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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

NATIONAL COLLEGIATE STUDENT LOAN TRUSTS, Plaintiffs and Respondents, v. NOHEMI MACIAS et al., Defendants and Appellants.	H040905 (Santa Cruz County Super. Ct. No. CISCV174111)

Plaintiffs National Collegiate Student Loan Trusts Nos. 2005-01, 2005-03, 2006-02, 2006-03, and 2007-03 are assignees for value of unpaid student loan debts. They brought five separate actions against defendants Nohemi Macias, Enrique Macias, Alberto Macias, and Ruben Macias to collect $131,080.03 owing on loans allegedly made to Nohemi by Bank of America and JPMorgan Chase between 2004 and 2006.[1] The complaints alleged that Enrique, Alberto and Ruben each cosigned one or more of the loans. The cases were consolidated and tried to the court. Judgment was entered for plaintiffs.

[1] Because defendants share the same surname, we refer to them by their first names to avoid confusion.

On appeal, defendants contend that the trial court prejudicially erred by admitting hearsay documents without requiring plaintiffs to satisfy the foundational requirements of Evidence Code section 1271.[2] We reverse.

I. Background

Each complaint alleged causes of action for breach of contract and account stated. Each trust alleged that it was an assignee for consideration of a written contract to loan money to defendants to finance education expenses. Each further alleged that defendants had indicated their consent to be bound by the contract terms "either by an authorizing signature on the agreement or by. . . taking possession of and using the monies provided," had made no payments "despite demands therefor," and had thus been unjustly enriched. Plaintiffs sought damages, costs, and attorney's fees. Defendants generally and specifically denied "each and every allegation and cause of action" in the unverified complaints "and the whole thereof."

Trial was to the court. Defendants' counsel appeared but defendants did not. Plaintiffs relied on documentary evidence and on the testimony of Angela Hughes, who testified as the custodian of records for NCO Financial Systems, Inc. (NCO). Hughes was employed by NCO, which became the master loan servicer for the National Collegiate Student Loan Trust Portfolio in November 2012. She testified that she was familiar with NCO's computerized recordkeeping methods and had reviewed the records for the loans at issue. Those records "detail[ed] the original loan, the truth and lending disclosure, the pool supplements and . . . [the] supporting documentation in terms of payment histories and check disbursement copies." Hughes found nothing in NCO's computerized records that reflected repayment or accommodation for repayment of the

[2] Subsequent statutory references are to the Evidence Code unless otherwise specified.

loans. She explained that any accommodation would have been noted and that she had seen such notations on other loan records in NCO's system.

Plaintiffs introduced a "loan packet" for each of the five loans. Each packet included (1) a loan request and/or credit agreement allegedly signed by Nohemi and a cosigner and submitted to the original lender; (2) a "Note Disclosure Statement" from the original lender; (3) a "Pool Supplement" showing the lender's sale of the loan to an entity called The National Collegiate Funding LLC; (4) a "Deposit and Sale Agreement" showing that entity's sale of the loan to one of the plaintiff trusts; (5) a loan activity printout showing accrued interest, fees, and any repayments; (6) plaintiffs' counsel's demand letters to Nohemi and her cosigner on the loan; and (7) a loan payment history report.

Hughes testified about the documents in one of the packets, explaining that she was "testifying as to the accuracy of the records that [she had] brought before the Court . . . ." The first record was a "Cosigned Loan Request Credit Agreement - Information Page" that identified Bank of America as the lender and the loan as a $10,000 "Education Maximizer Undergraduate Loan" for the September 2004 to June 2005 academic period at the University of California. The record named Nohemi as the borrower and Alberto as the cosigner. It listed their Social Security numbers, birthdates, and other identifying information. The next page contained borrower and cosigner signatures with a handwritten "11-13-04" after each signature.

The following pages recited the loan terms and conditions, stating among other things that "I promise to pay you the Loan Amount Requested shown on the first page of this Credit Agreement, to the extent it is advanced to me or paid on my behalf, and any Loan Origination Fee added to my loan . . . , interest on such Principal Sum, interest on any unpaid interest . . . and late fees. . . ." "I agree to accept an amount less than the Loan Amount Requested and to repay that portion of the Loan Amount Requested that you actually lend me." "If you approve this request and agree to make this loan, you will

notify me in writing and provide me with a Disclosure Statement . . . at the time the loan proceeds are disbursed." "I will let you know that I agree to the terms of the loan as set forth in this Credit Agreement and in the Disclosure Statement by doing either of the following: (a) endorsing the check that disburses the loan proceeds . . . ." "To cancel my loan, I will give you a written cancellation notice within ten (10) days after I received the Disclosure Statement." "You may assign this Credit Agreement at any time."

The next document in the packet was a Note Disclosure Statement dated November 23, 2004. It named Bank of America as the lender and Nohemi and Alberto as the borrowers. It listed the loan number, the amount financed ($10,000), the finance charge ($12,060.80), the total of payments ($22,060.80), and the prepaid finance charge ($1,173.18). Hughes explained that the remaining documents in the packet established that the loan had been transferred to one of the plaintiff trusts through a series of assignments, that no payments had been made on the loan, that demand letters had been sent to Nohemi and to Alberto, and that NCO's records showed no response to the letters.

Plaintiffs also introduced a copy of a $10,000 disbursement check for the above loan and copies of $10,000 and $20,000 disbursement checks for two other loans. The first check was allegedly endorsed by Nohemi and Alberto and the other two were allegedly endorsed by Nohemi and Enrique. Hughes testified that she did not find copies of disbursement checks for the remaining two loans in NCO's records.

Plaintiffs' trial counsel represented that the packets for the other four loans were substantially similar to the one he had just reviewed in detail with Hughes, although "[o]obviously, they will be different because the loan amounts were different." Counsel also represented that the evidence in the other four packets would be identical "[i]n terms of the foundation for them." He moved to admit all five loan packets into evidence.

Defendants' counsel objected on various evidentiary grounds, including that "the business records in question were either prepared by someone else that the witness is not qualified to testify to as the custodian of records" and that they had not been properly

authenticated. He also objected that there was no testimony about any element of section 1271. He argued that plaintiffs could have avoided these foundational problems by issuing business records subpoenas, "which, for whatever reason, the other side . . . decided that they did not want to do."

The trial court overruled the objections, observing that Hughes "had no difficulty whatsoever in explaining the documents that she had. . . . I did not find that this particular witness . . . was somebody that was just plucked out of nowhere and told to come in." "The issue really becomes for the Court one of trustworthiness more than anything else." "I note . . . that we are . . . dealing with banks. We are dealing with federal agencies. The issue of whether it is an abuse of discretion that exceeds the bounds of all reason is one that I have to consider in light of all the surrounding circumstances. These are banks, federally regulated. These are large businesses who admittedly sometimes make mistakes. That is why we are here." "Now, . . . the lack of a foundation, the final determination of what evidence is admissible rests in the sound discretion of the trial court. The issue here is whether, in my view, there was some kind of tampering, whether it has been sufficiently authenticated and in terms of admitting the evidence even under Evidence Code Section 405, this is not beyond a reasonable doubt. This is a preponderance standard. I do believe in this situation the plaintiff has met their [*sic*] burden by the preponderance of evidence. The objection to the admission of these exhibits is denied."

Defendants' counsel reiterated his objections. He objected to the admission of the check copies on grounds that they had not been properly authenticated or shown to be business records for purposes of section 1271. He objected to the admission of the loan packets on grounds that the documents were irrelevant (§ 350), contained inadmissible hearsay to which no exception applied (§§ 1200, 1271), and had not been properly authenticated (§ 1400). He also objected that Hughes lacked personal knowledge of the

matters she testified to (§ 702) and was improperly providing oral testimony to prove the content of writings (§ 1523).

The trial court admitted the check copies and the loan packets under the business records exception to the hearsay rule. The court stated that "[t]his witness was in a position to authenticate the record[s]. She did authenticate them. I don't have any question with respect to their authenticity. . . . I'm having a really hard time believing that these records somehow have been manufactured or that this witness is not competent to testify." The court added that Nohemi was "ten minutes away, 15. If you want to get her in here to testify that none of this -- half of these document[s] are false, that may have a bearing on this case." Plaintiffs' counsel joined in the court's comments, noting that there was no testimony from Nohemi "countering the trustworthiness of these records" because "the defendant has chosen to voluntarily absent herself from the trial in order to avoid being subject to examination over these issues . . . ."

In his closing statement, defendants' trial counsel argued that even if the court accepted everything stated in the documents, there was no proof that defendants owed "anywhere near the amount that is being demanded . . . . [E]vidence has been accepted for $40,000 worth of loans, for checks showing that amount."

The court took the matter under submission. In a written statement of decision, the court identified the principal legal issue at trial as whether plaintiffs' documentary evidence was admissible as business records under section 1271. "Defendants argued that in spite of Ms. Hughes' knowledge, she was not an employee of the original lending institution and thus could not testify as a qualified custodian. The Court disagreed, and admitted all of [plaintiffs' documentary evidence] as business records." The court relied on that evidence "and the associated testimony of Ms. Hughes in finding for the plaintiffs as to each element on each cause of action in the consolidated cases." The court entered judgment for plaintiffs. Defendants filed a timely notice of appeal.

II. Discussion

A Standard of Review

The parties disagree about the appropriate standard of review. Plaintiffs contend that the abuse of discretion standard applies. Defendants argue that the de novo standard should apply because the trial court misunderstood the foundational requirements of section 1271. They urge, however, that reversal is required under either standard.

"Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence." (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) "[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." (*People v. Russel* (1968) 69 Cal.2d 187, 195.) A trial court's decision that rests on an error of law is an abuse of discretion. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311.) "A discretionary ruling predicated on a required finding of fact is necessarily an abuse of discretion if no substantial evidence supports the fact's existence." (*Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 531 (*Borissoff*).) An evidentiary ruling based on a misunderstanding of the law is an abuse of discretion. (E.g., *Brown v. County of Los Angeles* (2012) 203 Cal.App.4th 1529, 1535; but see *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 319 (*Jazayeri*) [applying de novo standard of review where it appeared that the trial court misunderstood the foundational requirements of the official records exception to the hearsay rule].) Here, we need not resolve the parties' dispute because we agree with defendants that reversal is required under either standard.

B. The Business Records Exception

Defendants contend that the trial court prejudicially erred by admitting hearsay documents without requiring plaintiffs to satisfy the foundational requirements of section 1271. We agree.

"Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (§ 1271.) All four requirements must be satisfied. (*People v. Matthews* (1991) 229 Cal.App.3d 930, 939-940 (*Matthews*); see *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861.) The proponent of the proffered evidence has the burden of establishing the foundational requirements for admission under an exception to the hearsay rule. (*People v. Morrison* (2004) 34 Cal.4th 698, 724 (*Morrison*).)

Although foundational testimony is ordinarily provided by the custodian of the proffered records, any "qualified witness" who is knowledgeable about their preparation may lay the foundation for their introduction. (§ 1271; e.g., *People v. Hovarter* (2008) 44 Cal.4th 983, 1012 (*Hovarter*); *People v. Champion* (1995) 9 Cal.4th 879 (*Champion*), overruled on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860.) "[T]he witness need not be the . . . person who created the record." (*Jazayeri*, *supra*, 174 Cal.App.4th at p. 324.) "The key to establishing the admissibility of a document made in the regular course of business is proof that the person who wrote the information or provided it had knowledge of the facts from personal observation. [Citations.]" (*Id.* at p. 322.)

In *Hovarter*, the gatekeeper of a pulp mill laid the foundation for admission of log sheets. He testified that he was on the phone when the defendant entered the mill but that he recognized him and his truck and directed his supervisor to record the defendant's arrival on the log sheet. (*Hovarter, supra*, 44 Cal.4th at p. 1012.) In *Champion*, a fingerprint expert laid the foundation for admission of a laboratory employee's report as a

business record. (*Champion*, *supra*, 9 Cal.4th at p. 916.) The expert, who had been employed as a fingerprint expert at the same lab, testified that the employee "was obligated to prepare the report at or near the time that she did the acts described in the report." (*Ibid.*) In *Jazayeri*, "the means by which the [dead on arrival] numbers [of chickens delivered to a processing plant] were routinely recorded on the [food safety inspectors' poultry condemnation certificates] was sufficiently established by witnesses with firsthand knowledge of the process to qualify the evidence for admission under section 1271." (*Jazayeri*, *supra*, 174 Cal.App.4th at p. 324.)

In *Matthews* by contrast, the testimony of a police department fingerprint technician and custodian of records was insufficient to qualify rap sheets as business records where he testified in conclusory fashion that the records were made during the regular course of business at or near the event they were intended to memorialize and that he was familiar with their mode of preparation. (*Matthews*, *supra*, 229 Cal.App.3d at pp. 938-940.) The witness "neither explained the manner in which the computer lists are prepared nor identified the sources of information contained in the rap sheets—a critical deficiency in the foundational showing." (*Id.* at p. 939.) The witness was not responsible for compiling the information in the rap sheets. (*Ibid.*) "Apparently, the computer-generated rap sheets were merely retrieved by [him] in his capacity as custodian of records." (*Id.* at p. 940.) The court held that without testimony about the sources of information and the mode of preparation, "the rap sheets cannot be admitted as business records due to lack of a proper foundation." (*Ibid.*)

Here, as will be seen, plaintiffs' sole witness not only failed to establish the foundation for admission of the documents that section 1271 requires but effectively conceded that she was unable to do so.

1. Section 1271, subdivision (a)

Defendants contend that plaintiffs' foundational showing was inadequate because they made no attempt to establish that any of the records was prepared "in the regular course of a business," which section 1271, subdivision (a) requires. We agree.

Hughes provided no such testimony. Moreover, she effectively conceded on cross-examination that she could not do so. She explained that her employer did not prepare the loan applications and note disclosure statements and that she was not employed by the banks that did so. She was not testifying as the custodian of Bank of America's or Chase's records. Hughes conceded that she did not know the "original circumstances" of the documents' creation. She made similar concessions about the other documents. NCO was not a party to the pool agreements, nor was it the loan servicer when those agreements were made. Hughes was not personally familiar with how those documents were prepared. NCO was not a party to the deposit and sale agreements either, so Hughes was similarly unfamiliar with the circumstances of their creation. The loan financial activity records, which listed activities between 2005 and 2010, were not generated by NCO, which did not begin servicing the loans until 2012. Hughes explained that the records were "generated by one of the original servicers, ADS." She conceded that she was unable to testify about ADS's recordkeeping practices. She was similarly unable to testify about the demand letters from plaintiffs' counsel's law firm. She was not the custodian of the law firm's records and had no familiarity with the letters apart from their presence in NCO's computerized files.

Hughes made an additional concession about the loan payment history report, explaining that those reports "go out on every account assigned to a law firm." She acknowledged that those histories were prepared for the law firm to support its collection efforts. Documents prepared in anticipation of litigation are not prepared "in the regular course of a business." (§ 1271, subd. (a); *Gee v. Timineri* (1967) 248 Cal.App.2d 139, 148.)

Despite Hughes's many concessions, plaintiffs assert that "the testimony established that the [plaintiff] Trusts' records were made in the regular course of business in the business of student loan originations, securitization, and servicing." The record cites that plaintiffs provide do not support the assertion. Hughes did not and could not testify about the creation of any of the documents. She merely described the contents of the documents that she found in her employer's computerized files. Plaintiffs acknowledge as much when they argue that "[t]he large measure of worth of her testimony was simply as the conveyor of documents from the files that had been examined by her." Thus, Hughes's testimony was analogous to and indeed even weaker than the testimony that the court found inadequate in *Matthews.* We conclude that plaintiffs failed to lay the foundation that section 1271, subdivision (a) requires.

2. Section 1271, subdivision (b)

Defendants contend that plaintiffs' foundational showing was inadequate for another reason: because plaintiffs made no attempt to establish that any of the proffered records was prepared "at or near the time of the act, condition, or event" that the record reflected, which section 1271, subdivision (b) requires. (Capitalization omitted.) We agree.

Hughes offered no testimony on the subject. For that reason, the record provides no basis for plaintiffs' conclusory assertion that "the custodian established that the [plaintiff] Trusts' records, in particular the credit agreements, pools supplements, deposit and sale agreements and servicing notes were made at the time the loans were originated, assigned to, and serviced on behalf of [the] Trusts." Hughes merely described the contents of the proffered documents. She did not testify about when or how they were created. On the contrary, she conceded that she was unfamiliar with the circumstances of their creation. Thus, we conclude that plaintiffs failed to make the showing that section 1271, subdivision (b) requires.

3. Section 1271, subdivision (c)

Defendants contend that plaintiffs' foundational showing was inadequate for a third reason: because Hughes did not describe the mode of preparation of any of the documents, which section 1271, subdivision (c) requires. We agree.

"Section 1271 requires a witness to testify as to the identity of the record and its mode of preparation in every instance." (Cal. Law Revision Com. com., 29B pt. 5 West's Ann. Evid. Code (2015 ed.) foll. § 1280, p. 48; *Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 929.) Here, Hughes conceded that she had no information about the mode of preparation of the loan applications and note disclosure statements. NCO did not prepare those documents. Hughes "was not, obviously, there when the [loan applications were] signed." Nor was she familiar with any of the defendants' signatures. Hughes did not know the "original circumstances" of the documents' preparation because NCO was not the loan servicer when they were created.

We acknowledge that despite these concessions, the trial court expressly "found Ms. Hughes to be very knowledgeable of the mode and preparation of the proffered records." The issue is whether we must defer to this factual finding where no evidence in the record supports it. The answer is plainly no.

Whether the foundational elements for the admission of a business record have been established is a question of fact. (*Egan v. Bishop* (1935) 8 Cal.App.2d 119, 122-123 [construing substantially similar predecessor statute].) "Where . . . the determination of the trial court that the foundation laid was sufficient is a deduction reasonably drawn from the evidence, such conclusion is binding upon an appellate court . . . ." (*People v. Fowzer* (1954) 127 Cal.App.2d 742, 747-748 [construing predecessor statute].) Here, there was no such evidence. "A discretionary ruling predicated on a required finding of fact is necessarily an abuse of discretion if no substantial evidence supports the fact's existence." (*Borissoff, supra*, 33 Cal.4th at p. 531; *Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703, 720 [reports could not be admitted as business records

where the proponent of the evidence presented "no evidence as to how the [documents] were prepared or upon what sources of information they were based, or any evidence that the reports were trustworthy."].)

In *Sierra Managed Asset Plan, LLC. v. Hale* (2015) 240 Cal.App.4th Supp. 1 (*Sierra*), the appellate division of the superior court reversed a judgment in favor of the assignee of an unpaid credit card account, holding that the trial court abused its discretion in admitting the account agreement, credit card statements, and other documents without a sufficient foundational showing to qualify them as business records. In *Sierra* as in this case, the person who provided the foundational testimony was an "authorized agent" of the assignee. (*Id.* at p. Supp. 4.) As in this case, he conceded that he had no knowledge about the account or the charges in question "other than what he knows as a result of acquiring the documents from [the bank that issued the card and recorded the charges and amounts due]." (*Id.* at pp. Supp. 8-9.) The court held that the showing fell short of the foundation required for admission of business records against a hearsay objection. (*Id.* at p. Supp. 9.) The same result is compelled here. We conclude that plaintiffs failed to make the showing that section 1271, subdivision (c) requires and that the trial court abused its discretion in concluding otherwise.

4. Section 1271, subdivision (d)

Defendants contend that plaintiffs' foundational showing was inadequate for a fourth reason: because there was no evidence that the sources of information and method and time of preparation of the documents were such as to indicate trustworthiness, as section 1271, subdivision (d) requires. We agree. As we have explained, Hughes did not and could not testify about the sources of information or the method and time of preparation of any of the proffered documents. Thus, there could be no conclusion that those factors were "such as to indicate [their] trustworthiness." (§ 1271.)

Plaintiffs assert that the trial court made an express finding that the documents were trustworthy. The record cite they provide is to defendants' counsel's objection that

there was no evidence establishing the requirement of section 1271, subdivision (d) because among other things, "[t]here has been no evidence introduced as to the sources of information and method and time of preparation." It does not support plaintiffs' assertion.

Relying on *Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 784 (*Levy-Zentner*), plaintiffs argue that the trial court's findings need not be express and that a ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto. We have already explained that we need not defer to the trial court's factual findings when no substantial evidence supports them. Unlike in *Levy-Zentner*, here there was no evidence on which the trial court could have predicated an implied finding of trustworthiness. (*Id.* at pp. 783-784.)

Plaintiffs argue that bank records "are considered especially trustworthy among business records." That does not excuse plaintiffs' failure to lay a foundation for the proffered records. In *Remington Investments, Inc. v. Hamedani* (1997) 55 Cal.App.4th 1033 (*Remington*), the court rejected a similar argument, stating that it was unaware of any statute "requiring the admission of documents offered as business records without proof that the documents in fact qualify as business records (i.e., the foundational elements required by Evid. Code, § 1271)." (*Remington*, at p. 1040.) The court observed that "[a] rule allowing or requiring admissibility of any document found in a bank's records without evidence of reliability would be a sharp break with past practice [and] could raise grave implications for the continued maintenance of reliable bank records over the long term . . . ." (*Id.* at pp. 1037, 1039.) We agree.

Plaintiffs' reliance on *People v. Dorsey* (1974) 43 Cal.App.3d 953 (*Dorsey*) is misplaced. On appeal from his convictions for writing insufficient funds checks, Dorsey argued that the trial court improperly admitted his bank statements without a proper foundation. The court held that Dorsey forfeited that issue by failing to object that the bank's operations officer and custodian of records did not describe the mode and time of

preparation of the statements. (*Dorsey*, at p. 960.) The court added that Dorsey was not prejudiced by the claimed error because the missing foundational requirement could be inferred, since it is "common knowledge that bank statements on checking accounts are prepared *daily* and that they consist of debit and credit entries based on the deposits received, the checks written and the service charges to the account." (*Ibid.*) *Dorsey* does not stand for the broad proposition that the proponent of bank records need not establish a foundation for their admission.[3]

Plaintiffs next argue that defendants offered "no evidence" casting doubt on the genuineness of the loans. It was not defendants' burden to do so before plaintiffs laid a proper foundation for admission of their hearsay documents. (*Morrison, supra*, 34 Cal.4th at p. 724; see *Rodwin Metals, Inc. v. Western Non-Ferrous Metals, Inc.* (1970) 10 Cal.App.3d 219, 225 ["Counsel does not have to claim fraud in order to insist that hearsay be rejected absent a proper foundation for an exception."].)

To the extent plaintiffs argue that the specific requirements of section 1271 can be dispensed with if the proffered evidence meets the trial court's own standard of trustworthiness, we disagree. Plaintiffs cite no California authority to support that

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[3] Plaintiffs' reliance on *Unifund CCR, LLC v. Dear* (2015) 243 Cal.App.4th Supp. 1 (*Dear*) is similarly misplaced. On appeal from a $25,000 judgment against him for unpaid credit card charges owed to Citibank, Dear challenged the admission of documents authenticated by the custodian of records for the plaintiff, which had acquired the account through a series of assignments. The appellate division of the superior court affirmed. Noting that the custodian's testimony "coincide[d] with our common-sense understanding of how credit card records are electronically generated," the *Dear* court found that *Dorsey*'s reasoning applied "with equal force to credit card billings and bank records." (*Dear*, at pp. Supp. 7-8.) The *Dear* court also emphasized that, as in *Dorsey*, the defendant could not establish prejudice because his trial testimony was consistent with the challenged declaration. (*Dear*, at p. Supp. 10.) Dear had admitted at trial that he made purchases with the credit card, lived at the address to which the bills were sent, and never objected to any of the charges. (*Ibid.*) He also testified that he did not recall ever making payments on the card. (*Ibid.*) *Dear* does not advance plaintiffs' position. It does not stand for the broad proposition that the proponent of bank records need not establish a foundation for their admission.

proposition. Instead, they rely on federal district and intermediate court cases interpreting the federal rules of civil procedure. Those cases do not advance plaintiffs' position. In none of those cases were documents admitted as business records solely because a court found that they satisfied an abstract notion of trustworthiness. (*E.g.*, *United States v. Childs* (9th Cir. 1993) 5 F.3d 1328, 1333 [observing that some federal courts hold that the federal rules permit the admission of exhibits as business records of an entity even when the entity was not the maker of the records "*so long as the other requirements of Rule 803(6) are met* and the circumstances indicate the records are trustworthy." (Italics added)].)

Plaintiffs argue that the trial court properly considered the loan documents even if they did not qualify as business records. They assert that the loan papers were "operative loan contracts, signed by [defendants], and admissible merely upon adequate evidence of authenticity." The problem with this argument is that plaintiffs failed to present adequate evidence of authenticity. "A writing may be authenticated by evidence of the genuineness of the handwriting of the maker." (§ 1415.) Here, there was no such evidence. Defendants did not appear at trial. Hughes testified that she was not familiar with any of the defendants' signatures. Nor was she present when the applications were signed. On this record, the loan documents were never authenticated. They should have been excluded.

We emphasize that the proponent of student loan or similar documentary evidence need not call the custodian of the original record or the employee who personally prepared it to provide the necessary foundational testimony. (*Jayazeri*, *supra*, 174 Cal.App.4th at p. 324.) Any "qualified witness" will suffice. (§ 1271.) In *Jazayeri*, "the means by which the [dead on arrival] numbers [of chickens delivered to a processing plant] were routinely recorded on the [food safety inspectors' poultry condemnation certificates] was sufficiently established by witnesses with firsthand knowledge of the process . . . ." (*Jazayeri*, *supra*, 174 Cal.App.4th at p. 324.) In *Hovarter*, the gatekeeper

of a pulp mill laid the foundation for admission of log sheets. He testified that he was on the phone when the defendant entered the mill but that he recognized him and his truck and directed his supervisor to record the defendant's arrival on the log sheet. (*Hovarter*, *supra*, 44 Cal.4th at p. 1012.) In *Champion*, a fingerprint expert laid the foundation for admission of a laboratory employee's report as a business record. (*Champion*, *supra*, 9 Cal.4th at p. 916.) The expert, who had been employed as a fingerprint expert at the same lab, testified that the employee "was obligated to prepare the report at or near the time that she did the acts described in the report." (*Ibid.*) Alternatively, and as defendants' trial counsel expressly pointed out below, plaintiffs could have avoided the foundational problems that now plague them by issuing business records subpoenas pursuant to section 1560 et seq.

C. Prejudice

We have concluded that the trial court abused its discretion in admitting the challenged records. The remaining issue is whether that ruling was prejudicial and resulted in a miscarriage of justice. We agree with defendants that admission of the challenged evidence requires reversal.

The erroneous admission evidence does not require reversal unless the appellant establishes that the error was prejudicial and resulted in a miscarriage of justice. (Cal. Const. art. VI, § 13; Code Civ. Proc., § 475; § 353.) "'In civil cases, a miscarriage of justice should be declared only when the reviewing court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.]" (*Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 799.)

Here, the improperly admitted evidence was the only evidence that established plaintiffs' case. Had the trial court sustained defendants' objections to admission of the

evidence, plaintiffs would have been left with nothing to support their case. That would have compelled judgment for defendants. Reversal is required. (*Sierra*, *supra*, 240 Cal.App.4th Supp. 1, 5.)

III. Disposition

The judgment is reversed.

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Mihara, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P. J.

_____
Màrquez, J.

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