IN THE SUPREME COURT OF FLORIDA

CYNTHIA L. JACKSON and
THOMAS JACKSON,

Appellants/Petitioners

vs. Sup. Ct. Case No.: SC18-357

HOUSEHOLD FINANCE CORP III;
HOUSEHOLD FINANCE CORPORATION III;
THE DRAIN TEAM, INC.; NORTH STAR
CAPITAL ACQUISITION LLC AS ASSIGNEE
OF WELLS FARGO; and CAPITAL ONE
BANK (USA) NA., A CORPORATION,

Appellees/Respondents
_____/

ON PETITION FOR REVIEW FROM A DECISION OF THE SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA CASE NO. 2D15-2038

PETITIONERS' REPLY BRIEF ON THE MERITS

Respectfully submitted,

NICOLE M. ZIEGLER, ESQ
Fla. Bar No. 068495
Emerson Straw PL
1101 Dr. Martin Luther King Jr. St. N.
St. Petersburg, FL 33701
Tel: (727) 821-1500
Fax: (727) 821-1511
Attorney for Appellants/Petitioners

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

OTHER AUTHORITIES.

PREFACE

Appellants/Petitioners shall be referred to as the "Jacksons". Appellee/Respondent, Household Finance Corp. III shall be referred to as "Household". Household's Answer Brief shall be referred to by as "Ans. Br." with the corresponding page number. The Amicus Brief shall be referred to as "Amicus Br." with the corresponding page number.

STANDARD OF REVIEW

Both Household and the Amicus argue that the standard of review is abuse of discretion. While abuse of discretion is the typical standard of review for evidentiary rulings, it does not apply in this case. The issue in this case is whether the trial court properly admitted evidence under a Florida Statute Section 90.803 hearsay exception. "[W]hether evidence is admissible in evidence under an exception to the hearsay rule is a question of law ... [subject to] the de novo standard of review." *Powell v. State,* 99 So. 3d 570, 573 (Fla. 1st DCA 2012); *see also Browne v. State*, 132 So. 3d 312, 316 (Fla. 4th DCA 2014) ("whether evidence is hearsay and whether evidence fits within an exception to the hearsay rule are questions of law reviewed de novo"); *Washburn v. Washburn*, 211 So. 3d 87, 90 (Fla. 4th DCA 2017). The appropriate standard of review is de novo.

ARGUMENT

I. The Jacksons Seek to Require Household to Strictly Comply with Section 90.803(6) as it is Written, Which Expressly Requires a Qualified Witness.

The Jacksons do not seek to impose some "amorphous", "undefined", "stricter" standard than that required by § 90.803(6). The Jacksons seek to require Household to strictly comply with § 90.803(6), which expressly requires Household to use a qualified witness: "all as shown by the testimony of the custodian or other **qualified witness**." *See Yisreal v. State*, 993 So. 2d 952, 957 (Fla. 2008) ("If evidence is to be admitted under one of the exceptions to the hearsay rule, it must be offered in *strict* compliance with the requirements of the particular exception."). If it was enough for Household have a witness nod along with § 90.803(6)'s four foundational elements, without ever establishing the witness's qualification to do so, the qualification requirement would be rendered meaningless.

The statute does not define a qualified witness, however, the parties agree that Florida's courts define a qualified witness as one with knowledge and familiarity with the record-keeping system. *See Twilegar v. State*, 42 So. 3d 177, 199 (Fla. 2010); *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656, 659 (Fla. 4th DCA 2016); *Sanchez v. Suntrust Bank*, 179 So. 3d 538, 541 (Fla. 4th DCA 2015), *Morrill v. State*, 184 So. 3d 541, 545 (Fla. 1st DCA 2015). The witness must be well enough acquainted with the activity resulting in the creation of the record to provide the testimony. *Morrill*, 184 So. 3d at 545; *Landmark American Ins. Co., v. Pin-Pon*

Corp., 155 So. 3d 432, 441 (Fla. 4th DCA 2015). Stated simply, the witness understands how the data was produced and the record was created.

A. Federal Case Law Also Charges the Record Proponent With Establishing that Its Witness is Qualified as a Part of Its Initial Burden.

As recognized by the Amicus, given that § 90.803(6) is modeled after its federal counterpart, federal court opinions can be informative on the issue. (Amicus Br. p. 3) For example, in *JPMorgan Chase Bank, N.A. v. AME Financial Corp.*, 2009 WL 10668518, No. 1:08-CV-2543-LTW, *1, *3 (N.D. GA, Sept. 25, 2009), the court determined that the proponent failed to meets its initial burden because it did not demonstrate that its witness was qualified. The witness attested that:

- She is an employee at the Recourse and Compliance Management Office of [JPMorgan];
- She has personal knowledge of [JPMorgan's] practice of maintaining these records;
- These records were created or received by [JPMorgan] in its regularly conducted business activity; and
- That they were retained by [JPMorgan] in its file on Defendant in the course of its regular practice for making and keeping such records.

Id. at *3. The court rejected this "boilerplate recitation of the requirements under 803(6)" as insufficient to establish a proper foundation stating:

> **These assertions, however, are merely conclusory in the absence of facts supporting how and why Ms. Siepert possesses that knowledge. This vagueness also indicates a lack of trustworthiness** when Ms. Siepert attempts to claim knowledge of documents that are

> signed, sent, or received by persons whose roles and functions are unexplained. Further, Ms. Siepert broadly concludes that sixteen of the twenty-one exhibits attached to the Parrish Declaration are created or received, recorded, and maintained in the regular course of business **without describing any details about Plaintiff's record-keeping procedures or offering any information specific to these documents**.

Id. (Internal citations omitted) (Emphasis supplied). The court further held:

> The witness authenticating the exhibits must also identify the 'exhibits as documents of a type that the organization typically develops, and **testif[y] about the procedures the organization follows in generating, acquiring, and maintaining documents of that type, and explain[ ] the method by which the specific exhibits were retrieved from the organization's files**.

Id. (Emphasis supplied).

Similarly, in *Lorraine v. Market Am. Ins. Co.*, 241 F.R.D 534, 545-546, n.22 (D. Md. 2007) the court rejected magic-words testimony as insufficient, stating:

> [I]t is not required that the authenticating witness have personal knowledge of the making of a particular exhibit if he or she has personal knowledge of how that type of exhibit is routinely made. **It is necessary, however, that the authenticating witness provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so, as opposed to boilerplate, conclusory statements that simply parrot the elements of the business record exception** to the hearsay rule, Rule 803(6), or public record exception, Rule 803(8).

(Emphasis supplied, internal citation omitted). "Boilerplate recitation", "parroting elements", "magic-words testimony" is vague and conclusory. It does not provide

the court with any information showing that the witness is qualified, which indicates a lack of trustworthiness. For this reason, it should be rejected.

As in *JPMorgan Chase Bank* and *Lorraine*, Household's witness's testimony was vague and lacked any factual specificity or detail showing that he had knowledge or familiarity with HSBC's record-keeping process. Nevertheless, Household declares him to be qualified because "he was currently employed by HSBC in an executive capacity and was employed by them for twenty-five (25) years" and "worked in various departments, managed various departments, and was cross-trained." (Ans. Br. p. 17-18) These facts are meaningless without additional information. Length of employment and an executive title do not automatically render one qualified. Given the vague testimony in this case, it is just as likely that Household's witness was a twenty-five year assistant vice president of HSBC's marketing department as he is an executive in a loan administration department.

Household also argues that its witness was qualified because he looked at the records a couple of months prior to the trial and they looked the same as the ones presented to him at the trial. (Ans. Br. p. 4, 10) Being able to access records is not the same as knowing about their creation. The United States Eleventh Circuit Court of Appeals rejected such an argument in *U.S. v. Petrie*, 302 F.3d 1280, 1287-1288 (11th Cir. 2002) because the "initial link in the chain" was missing:

> In the instant case, Ms. Burrows is merely the secretary in Mr. Petrie's office. **While she is able to testify as to how the documents are**

> **maintained, filed and retrieved, she simply is not able to testify concerning the origination and compilation of the documents. In other words . . . Ms. Burrows simply cannot testify about the initial link in the chain producing the record** — that is, whether the circumstances surrounding the origination and compilation of the documents indicate reliability and trustworthiness.

(Emphasis supplied).

Similarly, in *U.S. v. Brown*, 553 F. 3d 768, 793 (5th Cir. 2008), the United States Fifth Circuit Court of Appeals affirmed the finding that a witness was not qualified. While the witness "knew about the pharmacy computer system, how to operate the system, and how to extract information from it, . . . that is not knowledge about the pharmacy's record keeping." *Id*. at 793. The court defined a qualified witness as "**one who can explain the record keeping system of the organization** and vouch that the requirements of Rule 803(6) are met." *Id*. at 792 (Emphasis supplied).

There is no information in this Record showing that Household's witness knew anything about the record-keeping process that resulted in the creation of the records admitted below.

B. Household Relies on Caselaw that Does Not Support Its Argument.

The cases Household cites in its Answer Brief do not support the argument that its witness was qualified. Unlike Household's witness, in *CitiMortgage, Inc. v. Hoskinson*, 200 So. 3d 191, 192 (Fla. 5th DCA 2016) the witness actually

demonstrated knowledge and familiarity with the record-keeping process by providing at least some detail about the process:

> [Citimortgage's] customer service department generates breach letters when mortgage payments become delinquent. The letters are delivered to [Citimortgage's] mail room on the day they are prepared and are collected by the postal service that day or the follow day. Although the witness had never worked in the customer service department, she had trained side-by-side with someone in that department and had observed the entire process from generating the breach letters to delivering them to the mailroom.

Similarly, in *Diaz v. Wells Fargo Bank, N.A.*, 189 So. 3d 279, 281 (Fla. 5th DCA 2016), the witness testified that she was a nineteen-year employee of the bank, was a loan administration manager, and managed a team of six individuals who "review and authorize business records for trials and depositions." "The witness also testified as to her familiarity with the manner in which Bank creates, stores, and maintains its business records" and her "familiarity with Bank's boarding process when it receives loan history data from a prior servicer of the loan and how that data is then converted and entered into Bank's system". *Id*.

Additionally, neither *Peuguero v. Bank of Am., N.A.*, 169 So. 3d 1198 (Fla. 4th DCA 2015) nor *Cayea* v. *Citimortgage, Inc.*, 138 So. 3d 1214 (Fla. 4th DCA 2014) are persuasive. Both cases predate the Fourth District's *Maslak* opinion. To the extent that there is any conflict between the three opinions, *Maslak* controls. Further, the witness in *Cayea* actually provided some detail regarding the record-

keeping process, identifying two separate groups of employees in the payment processing department who monitor the different forms of payment and enter them into the system. 138 So. 3d at 1216.

C. The Alternative Route for Admission Under Section 90.803(6) Does Not Support Household's Argument.

Perhaps recognizing that it failed to satisfy the qualified witness requirement, Household attempts to distract from the issue by arguing "Petitioners tellingly do not acknowledge the alternative methods for admitting business records into evidence, such as a certification of business records, which requires even less than a live witness." (Ans. Br. p. 30) (Emphasis in original) It does not matter if there were ten alternative methods for admission, Household chose to use the live witness route and it was required to strictly satisfy its burden under that route. More importantly, the certification route still requires a qualified person to execute the declaration.

In addition to live witness testimony, § 90.803(6) states that the four foundational elements may be shown "by a certification or declaration that complies with paragraph (c) **and section 90.902(11)**". Section 90.902(11) states that extrinsic evidence of authenticity as a condition precedent to admissibility is not required for "evidence that would be admissible under § 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another **qualified person**. .

." (Emphasis supplied). Even if Household chose to pursue this route, a qualified person was still required to show the four foundational elements.

II. Household Prematurely Shifts the Burden to the Jacksons Without Satisfying its Initial Burden.

Household and the Amicus advocate for a premature shifting of the burden when the record proponent has not satisfied its initial burden. It is clear from Household's Answer Brief that it considers the record proponent's initial burden to be satisfied, regardless of witness qualification, so long as the witness answers the four elemental questions affirmatively: "Although the *Maslak* testimony could reasonably be considered shaky, unlike *Jackson*, the Fourth District never implemented or discussed the burden shifting to the opponent as set forth in *Love*. **The witness in *Maslak* did, however, answer the four statutory questions in the affirmative. This should have placed the burden on the opponent** of the records to show lack of reliability or trustworthiness." (Ans. Br. p. 26) (Internal citations omitted) It is for this reason that both Household and the Amicus are critical of the Fourth District's decision in *Maslak*.

This argument renders the witness qualification requirement meaningless and is in direct derogation of the statute. It is only after the record proponent establishes a proper foundation that the burden shifts to the objecting party to demonstrate that the record lacks trustworthiness. Household's argument ignores that the failure to demonstrate the witness's qualification to testify prevents the record proponent from

satisfying its initial foundational burden. In the absence of a proper initial foundation there is no shifting of the burden. It is for this reason that the Fourth District could not shift the burden in *Maslak*.

A. Household's Criticism of the Jackson's Cross-Examination is Meaningless.

Household relies on its premature shifting of the burden argument to criticize the Jacksons for not "vigorously" cross-examining the witness regarding the trustworthiness of the records (Ans. Br. p. 24), however such argument is meaningless. Household never demonstrated that its witness was qualified. Thus, it never met its initial burden. Accordingly, the burden could not shift to the Jacksons to have to demonstrate a lack of trustworthiness. Why would the Jacksons give Household's witness a second opportunity to establish the predicate on cross-examination? Household bore the initial burden and it failed to satisfy it.

B. Questions of Trustworthiness are Apparent in the Record.

Household and the Amicus repeatedly criticize the Jacksons for not doing more to challenge the trustworthiness of the records, however, they ignore the lack of trustworthiness stemming from Household's failure to demonstrate that its witness was qualified. *See JPMorgan Chase Bank*, 2009 WL 106685118, *3 (holding that the witness's conclusory and vague testimony about her knowledge of the record-keeping process indicates a lack of trustworthiness). The Amicus is correct that "indicia of reliability are built into, or inherent in, the 'four prongs' [of

§90.803(6)]". (Amicus Br. p. 6) This "indicia of reliability" disappears, however, when the witness is not shown to be qualified to testify. Records admitted under § 90.803(6) are considered to be reliable because the proponent has demonstrated, **through a qualified witness**, that they have been created and maintained in a reliable and trustworthy manner. *See Petrie*, 302 F. 3d at 1288 (requiring testimony about the "circumstances surrounding the origination and compilation of the documents" to demonstrate reliability and trustworthiness, which could not be accomplished through an unqualified witness).

Additional questions as to the trustworthiness arise out of the unexplained relationship, or lack thereof, between the multiple "Household" entities reflected in the Record. Household characterizes this as an inconsequential nomenclature issue or a standing defense that has been waived (Ans. Br. p. 12), but it fails to address the trustworthiness questions the presence of these multiple entities raise. As set forth in greater detail in the Initial Brief, there are four different "Household" entities reflected in the records: Household Finance Corp. III, Household Financial Corporation III, Household Financial Corporation, and Household International, Inc. Both Household Finance Corp. III and Household Financial Corporation III brought foreclosure lawsuits against the Jacksons on the same promissory note. (R. 3, 102-105) Additionally, Household Finance Corp. III named Household Financial Corporation III as a defendant in this action. (R. 4)

Household's witness testified that Household and HSBC merged, however the merger announcement reflects that the merger was between Household International, Inc. and HSBC. There is no mention of the Household that brought this lawsuit. Thus, there is nothing linking Household and HSBC. Further, there was no evidence presented demonstrating a transfer of the loan from one "Household" entity to another. A witness from a subsequent servicer or holder of a loan can lay the foundation to admit records of a prior loan holder or servicer under § 90.803(6), however, the witness must also testify about the steps taken to verify the accuracy of the records and how the records were boarded into the current record system. *See Hidden Ridge Condo. Homeowners Assoc., Inc. v. Onewest Bank, N.A.*, 183 So. 3d 1266 (Fla. 5th DCA 2016). There is no such testimony in this Record.

III. The *Jackson* Decision is Far Reaching in its Application.

The *Jackson* decision will impact all cases where records are sought to be admitted under § 90.803(6) because it destroys the standard set forth therein. No qualified witness would be required. Record proponents would simply need a current, or maybe even former employee, to call to the stand and nod along with the elements. Likewise, if a qualified witness is not required for § 90.803(6)'s live witness route, then why would one be necessary under its alternative certification/declaration route? It would not make sense to require a qualified witness in one route but not the other.

The *Jackson* decision also affects Florida Statute Section 90.803(7). "In order to provide for the admissibility of evidence under section 90.803(7) it must be shown that the records were kept in accordance with section 90.803(6) and in such a manner that the fact would have been recorded if it had occurred. It is necessary to call a witness to testify to the required foundation." *Rae v. State*, 638 So. 2d 597, 598 (Fla. 4th DCA 1994) ("the ledger sheets would have been admissible under section 90.803(7) . . . *if* appellee had introduced testimony to lay the proper foundation. . . . the states failure to introduce testimony laying the proper foundation was fatal to the application of this exception"); *see also Riggins v. State*, 67 So. 3d 244, 247 (Fla. 2d DCA 2010) (finding erroneous the decision to admit a record under § 90.803(7) where the state called no witness who could establish that the records were kept in accordance with § 90.803(6) and in such a manner that the fact would have been recorded had it occurred). If the qualified witness requirement does not have to be satisfied to admit records under § 90.803(6) then it also would not have be satisfied to admit records under § 90.803(7).

Additionally, as set forth in the Jackson's Initial Brief on the Merits, the Fifth District Court of Appeals decision in *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592 (Fla. 5th DCA 1980), presents another example of how the *Jackson* decision would impact other evidentiary decisions. The witness in *Alexander* was not qualified to testify about the usual business practices of the business because the business failed

to establish that the witness was "either in charge of the activity constituting the usual business practice or is well enough acquainted with the activity to give the testimony." *Id*. at 593. Applying *Jackson* to the facts in *Alexander*, the witness's testimony would have been permissible simply because he was employed by the party that called him to testify. Whether he was well enough acquainted with the activity to describe the company's usual business practice would not have mattered, he could have simply nodded along as someone described it to him.

Household argues that *Alexander* supports its claim (Ans. Br. P. 30), because the court noted that there was an "extensive objection and voir dire", but this argument ignores the actual basis for the court's decision. Yes, the court made passing reference to the "extensive objection and voir dire", but its decision was based on business's failure to establish that the witness was qualified. It does not matter whether the witness was voir dired, it only matters that the business did not meet its burden.

IV. <u>This Court Should Reverse With Instructions to Dismiss the Action with Prejudice</u>.

Household argues that dismissal with prejudice would not be proper if this Court reverses because "only the payment history would have been excluded". (Ans. Br. P. 28) This is not accurate. As set forth supra and in the Initial Brief, Household's witness worked for HSBC. He never established any connection between HSBC and Household, nor did he ever demonstrate any knowledge or

familiarity with Household's record-keeping system or how Household's records were boarded into HSBC's system, assuming that there was a transfer. Thus, all of the Household records, the note, the mortgage, the default letters, and the pay history, should have been excluded. Excluding those records, Household completely failed to put on the necessary proofs and it should not be granted a second bite at the apple in the form of a new trial or even a trial only as to damages. *See Wolkoff v. American Home Mortgage Servicing, Inc.*, 153 So. 3d 280, 283 (Fla. 2d DCA 2014); *see also Sanchez*, 179 So. 3d at 543.

CONCLUSION

For all of the reasons set forth in this Brief, as well as in the Initial Brief on the Merits, the Jacksons respectfully request this Honorable Court to disapprove the Second District's *Jackson* opinion and reverse and remand for entry of an involuntary dismissal in their favor.

Dated: 11/5/2018

Respectfully submitted,

/s/ Nicole M. Ziegler
NICOLE M. ZIEGLER, ESQ
Fla. Bar No. 068495
Emerson Straw PL
1101 Dr. Martin Luther King Jr. St. N.
St. Petersburg, FL 33701
Tel: (727) 821-1500
Fax: (727) 821-1511
Attorney for Appellants/Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of November, 2018, a true and correct copy of the foregoing is being served through the Florida Courts E-Filing Portal with a copy sent via electronic mail and by U.S. Mail to the following:

Matthew A. Ciccio, Esq.
Aldridge Pite, LLP
1615 South Congress Ave., Ste. 200
Delray Beach, FL 33445
ServiceMail@aldridgepite.com
mciccio@aldridgepite.com

Spencer Gollahon, Esq.
Aldridge Pite, LLP
1615 South Congress Ave., Ste. 200
Delray Beach, FL 33445
ServiceMail@aldridgepite.com
sgollahon@aldridgepite.com

Robert Edwards, Esq.
Choice Legal Group, P.A.
P.O. Box 9908
Ft. Lauderdale, FL 33309-1864
eservice@clegalgroup.com
Robert.edwards@clegalgroup.com

David Rosenberg, Esq.
Robertson, Anschutz & Schneid, P.L.
6409 Congress Avenue, Suite 100
Boca Raton, FL 33487-2853
drosenberg@rasflaw.com

Marissa Yaker, Esq.
Padgett Law Group
6267 Old Water Oak Road, Suite 203
Tallahassee, FL 32312-3858
myakerattorney@padgettlaw.net

Andrea Tromberg, Esq.
Tromberg Law Group, P.A.
1515 South Federal Highway, Ste 100
Boca Raton, FL 33432-7404
atromberg@tromberglawgroup.com

Household Finance Corporation III
c/o Kathryn Madison, President
961 Weigel Drive
Elmhurst, IL 60126

The Drain Team, Inc.
c/o Neil G. Corella, Registered Agent
1862 East Lake Woodlands Parkway
Oldsmar, FL 34677

North Star Capital Acquisition, LLC
As Assignee for Wells Fargo
c/o LHR, Inc.
56 Main Street
Hamburg, NY 14075

Capital One Bank (USA) NA
1111 East Main Street
Richmond, VA 23219

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply Brief on the Merits uses Times New Roman 14-point font and complies with all font requirements of Fla. R. App. P. 9.210.

/s/ Nicole M. Ziegler_____
NICOLE M. ZIEGLER, ESQ