**CASE NO. 23-3061**

**IN THE**

# United States Court of Appeals

**FOR THE THIRD CIRCUIT**

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In re: VINCENT A. PIAZZA, III, aka Vincent Anthony Piazza, III,
*Debtor*,

PATRICIA ELLIOTT,
*Appellant,*

v.

Vincent A. Piazza, III,
*Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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## REPLY BRIEF OF APPELLANT

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Local Appellate Rule 26.1.1, Appellant is not aware of any publicly owned corporation with any interest in the outcome of this litigation.

## ARGUMENT

### I. The Bankruptcy Court Abused its Discretion by Excluding Bradley Strahl's Affidavit as Hearsay.

#### A. Standard of review

The Debtor incorrectly cites *U.S. v. Furst,* 886 F.2d 558, 571 (3d Cir. 1989), for the proposition that this court may review the lower court's ruling excluding the Strahl Affidavit as hearsay only for abuse of discretion because "[a]t trial, Elliott's counsel never asserted that the Strahl Affidavit was admissible as a 'business record.'" (Brief of Appellee p. 11). As noted in Appellant's initial Brief, Appellant disputes the contention that she failed to adequately assert the business records exception at trial. But even if she had, not only did *Furst* have nothing to do with any alleged failure to assert the business record exception, but the court explicitly held that "documents may be admitted under the business record exception to the hearsay rule when circumstantial evidence provides the necessary foundation." *Id.*, 886 F.2d at 572, citing *In re Japanese Elec. Products Antitrust*

*Litigation*, 723 F.2d 238, 288 (3d Cir. 1983). The only part of *Furst* applicable to this case is the portion that reiterates the standard cited in Appellant's initial Brief:

> To the extent that the district court's admission of… documents [under the hearsay exception] was based on an interpretation of the Federal Rules of Evidence, we exercise plenary review, *see In re Japanese Electronic Products Litigation*, 723 F.2d 238, 265 (1983), *rev'd on other grounds sub nom. Matsushita Electronic Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), but to the extent that the district court was making a discretionary ruling premised on a permissible view of the law we may review the ruling only for an abuse of discretion. *See id.* at 265-66.

*Id.,* 886 F.2d at 571.

### B. Appellant established the admissibility of the Strahl Affidavit under the business records exception.

The standards for admissibility under the business records exception for hearsay evidence found in Federal Rules of Evidence, Rules 803(6) and 902(11) contain no requirement that the certifying witness be the "custodian" of the records: Rule 902(11) provides that the certification may be made by "the custodian of the record *or other qualified witness*." The rules also contain no requirement that the affidavit be submitted "on behalf of the company," rather than by the witness in his personal capacity. Therefore, The Debtor's arguments that Appellant failed to establish the admissibility of Strahl's Affidavit because Strahl "did not claim to be the records custodian" or that he was "authorized to submit his Affidavit on behalf of the company" are unfounded.

As discussed in Appellant's initial brief, Strahl's representations that he was a representative of ASRC McGraw and familiar with its recordkeeping practices, (A333), and that they were kept in the ordinary course of business, (A334) are sufficient to satisfy the Third Circuit's broad interpretation of the phrase "other qualified witness." See *In re CGR Inv'rs Ltd. P'ship*, 464 B.R. 678, 683 (Bankr. E.D. Pa. 2010) (citations omitted).

The Debtor's argument that that Appellant "failed to make an offer of proof in accordance with Fed. R. Evid. 103 when the trial court rejected her purported evidence" is also meritless. Fed. R. Evid. 103 does not require a party to attempt a *second* "offer of proof" after the court has already excluded the evidence proffered. Indeed, Rule 103(b) explicitly states that "[o]nce the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

The Debtor also objects to Federal Rule of Evidence 902(8) "as a basis for admission of the Strahl Affidavit." Appellant has not advanced Rule 902(8) as an independent basis for admission—rather, Appellant merely argues that the Strahl Affidavit is self-authenticating under Rule 902(8), and therefore sufficient to provide the foundation to establish that the attached business records are self-authenticating pursuant to Rule 902(11). See *Skyline Potato Co. v. Hi-Land Potato Co.*, No. CIV 10-0698 JB/RHS, 2013 U.S. Dist. LEXIS 10670, at *68-69 (D.N.M.

Jan. 18, 2013)(Rejecting argument that documents had not been authenticated because the supporting affidavits were "self-authenticating pursuant to rule 902(8), and provide the foundation to establish that the… documents are self-authenticating pursuant to rule 902[11]."") Rule 902(8) provides that "a document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments" is self-authenticating. The mere fact that an opponent disputes the contents of an affidavit does not take it outside of the rule. See, e.g. *Ass'n of Irritated Residents v. C&R Vanderham Dairy*, No. 1:05-CV-01593 OWW SMS, 2007 U.S. Dist. LEXIS 70890, at *30 (E.D. Cal. Sep. 24, 2007)(Finding that affidavits were self-authenticating under Rule 902[8] notwithstanding the fact that the contents of the affidavits "may contain matters subject to dispute.")

**C. None of the arguments raised in the debtor's reply brief are sufficient to meet the debtor's burden to establish that the Strahl Affidavit was not trustworthy.**

The Debtor offers, for the first time on this subsequent appeal, wholly unfounded speculation that Exhibit C to the Strahl Affidavit was "manipulated and created for the purpose of litigation." Nothing at trial or anywhere else in the record indicates that the documents in Exhibit C to the Strahl affidavit were altered or "manipulated" from the records of ASCR McGraw Constructors, LLC—in fact Strahl's affidavit explicitly attests that Exhibit C is "a true and correct copy of our

Viewpoint Vista ERP records." A334. No contrary evidence was presented. Mere speculation is plainly insufficient to meet the Debtor's Rule 803(6)(E) burden to produce "specific and credible evidence" of untrustworthiness to oppose the admission of an affidavit with an otherwise proper foundation. Additionally, The Debtor's counsel did not raise the argument that the exhibits had been "manipulated" either in the Bankruptcy Court or the District Court, and this court should decline to entertain that argument at this stage in the litigation. See *Wash. Mut., Inc. v. Griffin*, 848 F. App'x 84, 88 (3d Cir. 2021)(The Third Circuit generally does not consider arguments raised for the first time on appeal).

The Debtor further argues that he lacked an opportunity to cross-examine Strahl about "contradictory facts," but the specific facts referenced by the Debtor neither "contradict" anything in Strahl's affidavit, nor do they have any bearing on the sole relevant fact established by the Strahl Affidavit: that final payments on the Auke Bay and Hoonah Schools projects had been made in 2013, with no unpaid invoices outstanding. (A122—125, 332—413). The "fixed price" provisions Appellant cites from the Auke Bay and Hoonah Schools contracts both explicitly state that they are "subject to additions and deductions as provided for in the Subcontract Documents," (A 356, 359), and therefore the prices quoted don't contradict Strahl's statements that the payments made were final. The email from Kathi Collum *predates* the final payments, and therefore any indication in the

email that additional payments were forthcoming also doesn't contradict anything in the Strahl Affidavit. Moreover, the Debtor did not challenge the admissibility of the Strahl Affidavit on the basis of any purported "contradictions" at any earlier point in this litigation, and should not be permitted to do so now. See *Wash. Mut., Inc.*, 848 F. App'x at 88.

## II. The Bankruptcy Court Erred as a Matter of Law by Denying Appellant's Claim of Exception to Discharge Under §523(a)(2)(B).

Section 523(a)(2)(B) undisputedly requires that, for a written statement to be the basis for an exception to discharge, the statement must have been "materially false," the debtor must have published the statement with the "intent to deceive" and the creditor must have "reasonably relied" upon it. In its ruling, the Bankruptcy Court made no finding as to whether Appellant had or had not "reasonably relied" on the Debtor's statements, because it found that the Debtor lacked the requisite intent to deceive. A29. In a footnote, the Bankruptcy Court found that "Elliott failed to contradict Piazza's testimony that the facts were true as of the date he represented to her that they were true." *Id.*

As set forth in Appellant's initial Brief, the Bankruptcy Court erred by finding that the Debtor lacked the intent to deceive Appellant. The Debtor does not substantively challenge that argument, but instead argues that (1) the statements were true when made, and (2) Appellant did not rely on the statements. Both arguments are plainly meritless.

### A. The Debtor presented no substantive evidence at trial to rebut Appellant's evidence that his statements were false when made.

As set forth in Appellant's initial Brief, the Debtor made two statements on April 2, 2012 while being, at a minimum, recklessly indifferent to their truth or falsity: (1) that he owned "six properties" with "a ton of equity," and (2) that Appellant's Card was "the first bill [he would] pay" from payments received for upcoming work. A139.

As to the first lie, Appellant presented evidence at trial that The Debtor owned *four* properties, not six, that there was minimal equity in the properties when they were purchased, minimal equity in the properties when they were subsequently sold, and therefore, presumably, minimal equity in the properties during the entire period including April 2, 2012. See 1979 IRB LEXIS 1838, *1 (I.R.S. January 1, 1979)("The best indication of the value of a property is 'the price paid for the property in an arm's-length transaction on or prior to the valuation date.'")

In his Brief, The Debtor argues merely that his statement about "a ton of equity" was "too vague and unquantifiable" to form the basis of a fraud claim, conveniently ignoring the eminently quantifiable issue of whether he owned six properties or four. On that issue The Debtor provided false answers in discovery, claiming to have owned two properties he did not in fact own in April of 2012, and then, when caught in that lie, suddenly "remembered" two additional properties he

had not disclosed in discovery. The Debtor did not present any evidence of a short-lived "real estate boom" or any other real-world conditions from which it could be reasonably concluded that he actually had substantial equity in the properties as of April 2, 2012. The only "facts" that The Debtor claimed to have relied on in concluding that he had equity in the properties—including the down payments he claimed to have made for the Pond Reef and Sea Level Drive properties—were contradicted by the closing documents which showed that The Debtor *had made no such payments*. There is simply no evidence on the record from which it can be reasonably concluded that The Debtor actually owned "six properties with a ton of equity" on April 2, 2012, or that he had any non-reckless basis to claim that he did.

The Debtor simply glosses over the second lie, arguing that he "had every intention to try to pay Elliott at the time the communications were made." As argued in Appellant's initial brief, a general intent to repay is not sufficient when the debtor made a false, written representation that a particular asset or claim would be used to pay the creditor. See *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1757-58 (2018). Even if the Court gives credence to The Debtor's claims that he had a general desire to repay Appellant some day, the only evidence on the record shows that he had no present intent to actually repay her *from payments received from upcoming work* at the time he promised he would.

### B. Appellant presented credible evidence that she reasonably relied on the Debtor's misrepresentations.

As noted above, the Bankruptcy Court did not reach the issue of reasonable reliance. However, Appellant plainly presented credible evidence on that issue. At trial, Appellant testified as follows:

> Q … Did you ever make a suggestion to Mr. Piazza how he might be able to provide you with some sort of security to cover the obligation?
>
> A I agreed with what he said, that he had money coming in… and that he would pay me off or sell a house.

(A116-117).

The Debtor attempts to argue that this testimony somehow "contradicts" her earlier testimony that she "relied on past history, and all the work [she] knew [The Debtor] had" (A111) in her decision to let him continue making charges. However, Appellant's statements are easily reconciled. It is clear from her trial testimony that Appellant's knowledge of the "work" The Debtor had was derived from his emails, including the April 2, 2024 email falsely claiming that Appellant's Card was "the first bill [he would] pay" from payments received for upcoming work. A139. Moreover, the requirement that a creditor have "reasonably relied" on a false statement does not equate to a requirement that the creditor *exclusively* relied on the statement.

"The reasonableness of a creditor's reliance under § 523(a)(2)(B) is judged by an objective standard, i.e., that degree of care which would be exercised by a

reasonably cautious person in the same business transaction under similar circumstances." *Ins. Co. of N. Am. v. Cohn (In re Cohn),* 54 F.3d 1108, 1117 (3d Cir. 1995), citing *In re August*, 448 B.R. 331, 351 (Bankr. E.D. Pa. 2011). Appellant's reliance was objectively reasonable: although she did not do any independent investigation of the Debtor's real estate holdings, and obviously could not do any investigation of his subjective intent to pay her from specific sources, his claims and promises appeared to her to be consistent with his past history of payment and evidence from the cards of substantial ongoing business. *Id.*

To the extent that there is any question of fact as to whether Appellant reasonably relied on The Debtor's misrepresentations, this matter must be remanded to the trial court to make factual findings on that issue. "In reviewing the judgment of a trial court, an appellate court may vacate the judgment and remand the case for findings if the trial court has failed to make findings when they are required or if the findings it has made are not sufficient for a clear understanding of the basis of the decision." *H. Prang Trucking Co. v. Local Union No. 469*, 613 F.2d 1235, 1238 (3d Cir. 1980)(citations and punctuation omitted).

Dated: Wilkes-Barre, Pennsylvania
July 22, 2024

Respectfully submitted,

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## COMBINED CERTIFICATES

### I. Statement of Bar Membership.

Pursuant to Local Appellate Rule 46.1(e), C. Stephen Gurdin, Jr., certifies that he is counsel of record and is a member of the bar of the United States Court of Appeals for the Third Circuit.

### II. Statement of Compliance with Frap 32(a)(7)(b) 1.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 2,263 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman.

### III. Statement Of Service and ECF Filing

I, C. Stephen Gurdin, Jr., certify that on July 22, 2024, I electronically filed the foregoing Opening Brief on Behalf of Appellant by using the CM/ECF system with the Clerk of the Court for the United States Court of Appeals for the Third Circuit. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system. I further certify, I sent seven

(7) copies of the Reply Brief on Behalf of Appellant, via FedEx, to the Clerk of the Court for the United States Court of Appeals for the Third Circuit.

## IV. Statement of Identical Compliance Briefs

I, C. Stephen Gurdin, Jr., hereby certify that the text of the electronically filed brief is identical to the text of the original copies that were dispatched on July 22, 2024, by FedEx delivery, to the Clerk of the Court of the United States Court of Appeals for the Third Circuit.

## V. Statement of Virus Check

I, C. Stephen Gurdin, Jr., hereby certify that on July 20, 2024, I caused a virus check to be performed on the electronically filed copy of the forgoing Reply Brief of Appointed Amicus Curiae Supporting Appellant using the following virus software: Microsoft Defender Antivirus. No virus was detected.

*/s/ C. Stephen Gurdin, Jr.*
C. Stephen Gurdin, Jr.