

STATE OF NEW JERSEY  
DEPARTMENT OF BANKING AND INSURANCE

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

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Commissioner of the New Jersey  
Department of Banking and Insurance,  
Petitioner,

v.

John Savadjian,  
Respondent.

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DECISION AND ORDER  
GRANTING PETITIONER'S  
REQUEST FOR  
INTERLOCUTORY RELIEF

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

On December 27, 2016 Petitioner, the New Jersey Department of Banking and Insurance ("the Department" or "Petitioner"), requested interlocutory review of Administrative Law Judge Moscovitz's ("ALJ Moscovitz") December 19, 2016 ruling barring the Department's witness, Prudential employee Charles Shanley ("Shanley"), from authenticating evidence created and collected during a Prudential investigation. Respondent John Savadjian ("Respondent" or "Savadjian") opposed this motion on or about December 30, 2016. Thereafter, Director of Insurance Peter Hartt, in the capacity

as Acting Commissioner, requested clarification from ALJ Moscowitz on the ruling, and, by letter dated January 18, 2017, ALJ Moscowitz memorialized his ruling and order.

Via letter dated January 20, 2017, Acting Commissioner Hartt granted the Department's request for interlocutory review of ALJ Moscowitz's ruling, but permitted the parties to supplement their motion submissions as described below.

On February 2, 2017, the Department submitted a supplemental brief. Respondent submitted a supplemental opposition brief on February 6, 2017. The Department replied to the opposition brief on February 8, 2017, and although not permitted by the briefing schedule, Respondent submitted a letter dated February 15, 2017 further commenting on the Department's supplemental reply brief.

#### **BACKGROUND AND PROCEDURAL HISTORY**

This interlocutory review concerns three specific documents - a compact disc<sup>1</sup> containing telephone calls that Savadjian allegedly made to Prudential's customer service center ("CD"), a report created by Prudential's Corporate Investigations Division ("CID Report") and an Excel spreadsheet listing the calls that Savadjian allegedly made to Prudential's Customer Service Office ("CSO").

On April 10, 2014, the Department issued Order to Show Cause ("OTSC") E14-36, which alleged, in eight separate counts, that Savadjian committed multiple violations of the Producer Act by conducting bulk transfers of orphaned life insurance accounts via facsimile transmission sheets without the knowledge or consent of policyholders or his managing director. Respondent/Appellee John Savadjian's Memorandum of Law in Opposition to the Department of Banking and Insurance's Interlocutory Appeal of Administrative Law Judge Barry Moscowitz's December 19, 2016 Ruling Barring

Testimony of Charles Shanley on Issues Related to Purported Audio Recordings (“Savadjian Opposition Brief”), Appendix 1 at 7a-21a. OTSC E14-36 also alleged that Savadjian committed forgery on a number of insurance documents. Ibid.

Savadjian denied the allegations and requested a hearing and, as a result, this matter was transmitted to the Office of Administrative Law for a hearing before ALJ Moscowitz. Department’s Opposition to Respondent’s Interlocutory Appeal dated August 10, 2016, Appendix at Pa0013-18.

On or about September 17, 2014, Prudential lodged an additional complaint with the Department about Savadjian alleging that, on 52 occasions between December 1, 2011 and June 12, 2013, Savadjian called Prudential’s Customer Service Office (“CSO”) and impersonated six different persons to obtain policy information, conduct business, or help transfer accounts to Respondent’s son, who is also a licensed insurance producer. Petitioner’s Memorandum of Law in Support of its Request for Interlocutory Review of the Administrative Law Judge’s December 19, 2016 Ruling Barring the Authentication of Evidence through the Testimony of Prudential Representative Charles Shanley (“Department Moving Brief”), Certification of Department Investigator Daxesh M. Patel (“Patel Certification”) at ¶3. In at least three phone calls, Savadjian identified himself. Department Moving Brief, Certification of Deputy Attorney General Aziz O. Nekoukar (“Nekoukar Certification”) at ¶2, Ex. A. As a result, the Department filed Amended Order to Show Cause E14-130 on November 7, 2014, alleging, in 52 additional counts, that Savadjian made fraudulent telephone calls to Prudential wherein he impersonated others. Department Moving Brief, Patel Certification at ¶7.

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<sup>1</sup> In its brief in support of this request for interlocutory relief, the Department refers to this as a DVD.

As part of the complaint against Savadjian, Prudential provided the Department with a CD containing electronic audio files of the alleged telephone calls and a brief summary of the investigation conducted by Prudential's Corporate Investigations Division ("CID"). Id. at ¶4. The audio files contain metadata reflecting the date they were downloaded from Prudential's phone system instead of the dates and times that the calls were purportedly made. Id. at ¶5. Moreover, in November 2015, in response to Savadjian's discovery subpoena, Prudential produced 56,000 documents which also included copies of the telephone calls along with an Excel spreadsheet created by Prudential's CID in the course of its internal investigation of Savadjian's telephone calls to Prudential's CSO. Id. at ¶8. This Excel spreadsheet contains embedded audio files of the telephone calls allegedly made by Savadjian to the CSO, the dates and times each call was placed, and the phone number from which the calls originated. Id. at ¶10.

Further, on or about January 21, 2015, and January 30, 2015, Savadjian issued subpoenas to Prudential demanding, among other things, the audio recordings with their electronically stored information ("ESI"). Department Moving Brief, Nekoukar Certification at ¶¶3-4, Exhibit B. In other words, Savadjian sought the audio files in their native format – that is, with the original metadata intact. Prudential, however, objected to Savadjian's demand for the telephone calls with ESI and offered to produce the recordings in the same format in which they were produced to the Department. Id. at ¶5, Exhibit C and ¶6, Exhibit C.

On or about June 2, 2016, Savadjian moved in limine before the ALJ to exclude the Excel spreadsheet and all copies of the telephone calls, arguing that the Department

was responsible for the spoliation of metadata.<sup>2</sup> Id. at ¶7. The Department opposed this motion. Id. at ¶8. ALJ Moscowitz denied the motion to exclude the evidence in a July 1, 2016 Order stating that “Respondent’s motion in limine is denied for the reasons stated in Petitioner’s papers in opposition to that motion. If Petitioner intends to offer PRU-009042 or PRU-009042.000001 through PRU-009042.0000016 into evidence it is on notice that respondent may raise questions of their authenticity.” Id. at ¶9, Exhibit D. Savadjian then sought interlocutory review of this denial, inter alia, with Acting Commissioner Hartt. Id. at ¶11, Exhibit E. In a letter issued on July 15, 2016, Acting Commissioner Hartt denied this motion concluding that “ALJ Moscowitz’s July 1, 2016 Order and subsequent Order dated July 6, 2016<sup>3</sup> adequately address the issues raised by Respondent in his request for interlocutory review and that the interests of justice do not suggest or compel review of the July 1, 2016 Order.” Ibid. Savadjian then filed a motion for leave to appeal with the Appellate Division, which also denied the motion. Id. at ¶11 and ¶12, Exhibit F. On October 5, 2016, Savadjian moved for interlocutory leave to appeal the Appellate Division’s Order to the Supreme Court, which was pending at the time of filing of the briefs for this matter. Id. at ¶14.

The hearing in this matter began before ALJ Moscowitz on October 17, 2016. Id. at ¶16.

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<sup>2</sup> In this July 1, 2016 Order, ALJ Moscowitz also granted the Department’s Motions to Quash the trial subpoenas issued to Deputy Attorney General Ryan Schaffer and transcriptionist Stefanie Lucas.

<sup>3</sup> Acting Commissioner Hartt noted in his July 15, 2016 letter denying Savadjian’s Motion for interlocutory review of ALJ Moscowitz’s granting of two Motions to Quash and denial of a Motion in limine to exclude the evidence at issue that, “ALJ Moscowitz, sua sponte, on July 5, 2016, amended his July 1, 2016 Order, of which interlocutory review is sought and allowed the Respondent to submit opposition to the two motions to quash the trial subpoena of Ryan S. Schaffer and Stefanie Lucas. Thereafter, on July 6, 2016, ALJ Moscowitz issued a formal order that allowed the Respondent to file opposition to the aforementioned motions to quash by July 8, 2016.”

### December 19, 2016 Hearing

At the December 19, 2016 hearing, the Department originally intended to have Thomas Shreck (“Shreck”), a Prudential employee at the time and Director of Prudential’s CID Unit since 2014, authenticate this evidence. Savadjian Opposition Brief, Exhibit G at ¶1.

Prior to the hearing, Schreck certified that the Excel spreadsheet was created in the following manner:

As part of the investigation, Prudential identified 60 phone calls that originated from telephone numbers associated with [Savadjian]. I created a spreadsheet to capture pertinent information about each call, including the date and time of the call, the number from which the call was placed, whether the voice on the call was [Savadjian’s], whose authentication information was used, the policy number mentioned on the call, the names of the clients whose information was sought, and a summary of what was discussed on the call. Id. at ¶ 5.

He further stated in his certification that, “I personally reviewed the recordings of a number of the telephone calls identified by Prudential, and I incorporated that information into the spreadsheet. Id. at ¶6.

On or about December 9, 2016, Shreck was terminated from Prudential, and the Department offered Charles Shanley (“Shanley”), current Director of Prudential’s Corporate Investigation Unit, to authenticate these same documents. Department Moving Brief, Patel Certification at ¶21 and Nekoukar Certification, Exhibit H. At the hearing, counsel for Savadjian objected to Shanley appearing as a witness to authenticate all three pieces of evidence at the hearing, and the ALJ granted this objection and barred Shanley from testifying in this regard. Thereafter, the Department filed the instant motion for interlocutory review.

Prior to objection, Shanley testified that he served as an investigator, manager and CID Director at Prudential and, prior to that, he served as a law clerk and associate for a law firm. Savadjian Opposition Brief, Appendix Volume VIII at 1235a. He also was trial counsel and then enforcement director at the New York Stock Exchange, and then at FINRA, when NYSC and NASD merged. Ibid. He talked about his experiences managing the investigations unit at Prudential. Id. at 1236a -1237a. He stated that he has six investigators who report to him and that they investigate external and internal fraud. Ibid.

Shanley described his duties as Director of CID. He described his job duties in the following manner:

Basically to work with then (sic) business lines and try to sort out problems if something comes up, if we spot some risks or problems and procedures in the course of our investigations, we bring that to their attention. If we see anything developing in terms of patterns and types of fraud, we let the different business lines know about that so that they can kind of watch out for it, especially call-in' and things of that nature.

Then of course we do the investigations itself, and I manage the investigations. The investigators contact the clients. They examine the documents. They interview clients and F.P.'s if it's necessary, and they write the report. I review it, and when it's satisfactory I'll sign it and send it out to the business lines.

Ibid.

He stated that he conducts about 300 investigations in a year. Id. at 1237a.

Shanley, who himself conducted hundreds of investigations over the years, testified generally about how investigations in the CID unit at Prudential are conducted. He stated that, once an investigator in the CID unit is alerted to a suspicious number, a search is conducted through Prudential's Verint System for other calls placed by that number. Id. at 1255a. The Prudential investigator then listens to each call identified by

the Verint System. Ibid. Shanley further testified that the Verint System records the calls coming in, records the telephone number of the originating call, and indicates to which number the phone call went. Id. at 1254a. It also records the date and time that each phone call came in. Ibid. This is all done automatically. Ibid. Following such search, these audio files can be downloaded and embedded into an Excel spreadsheet where the audio files can be accessed by clicking on each downloaded audio file. Id. at 1257a. Such an Excel spreadsheet was created here. Department Moving Brief, Patel Certification at ¶11 and Exhibit 6 at ¶5. However, the audio files, when downloaded, are stripped of the original metadata. Department Moving Brief, Patel Certification at ¶14.

Shanley also testified that it was customary at the end of a CID investigation to create a report and that the report is kept “in the file” which could be maintained either electronically or hardcopy in a physical file. Savadjian Opposition Brief, Appendix Volume VIII at 1238a.

Shanley did not personally investigate the matters relating to Savadjian and was ultimately precluded at the December 19, 2016 Hearing from offering testimony about the Savadjian matter following objections by Savadjian’s counsel and an oral ruling by ALJ Moscovitz. Id. at 1309a. Counsel for Savadjian objected to Shanley’s testimony, arguing that Shanley lacked personal knowledge to authenticate the CID report, Excel spreadsheet, or telephone calls. Id. at 1241a. DAG Schaffer proffered that Shanley was prepared to testify to his personal knowledge of the authenticity of the telephone calls because he listened to each call, as maintained electronically within Verint, and confirmed that the dates and times of the calls as set forth in the Excel spreadsheet are true and correct. It was noted that:



He's [Shanley] gone into the Verint System. He's downloaded each call individually, reviewed all the information, made sure that it's all correct in the report. Essentially he's done the investigation all over again. Id. at 1259a-1260a.

DAG Schaffer also proffered that the documents are business records as they were created and kept in the ordinary course of business. Id. at 1260a. He also stated that Shanley can attest to the accuracy of the spreadsheet. Ibid.

ALJ Moscowitz ruled that Shanley could not authenticate the calls, Excel spreadsheet or CID report.

#### **January 18, 2017 Order**

In response to the January 6, 2017 request by Acting Commissioner Hartt, ALJ Moscowitz memorialized his ruling in a formal Order dated January 18, 2017. In that Order, the ALJ relied upon his belief that Shanley did not have personal knowledge to be able to authenticate the three pieces of evidence at issue here. January 18, 2017 Moscowitz Order at 2. In his ruling, the ALJ stated that:

Shanley, however, has no personal knowledge. In short, he had no part in the investigation of this case whatsoever. Shanley did not participate in the investigation, and he did not supervise anyone who did. Shanley did not create the CD; Shanley did not write the report; and Shanley did not create the spreadsheet. Thomas Schreck created the CD, wrote the report, and created the spreadsheet. Without any personal knowledge, Shanley cannot authenticate any of these documents. Ibid.

With respect to the sound recordings, ALJ Moscowitz analyzed them in the context of the factors set forth in State v. Driver, 38 N.J. 255 (1962), noting that, while the Department may be able to satisfy the first two factors, that the device was capable of taking the conversation and that its operator was competent, the Department could not

satisfy the third and fourth factors, which require the Department to establish that the recording is authentic and correct and that no changes, additions, or deletions were made.<sup>4</sup> Ibid. citing State v. Driver, 38 N.J. 255, 287 (1962). The ALJ noted that:

If Prudential had preserved the metadata in its copies, or respondent<sup>5</sup> had obtained the metadata during discovery, this issue of authenticity would not have been raised, but Prudential never preserved the metadata in making the copies, and respondent never succeeded in obtaining the metadata (sic) from Prudential, even though petitioner asked respondent for the copies with the metadata during discovery, and put respondent on notice that he would raise the issue of authenticity at trial if he did not receive the copies with the metadata.

Respondent now represents that the metadata does not exist. Schreck, however, still exists. Yet respondent does not call him as a witness to authenticate the sound recordings on the CD and the sound recordings on the spreadsheet. Id. at 2-3.

Moreover, ALJ Moscowitz ruled that the Department failed to establish that the written documents are business records under the business records exception to hearsay. Id. at 3 citing N.J.R.E. 803(c)(6). He stated that the Department incorrectly asserted that these documents qualify as business records by conflating authenticity and the business record exception. Ibid. “Such designation,” ALJ Moscowitz stated, “however, does not obviate authenticity. The documents must still be authentic. Once again, Shanley cannot prove their authenticity. Authenticity is not subsumed in the rule; it is part of the rule.” Ibid.

Similarly, ALJ Moscowitz ruled that neither the calls on the CD nor those embedded in the Excel spreadsheet are business records because “Shanley cannot testify that the calls on the CD or the calls in the spreadsheet were made in the regular course

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<sup>4</sup> State v. Driver, 38 N.J. 255, 287 (1962), also sets forth a fifth requirement for proponents of sound recordings to establish as a precondition to admissibility. This fifth factor, however, relates to instances of criminal confessions and therefore does not apply here.

<sup>5</sup> ALJ Moscowitz inadvertently refers to the Department as Respondent.

business (sic) and it was the regular practice of Prudential to make them.” Ibid. ALJ Moscowitz noted that Shanley could testify about the Verint System and how the calls are kept and maintained but he has “no first-hand knowledge” of this investigation or their reproduction on the CD or Excel spreadsheet. Id. at 3-4.

ALJ Moscowitz further noted that

Even if Shanley did testify that the calls on the CD and the calls in the spreadsheet were made in the regular course of business and it was the regular practice of Prudential to make, the petitioners has (sic) already challenged the method, purpose, and circumstance of their preparation during his motion *in limine* to bar their admission, an issue respondent was supposed to address and overcome at hearing. Id. at 4.

ALJ Moscowitz also noted that he had questions about the method, purpose, and circumstances of their preparation because of issues raised during the testimony of other witnesses from Prudential. Ibid.

Lastly, with respect to the written documents, ALJ Moscowitz ruled that the typewritten information on the spreadsheet is not a business record because “Shanley cannot testify that the spreadsheet was made in the regular course business (sic) and it was the regular practice of Prudential to make it.”

He further ruled that the probative value of the report, without the calls, is substantially outweighed by the risk that its admission would necessitate an undue consumption of time and create a substantial danger of undue prejudice, and thus should be excluded under N.J.A.C. 1:1-15.1.” Id. at 5.

### **ARGUMENT of the PARTIES**

The Department requests that Acting Commissioner Hartt reverse the ALJ’s ruling barring Shanley from testifying to the authenticity of the audio recordings, the CID report and the Excel Spreadsheet.

### **Authentication**

The Department argues that ALJ Moscowitz's ruling, which barred Shanley from testifying as to the authenticity of the telephone calls evidence at issue was in error given that the standard set forth Delguidice v. New Jersey Racing Com., establishes that, "all relevant evidence is admissible." 100 N.J. 79, 84 (1985). Further, the Department maintained that the Uniform Administrative Procedure rules "contemplate that relevant evidence should be admissible, and not excluded until the ALJ has held a preliminary hearing." Department's Moving Brief at 13; see also N.J.A.C. 1:1-15.1(e). The Department further argued that this demonstrates plain error and noted that "this rule is intended to militate against the circular reasoning to which the evidence at issue here has been subjected: that the telephone calls cannot be played because they have not been authenticated, yet they cannot be authenticated because they cannot be played." Id. at 14. The Department noted that ALJ Moscowitz should have permitted the DAG to continue the direct examination of Shanley and maintained that it was error to not admit the evidence at issue without reviewing it. Id. at 14.

In that vein, the Department maintained that Shanley is qualified to authenticate the telephone call evidence under the low bar set forth in N.J.R.E. 901, which states that "authentication...as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." The Department further noted that case law and precedent establish that only a "prima facie showing of authenticity is required" and that direct proof is not required but rather circumstantial evidence may suffice. Department's Moving brief at 14-15 citing State v.

Tormasi, 443 N.J. Super. 146, 155 (App. Div. 2015) (citation and internal quotation marks omitted). Moreover, the Department argued the following:

[I]t was error for the ALJ to cite an absence of metadata in the electronic audio files as an indicator of inauthenticity. [T39:7; T39:22]. Metadata does not reflect upon the quality of the recordings, which was the crux of the authenticity analysis in Driver. The ALJ also erred in barring Petitioner from establishing a complete record relative to the Driver factors during the December 19, 2016 hearing. At a minimum, the ALJ's ruling was premature and should be reversed on that basis." Id. at 17.

The Department also asserts that, through Shanley's testimony at the December 19, 2016 hearing, the bulk of the inquiry required by Driver has been satisfied in that the Department has established that Shanley is familiar with the Verint System, and he noted how the audio files are created and stored and downloaded from the Verint System. Ibid. citing T27:4-18, T26:10-16, T26:23-27:3, T28:8-29:5. At a minimum, the Department argues that a foundation has been established and Shanley should be permitted to continue to testify. Ibid.

Additionally, the Department puts forth that, although Driver establishes that a proponent of a recording must demonstrate that the recording has not been altered, this requirement can be satisfied with circumstantial evidence. The Department noted seven different examples of circumstantial evidence that has been submitted into evidence in support of the reliability of the telephone calls here. The first of such evidence is witness Michael Saccento, who the Department asserts, has extensive personal knowledge of Savadjian's voice, testified that he heard one of the calls at issue and verified Savadjian as the voice on the phone impersonating another agent. Id. at 18 citing Nekkoukar Certification, Ex. J. The Department also avers that three phone calls where Savadjian

identifies himself constitute circumstantial evidence. Ibid. (citing Patel Cert., Ex. 6, pp. 1, 8, 16). As further circumstantial evidence, the Department asserts that, at the time that Savadjian made the phone calls, Savadjian provided numbers associated with Savadjian to the CSO. Ibid. (citing Patel Certification, Ex. 6 at ¶5). Additionally, the Department avers that Schreck's Certification describing the investigation process and the CID report is circumstantial evidence supporting the reliability of the telephone calls and is consistent with N.J.A.C. 1:1-15.6. Ibid. citing Patel Cert., Ex. 6. Moreover, the Department argues, that the CID contains information such as emails which provide Savadjian's fax and cellular numbers. Ibid. Further, the Department asserts that, shortly thereafter, Savadjian would call about a policy and then Prudential would receive documents related to the policy that were signed by Savadjian. Id. at 19. In addition, the Department notes that testimony offered by a previous witness established that Savadjian submitted documents with fabricated signatures to assign orphan accounts to his book of business. Ibid. The Department further notes that "Savadjian has not raised any 'genuine question' that the recording itself, or the voices on the recording, have been altered." Id. at 18 (citing N.J.A.C. 1:1-15.6). Ultimately, the Department concludes that the issue of metadata is irrelevant to that analysis, because the recordings themselves are not "unintelligible." Ibid.

In response, however, Savadjian asserts that ALJ Moscowitz correctly determined that the recordings, the CID report, and the Excel spreadsheet are inadmissible without a proper foundation because Shanley's testimony demonstrated that he has no personal knowledge of the investigation and "that any additional testimony that he would provide in an attempt to authenticate the Recordings would be pure hearsay, without the required

residuum.” Savadjian Opposition Brief at 19 citing N.J.A.C. 1:1-15.5(b). Savadjian avers that ALJ Moscowitz properly applied the Driver factors in making his determination.

Savadjian notes that the recordings were not captured in a manner that preserved pertinent information. Id. at 16. He notes that, although Shanley offered general information about the Verint System, he was unable to offer specifics about this matter because he was not involved in the investigation. Ibid. Furthermore, Savadjian asserts that his digital forensics expert determined that the components of the Verint Impact 360 Recorder System used to capture the recordings at issue in this case were utilized so improperly that the system did not capture the recordings in a manner that preserved highly relevant metadata which provides actual details about the recordings, including, but not limited to, the date and time that the recordings were allegedly made. Id. at 21 citing Ra270-Ra273. In that vein, Savadjian argues that the Department failed to meet the first prong of Driver because Shanley does not possess knowledge of the Verint System. Id. at 21.

Similarly, Savadjian maintains that Shanley cannot testify as to whether the recordings were competently collected by Schreck and that, therefore, the Department failed to meet the second prong of Driver, i.e., the Department failed to demonstrate that the recordings are authentic because no direct evidence of authenticity from Shanley was presented. Id. at 22. Savadjian distinguishes the facts in this case from those in Hannah, where the court acknowledged that authenticity of a document or other writing, as a condition precedent for admissibility, “can be established by direct proof” or by circumstantial proof because that matter did not involve recordings but rather social

media posts. Id. at 23 (citing State v. Hannah, Docket No. A-5741-14T3 (December 20, 2016)). Savadjian noted that “Hannah did not involve recordings or other three dimensional types of evidence where metadata is a critical, inseparable component.” Ibid.

Savadjian asserts that the Department failed to present any direct evidence that the recordings are authentic arguing that: “[a]fter Savdjian raised issues concerning the authenticity of the Recordings in the Underlying Motion in advance of trial, ALJ Moscowitz provided [the Department] with the exact steps that it needed to take in order to demonstrate that the Recordings are, in fact, authentic.” Ibid. (citing Ra648; Ra1229:8-15). Namely, Schreck was expected to establish the authenticity, but Schreck did not testify. Id. at 24.

Savadjian also maintains that the Department failed to identify any circumstantial evidence demonstrating the authenticity of the recordings, disputing the seven separate pieces of circumstantial evidence put forth/proffered by the Department. With respect to the first, Savadjian notes that Michael Saccento listened to so little of one recording, namely three seconds of one phone call where Savadjian allegedly impersonated agent Mario Fernandez, that his testimony proves nothing. Id. at 25 (citing Department’s Moving Brief at 18; and Ra939:19-25). Moreover, Savadjian states that there is no evidence identifying the date and time the call was made. Id. at 26.

As to the second piece of circumstantial evidence proffered by the Department, Savadjian argues that phone calls where Savadjian self-identifies are not relevant to this case because the allegations involve impersonation. Id. at 27.



Third, Savadjian notes that individuals other than Savadjian, including Armand Savadjian, communicates with Prudential through the CSO, works at Old Tappan Financial, and information concerning its phone numbers fails to demonstrate that the recordings are authentic. Id. at 27-28.

Fourth, Savadjian notes that Schreck's Certification does not describe his collection of the recordings and fails to authenticate the recordings, because, contrary to the Department's assertions, the certification does not speak to the recordings or the collections thereof. Id. at 28.

Fifth, Savadjian argues that the identity of Savadjian's telephone and fax number on the email signature line number fails to demonstrate that the recordings are authentic because the telephone number, without any additional information, demonstrates nothing. Id. at 28-29.

Savadjian counters the Department's sixth piece of circumstantial evidence by arguing that the Department failed to present evidence demonstrating the date and time the phone calls were allegedly made, rendering any circumstantial evidence relating to the timing of the phone calls pointless. Id. at 29.

Lastly, Savadjian counters the Department's proffer of circumstantial evidence by asserting that, without information demonstrating the dates and times that the recordings were made, it is impossible to determine whether Savadjian could have transferred Prudential orphan accounts to his book of business. Id. at 30.

Savadjian avers that Shanley cannot satisfy the fourth Driver factor because Shanley, as the witness offered by the Department, cannot establish that the recordings produced in discovery were not altered. Id. at 31-33.

In the supplementary briefs submitted by both parties, much of the same arguments were set forth, with the exception of Savadjian's supplementary brief which added a section on supplementary facts and procedural history. These supplementary facts will not be considered at this time as they are outside the scope of the issues being addressed herein.

### **Business Record Exception**

The Department asserts that the telephone calls, CID Report, and Excel spreadsheet are admissible as records of regularly conducted activity under N.J.R.E. 803(c)(6), which is often referred to as the "business records exception." The Department avers that, in order to qualify under this exception, the "foundation witness" is generally not required to have personal knowledge of the facts as long as the witness is familiar with the record-keeping system. Department Moving Brief at 22 (citing Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11, 17-18; State v. Sweet, 195 N.J. 357, 370 (2008)).

The Department further notes that it has established a sufficient basis and foundation for Shanley to authenticate the records at issue because: "(i) [Shanley] testified to his familiarity with the Verint system; (ii) that familiarity allows him to demonstrate that the audio files are what they purport to be; and (iii) [Shanley] testified that all calls to the CSO are automatically recorded by Verint." Department Moving Brief at 22 (citing T26:10-27:3).

Savadjian argues that the recordings, Excel spreadsheet and the CID report constitute inadmissible hearsay without a residuum. Savadjian avers that the Department conflates the issues of authentication with admissibility, stating that the Department's

suggestion that these three pieces of evidence are admissible as business records “ignores the plain fact that the content of the documents is entirely hearsay for which there is no residuum.” Savadjian Opposition Brief at 34. Savadjian noted that, under N.J.R.E. 803(c)(6), “a business record memorializing events may be admissible, but the notes and statements contained therein may not (sic) admissible if offered for the truth of the matter asserted.” Ibid citing Mantana v. Pereira, 436 N.J. Super. 330 (App. Div. 2014). Savadjian further notes that the APA rules require legally competent evidence is required to support each finding of fact, even though hearsay is admissible. Ibid. Savadjian notes that there are a number of statements made by Schreck in the documents that are hearsay that the Department seeks to support with other hearsay statements, which Savadjian maintained is disallowed pursuant to N.J.A.C. 1:1-15.5(b). Id. at 36.

Lastly, Savadjian notes that ALJ Moscowitz correctly determined that fundamental fairness requires that the Department establish a proper foundation for the recordings, the Excel spreadsheet and the CID report as a prerequisite to admissibility.

### **DECISION**

N.J.A.C. 1:1-14.10 sets forth the standards by which an agency head may review rulings and orders of an ALJ on an interlocutory basis. N.J.A.C. 1:1-14.10 provides for a two-tiered review process. First, the agency head determines whether interlocutory review of an order or ruling should be granted. Second, if the agency head determines to conduct an interlocutory review, he or she then decides whether the order or ruling should be upheld, rejected or modified. The decision memorialized herein constitutes the second step of this two-tiered process, and as such, I now turn to the substance of the

Department's motion seeking invalidation of the ALJ's ruling that Shanley is barred from testifying to authenticate, and as a conduit for admission of, the three pieces of evidence.

I first note that the Uniform Administrative Procedure Rules at N.J.A.C. 1:1-15.1(c) afford an ALJ, as trier of fact, broad discretion in determining whether to admit evidence at a hearing. It is primarily the province of the ALJ to determine whether the probative value of the evidence offered is substantially outweighed by the risk admission would create an undue consumption of time or create substantial danger of undue prejudice or confusion. Nevertheless, the APA and its rules have also established relaxed rules of evidence. For example, N.J.A.C. 1:1-15.1(c) provides that, "[p]arties in contested cases shall not be bound by statutory or common law rules of evidence or any formally adopted in the New Jersey Rules of Evidence except as specifically provided in these rules. All relevant evidence is admissible except as otherwise provided herein." Further, pursuant to N.J.A.C. 1:1-15.1(b), "evidence rulings shall be made to promote fundamental principles of fairness and justice and to aid in the ascertainment of truth." The standard thus expressed is that all relevant evidence should be admitted.

With respect to authenticity, the singular standard set forth in N.J.A.C. 1:1-15.6, provides that, "[w]here a genuine question of authenticity is raised the judge may require some authentication of the questioned document. For these purposes, the judge may accept a submission of proof, in the form of an affidavit, certified document or other similar proof." The New Jersey Rules of Evidence also provide guidance on this issue. N.J.R.E. 901 sets a low bar for authentication, stating that "authentication...as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims."

Moreover, hearsay is generally admissible in administrative proceedings. See N.J.A.C. 1:1-15.5(a). However, “[h]earsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.” Ibid. However, there must be some legally competent evidence to support each finding of fact. In other words, “[n]otwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.” N.J.A.C. 1:1-15.5(b). This is often referred to as the residuum rule.

Regarding the underlying matter, the parties here disagree as to whether the Department can authenticate the three pieces of evidence – namely the CID report, the phone calls and the Excel spreadsheet - through the following means: a) Shreck’s certification; b) Shanley’s testimony as interrupted and as to be provided if permitted to continue his testimony; and c) the testimony of the Department’s other witnesses. Given the existing certification of Shreck regarding his investigation and the creation of the proffered evidence, the testimony already offered by Shanley, the Department’s proffered direction of that testimony, the testimony of the other Department witnesses, and the applicable legal precedent set forth below, I herein FIND that ALJ Moscovitz erred in preventing Shanley from testifying authenticating the evidence at issue. The bar for authentication of evidence and the evidentiary standards established for administrative proceedings provide for a more relaxed framework upon which to conduct agency proceedings. In that vein, for the reasons set forth below, the ALJ’s determination to

exclude the specified evidence is hereby MODIFIED as set forth below, and this matter should be scheduled for a hearing to allow Shanley to continue his testimony with respect to authentication of the evidence.

Two cases are noteworthy and instructive here. State v. Driver, 38 N.J. 255, 287 (1962), has established that sound recordings are admissible into evidence where the matter contained therein is competent and relevant, and further sets forth the test for the admissibility. Driver requires, as a condition to admissibility, that the following factors be established: “the speakers should be identified and it should be shown that (1) the device was capable of taking the conversation or statement, (2) its operator was competent, (3) the recording is authentic and correct, (4) no changes, additions or deletions have been made.” Ibid. In Driver, the tape recording was ultimately excluded because it was garbled, full of static and other foreign sounds” and it was “unintelligible and inaudible for the most part.” Id. at 288.

Moreover, in the more recent case State v. Nan-Tambu, the New Jersey Supreme Court ruled that “even a flawed audio recording is ‘not inadmissible per se, so long as its capacity to record accurately, and the other conditions precedent [are] established.’” 221 N.J. 390, 403 (2015) (citing Driver, supra, 38 N.J. at 288).

With that precedent in mind, I hereby FIND that ALJ Moscowitz erred in preventing Shanley from authenticating the three documents at issue and I hereby remand the matter to the OAL to provide the Department with the opportunity to present testimony from Shanley, as well as the other direct evidence as to their creation contained in Shreck’s certification, and the circumstantial evidence posited at the December 19, 2016 hearing, to satisfy the minimum threshold for establishing that the recordings are

authentic, both those on the CD and those embedded in the spreadsheet. I would note that, based on a review of the proceedings to date, the authentication process of the three documents appears to have been substantially in progress.

I would note the following findings:

First and foremost, although former CID Director Schreck did not testify at the December 19, 2016 Hearing, he previously executed a certification verifying his supervisory role in the Savadjian investigation and briefly described how the subject audio files were collected and maintained. This is a significant piece of legally competent, direct evidence. It was Shreck that conducted the investigation and as admitted by the Respondent has personal knowledge of the investigation and the evidence provided to the Department in support of its allegations. It provides a direct and reliable basis upon which to determine the authenticity of Prudential's records, including the CID report and the Excel spreadsheet. While it is disputed by the parties as to whether ALJ Moscowitz considered this certification, I find that this certification should have been considered as it is highly relevant to the authenticity of the recordings. Although certainly preferable, Schreck need not be present at the hearing as a witness to testify as to the process or to his personal knowledge of the investigation as so ruled by ALJ Moscowitz, or to authenticate the recordings, the Excel spreadsheet or the CID Report. Moreover, if the Respondent has an actual basis upon which to dispute the assertions in the certification, he can call Shreck as a rebuttal witness.

Furthermore, Shanley need not have personal knowledge of the evidence to authenticate the three pieces of evidence at issue here. Shanley's testimony, while prematurely interrupted, already provided a foundation for the authenticity of the

documents and he should therefore be permitted the opportunity to satisfy the minimum requirements for authentication in administrative proceedings. Not only did Shanley testify about the general investigative process at Prudential but he also established that he acquainted himself with the recordings themselves by listening to each one and reading and verifying the related information on the Excel spreadsheet itself. He verified the investigation process and the evidence being offered as a part of his position and regular job duties at Prudential, and – as proffered by the Department - it appears that he through this process has in fact obtained direct knowledge that the recordings and the data in the spreadsheet being presented for admission are what the Department asserts they are, without alteration.

Moreover, many of the elements set forth in Driver have already been established by the Department through Shanley's testimony. For instance, Shanley described the Verint System in sufficient detail and, for that matter so did Schreck in his certification, to satisfy the first prong of Driver, which requires that a proponent of a recording was capable of taking the conversation or statement. Between the Schreck certification and Shanley's testimony, the record is clear that the Verint System automatically records incoming calls and then stores these recordings which are then capable of being downloaded from the Verint System if need be.

Moreover, there is no indication or challenge from Savajian as to the competency of the operator as so required under prong two of Driver. The Department was not permitted to complete its inquiry and was thereby prevented from establishing that the recording is authentic and correct and that no changes, additions or deletions have been made as required in prongs three and four of Driver. A tremendous amount of discussion



ensued during the hearing about the metadata and how, in the absence of the original metadata and/or Schreck's testimony, the audio recordings at issue cannot be verified and therefore cannot be authenticated. This is simply not true. Metadata in and of itself is only one indicia of reliability capable of providing authentication for recordings and, the absence of the original metadata is not fatal to the analysis. Here, the Department presented a substantial amount of direct and circumstantial evidence, not fully considered by ALJ Moscowitz, in lieu of the original metadata to support the reliability of the audio records, not the least of which was the proffered testimony of a witness who was very familiar with Savajian's voice. These direct and circumstantial pieces of evidence can, and should have been, considered by ALJ Moscowitz. However, the inquiry was cut short. In fact, the recordings were not even allowed to be played at the hearing, thereby preventing any consideration of other evidence that might have provided an indicia of reliability.

I therefore disagree with ALJ Moscowitz's ruling wherein he indicated that, "Shanley cannot testify that no changes, additions, or deletions have been made. Respondent has already acknowledged that some deletions have in fact been made to the sound recordings because [the Department] has already acknowledged that the copies of the sound recordings are in fact missing the metadata, which are among the strongest indicators of authenticity." While the original metadata attached to the recordings was not preserved, and it is not entirely clear why, there is no indication that the recordings themselves have been altered in any meaningful way. In fact, the testimony and Schreck's certification, so far presented, indicate that all phone calls are automatically

recorded by the Verint System and then can be downloaded. This lack of human intrusion, at least with respect to the CD, lends credence to its authenticity.

I would also note that the Excel spreadsheet, specifically the written entries, contain information that could authenticate and verify the reliability of the phone calls, such as strong indicators of when the phone call was placed. In some of the entries, the actual date is mentioned. In others, the date of the phone call can be narrowed down to a specific date range. Moreover, the Department offered many other pieces of evidence in an attempt to verify the reliability of the evidence but was prevented from doing so.

I also disagree with ALJ Moscowitz's ruling, as to both the "sound recordings" and the written information, that the Department cannot establish these documents as business records because Shanley cannot testify that the calls on the CD or the call in the spreadsheet, or in the case of the written documents, the information contained in the report, were made in the course of business and that it was the regular practice of Prudential to make them or create them. See January 18, 2017 Moscowitz Order at 3 and 4. To the contrary, Shanley, as the current Director of CID at Prudential, testified about the general investigatory practices employed at Prudential, and he further testified at length about the Verint System, describing that the calls can be downloaded onto an Excel spreadsheet. Savadjian Opposition Brief at Ra1255a-1257a. He also testified that creating a spreadsheet is something that the CID normally does when investigating a matter but it depends on the case. Id. at 1257a. Additionally, he also testified that it is customary at the end of an investigation to create a report. Id. at 1238a. In that vein, ALJ Moscowitz erred as Shanley clearly can and has established that such documents are

created in the regular course of business and that it was the regular practice of Prudential to make them.

However, the Department's inquiry into the business records exception to hearsay was not permitted to continue with respect to both the written documents, namely the written portion of the Excel spreadsheet and the CID report and the recordings. Therefore, a full and fair opportunity was not afforded to the Department to enable them to authenticate these documents. Certainly a strong foundation has been laid with respect to authentication, but Shanley's testimony was cut short, it appears to not have been viewed in conjunction with the Shreck Certification providing direct evidence of authentication, and the issue was not fully developed or ripe for a ruling without allowing the Department to present its case in full regarding whether the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy, as set forth in N.J.R.E. 803(c)(6). Therefore, this matter is also remanded to the OAL for ALJ Moscowitz to allow Shanley to continue to testify as to how the documents at issue satisfy the business records exception, and ALJ Moscowitz's ruling is hereby MODIFIED in this regard.

#### CONCLUSION

For the reasons set forth above, the ALJ's December 19, 2016 oral ruling of ALJ Moscowitz and subsequent January 18, 2017 Order is MODIFIED. Moreover, for the above reasons it is on the 27<sup>th</sup> day of February, 2017

ORDERED that:

This matter is hereby remanded to the OAL for continued proceedings as to the authenticity and admissibility of the CID Report, the CD and the Excel spreadsheet as

business record exceptions to the hearsay rule, including permitting the Department to continue its examination of Shanley in this regard.

February 27 2017  
Date

  
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Peter L. Hartt, Director of Insurance  
Acting Commissioner

Orders/Savadjian Interlocutory Review