*	FOR
PASADENA RECEIVABLES, INC.	*	HOWARD COUNTY
Appellee	*	Case No.: 13-C-12-092956

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SECOND MEMORANDUM OPINION

The matter has come before the Court for the second time for a record appeal of the decision of the District Court of Maryland for Howard County in Case Number 100100065172009. The first trial before the District Court resulted in judgment in favor of Loren W. Parker. Pasadena Receivables, Inc. appealed to the Circuit Court for Howard County and the District Court judgment was reversed and the case remanded to the District Court pursuant to the Court's Memorandum Opinion filed on October 13, 2011. Appellant Loren W. Parker filed a Petition for Writ of Certiorari to the Court of Appeals that was denied on January 23, 2012.[1] The remand was heard in the District court on June 25, 2012 after which the District Court entered judgment for Appellee Pasadena Receivables, Inc. Appellant filed the instant appeal on August 15, 2012. The parties submitted memorandums of law and the Court heard oral argument on February 21, 2013.

Questions Presented

Appellant presented the following questions in his "Appellant's Memorandum in Opposition to the Decision of the District Court":

1. Whether the District Court erred or abused its discretion in overruling the Appellant's Rule 5-805 objection to the purported Chase to Turtle Creek Bill of Sale.
2. Whether the District Court erred or abused its discretion in overruling the Appellant's relevancy objection to the purported Chase to Turtle Creek Bill of Sale.

[1] *Parker v. Pasadena Receivables, Inc.*, Petition Docket Number 427.

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Wayne A Robey
Acting Clerk

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3. Whether the District Court erred or abused its discretion in overruling the Appellant's Rule 5-805 objection to the purported Chase account statements, Cardmember Agreement, and documents derived therefrom.
4. Whether the District Court erred or abused its discretion in finding that the paper identified by the Appellee as "Exhibit 1" to the Turtle Creek to Pasadena Bill of Sale was also "Exhibit 1" to the Chase to Turtle Bill of Sale.

Discussion

In the first three questions presented, the Appellant resurrects the opposition to evidence that was decided by the Court in the first Memorandum Opinion which has now become the law of the case. The Court's ruling in the instant appeal shall incorporate the first Memorandum Opinion. As such, the prior determination that the disputed records had been integrated into the Appellee's company records, were relied on as a critical part of the day to day operations of the Appellee's business, and that the Appellee relied on the accuracy of the disputed leads to the conclusion that the disputed records were properly admitted at the second trial, just as they should have been admitted at the first trial.

The fourth question presented by the Appellant is a question of sufficiency of the evidence. The Court of Special Appeals recently set forth the applicable standard of review:

> The standard of review of a question of the sufficiency of the evidence is *de novo.* In a civil case, the evidence is legally sufficient to support a finding in support of the prevailing party if, on the facts adduced at trial viewed most favorably to that party, any reasonable fact finder could find the existence of the elements of the cause of action by a preponderance of the evidence. *B-Line Med., LLC v. Interactive Digital Solutions, Inc.* 209 Md. App. 22, 44-45 (2012) (quoting *Univ. of Md. Med. Sys. Corp. v. Gholston,* 203 Md. App. 321, 329 (2012)) (internal citations omitted).

The record demonstrates that in the instant case the District Court, acting as the fact finder, had significant evidence to consider and weigh including, but not limited to: Parker's testimony that he in fact did have a credit account with Chase and that he did owe a debt based on that credit account; Lagana's testimony that Appellant's business was to purchase debt and collect on the debt; that Lagana was involved in the purchase of Parker's debt from Turtle Creek; that the documents received into evidence demonstrated the purchase and assignment of Parker's

debt to Chase to Turtle Creek and then to Pasadena Receivables, Inc.; and the copies of the documents of which Lagana testified.

As the Court noted in the first Memorandum Opinion, as the fact finder the District Court had the obligation to weigh the evidence. The District Court carefully considered and discussed the evidence presented in reaching the decision.[2] The record contains sufficient evidence presented to the District Court for a reasonable fact finder to find as the District Court did.

Therefore, for the reasons stated above, it is this 4th day of March, 2013 by the Circuit Court for Howard County, Maryland,

ORDERED, that the decision of the District Court is AFFIRMED.

Richard S. Bernhardt,
Judge, Circuit Court for Howard County

ENTERED
MAR 11 2013
CLERK, CIRCUIT COURT
HOWARD COUNTY

[2] Transcript June 25, 2012, pages 71 (line 25) through 74 (line 4).