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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	CC-04-1284-KMoP
)		
7	VEE VINHNEE,)	Bk. No.	LA 03-29549-SB
)		
8)	Adv. No.	LA 03-02660-SB
	Debtor.)		
9)		
)		
10	_____)		
)		
11	AMERICAN EXPRESS TRAVEL)		
	RELATED SERVICES COMPANY,)		
12	INC.,)		
)		
13	Appellant,)		
)		
14	v.)	OPINION	
)		
15	VEE VINHNEE,)		
)		
16	Appellee.)		
	_____)		

Argued and Submitted on January 20, 2005
at Pasadena, California

Filed - December 16, 2005

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI, and PERRIS, Bankruptcy Judges.

1 KLEIN, Bankruptcy Judge:
2

3 This appeal involves the elements of the evidentiary
4 foundation for introducing electronic business records and
5 whether a trial court is entitled to insist upon a complete
6 foundation, even in the absence of an objection.

7 The court declined to admit plaintiff's computerized
8 business records as inadequately authenticated at a bench trial,
9 but gave plaintiff a chance to cure the foundational defects in a
10 post-trial submission. When the ensuing submission proved
11 unsatisfactory to the court, it entered judgment for defendant
12 and added salt to the wound by noting that plaintiff would have
13 prevailed on one of two counts if the records had been admitted.

14 While the result may seem harsh, we hold that the court was
15 within its rights to insist, even in the absence of an objection,
16 that all elements of a proper evidentiary foundation be correctly
17 established. Under the circumstances, including the extra post-
18 trial opportunity to cure the defect, we cannot say that the
19 court abused its discretion. Hence, we AFFIRM.

20 FACTS

21 Vee Vinhnee filed a chapter 7 bankruptcy case on July 24,
22 2003. His 2003 income through the date of filing was \$14,800,
23 and he earned \$24,000/year in 2001 and 2002. He had no secured
24 debt. Priority tax debt was \$33,861.14, dating back to 1992.

25 American Express was owed more than 80 percent of the
26 unsecured debt based on two credit cards: a "gold" card (with
27 two sub-accounts) issued in 1989 and a "platinum" card issued in
28 February 2003. The gold card had an additional user, Kim A Ly.

1 Vinhnee scheduled both American Express cards with correct
2 account numbers. The \$21,098.00 listed as owed on the platinum
3 card was the balance due per his June 2003 statement. The sum
4 listed as owed on the gold card, \$3,245.00, was the minimum
5 payment due on the June 2003 statement and not the full balance
6 of \$25,485.92¹ due on the two gold card sub-accounts.

7 The gold card sub-account that required payment in full each
8 month was current until May 2003. The \$2,825.47 balance for that
9 sub-account on the June statement reflected charges made April 3
10 to May 6, 2003, of which Kim A Ly had charged \$204.47.

11 The \$23,377.43 owed on the gold card "flexible payment" sub-
12 account, which was a typical credit card account at interest and
13 with minimum payments, reflected charges made primarily between
14 January and May 4, 2003, of which Kim A Ly had charged \$1,783.97.
15 Vinhnee paid more than the monthly minimums in February and March
16 2003 and made a minimum payment in April 2003.

17 The debt on the platinum card that was issued in February
18 2003, was based on \$21,115.24 charged during the period April 5-
19 18, 2003, and was \$21,728.87 as of July 24, 2003.

20 Vinhnee had stopped charging on American Express accounts by
21 May 7, 2003. Kim A Ly was deleted from the gold card account on
22 May 10. Vinhnee filed his bankruptcy case on July 24, 2003.

23 American Express filed a two-count adversary proceeding
24 seeking to have \$41,597.63 of the debt excepted from discharge
25 under 11 U.S.C. § 523(a)(2)(A). Implicitly conceding that
26 \$5,617.16 of the \$25,485.92 gold card balance is dischargeable,
27

28 ¹ Our description of the account charges is not based on
findings of fact. Because the billing records were not admitted,
they merely constitute an offer of proof. Fed. R. Evid. 103(b).

1 one count sought to except only the remaining \$19,868.76 from
2 discharge. The other count sought to have the full platinum card
3 balance, \$21,728.87, held nondischargeable.

4 The court held a status conference on December 23, 2003, at
5 which it fixed a trial date, noting that, if Vinhnee did not
6 appear, it would exercise its discretion to require the plaintiff
7 to adduce evidence to prove its case.

8 Vinhnee's default was entered at American Express' request
9 on February 11, 2004. No motion for default judgment was filed.

10 Trial was held on March 25, 2004. American Express appeared
11 and was prepared for trial. Vinhnee did not appear. The court,
12 without objection by American Express, proceeded with the trial
13 consistent with its prior announcement that it would require
14 proof of entitlement to the relief requested.

15 An American Express employee testified that he was the
16 custodian of records for the monthly statements, that the entries
17 thereon were made at or about the time of the transactions, that
18 the records were kept in the regular course of business, and that
19 the regular practice was to retain the records.

20 The witness, in response to the court's inquiry, testified
21 that the term "duplicate copy" appeared on the exhibits because
22 the records were maintained electronically.

23 The court then explained that the electronic nature of the
24 records necessitated, in addition to the basic foundation for a
25 business record, an additional authentication foundation
26 regarding the computer and software utilized in order to assure
27 the continuing accuracy of the records.

28 When the witness knew little about the computer software or

1 hardware, the court deferred ruling on the admission of the
2 exhibits. Offering American Express an opportunity to cure the
3 foundational defect later, and calling counsel's attention to an
4 evidence treatise on point, it completed the rest of the trial.

5 At the close of trial, the court held the evidentiary record
6 open so that American Express could supplement its foundation for
7 admission of the computer records.

8 Once American Express made its post-trial submission and the
9 evidentiary record closed, the court rendered written findings.

10 The court refused to admit the electronic business records
11 because it concluded that the defective evidentiary foundation
12 was not cured by the supplemental materials. The declaration did
13 not establish the declarant's qualifications to testify. Nor did
14 the court perceive testimony that the business conducts its
15 operations in reliance upon the accuracy of the computer in the
16 retention and retrieval of the information in question.

17 The refusal to admit the billing statements in evidence left
18 American Express with only Vinhnee's admissions on his schedules
19 as evidence. He had admitted to a gold card debt of only
20 \$3,245.00, which was less than the \$5,617.16 American Express
21 conceded was discharged. His admission to a platinum card debt
22 of \$21,098.00 did not reveal the dates or nature of specific
23 charges.

24 The court declined to except the gold card debt from
25 discharge. It added, however, that "[i]f the account evidence
26 were properly before the court," it would hold nondischargeable
27 all charges on the flexible payment sub-account made after
28 February 1, 2003. Thus, the evidentiary foundation issue was

1 crucial to the outcome of the count seeking to except from
2 discharge \$19,868.76 of the gold card account.

3 Although Vinhnee's admission that he owed \$21,098.00 on the
4 platinum card made that aspect of the evidentiary problem less
5 acute, dates and details were still missing. The court also
6 discerned a failure of proof as to the substantive element of
7 nondischargeability under § 523(a)(2)(A) under which a creditor
8 must prove justifiable reliance. It ruled that the issuance of
9 the platinum card in February 2003 was unjustifiable in light of
10 the absence of evidence of inquiry into Vinhnee's income, which
11 it reasoned would have exposed income too low to support the
12 card.

13 Following entry of judgment for the defendant on all counts,
14 this appeal ensued.

15 JURISDICTION

16 The bankruptcy court had jurisdiction via 28 U.S.C. §§ 1334
17 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).

18 ISSUE

19 Whether the court erroneously refused to admit computer-
20 generated records as not properly authenticated.

21 STANDARD OF REVIEW

22 Evidentiary rulings, including admissibility of electronic
23 records, are reviewed for abuse of discretion. E.g., Sec. Farms
24 v. Int'l Bhd. of Teamsters, 124 F.3d 999, 1011 (9th Cir. 1997);
25 United States v. Catabran, 836 F.2d 453, 456 (9th Cir. 1988).
26 Whether there has been proof of an essential element of a cause
27 of action under 11 U.S.C. § 523(a)(2)(A) to except a debt from
28 discharge is a factual determination reviewed for clear error.

1 Anastas v. Am. Sav. Bank (In re Anastas), 94 F.3d 1280, 1283 (9th
2 Cir. 1996).

3 DISCUSSION

4 I

5 The nub of American Express' argument for admission of its
6 electronic business records into evidence is an assertion that it
7 is an abuse of discretion for a court to require that all
8 elements of an evidentiary foundation be established by testimony
9 of a qualified witness. Hence, it contends that the court was
10 required, apparently as a matter of law, to fill the gap by
11 taking judicial notice of the accuracy and reliability of
12 American Express computer systems. The standard of review makes
13 American Express' persuasive task a difficult row to hoe.

14 The court acts as gatekeeper on the preliminary questions
15 regarding the admissibility of evidence. Fed. R. Evid. 104.²

16 In general, rulings on admissibility of evidence are
17 reviewed for abuse of discretion. Sec. Farms, 124 F.3d at 1011.

18
19

² The pertinent portions of the rule are:

20 (a) Questions of admissibility generally. Preliminary
21 questions concerning the qualification of a person to be a
22 witness, the existence of a privilege, or the admissibility
23 of evidence shall be determined by the court, subject to the
24 provisions of subdivision (b) [relevancy conditioned on
fact]. In making its determination it is not bound by the
rules of evidence except those with respect to privileges.

25 (b) Relevancy conditioned on fact. When the relevancy
26 of evidence depends upon the fulfillment of a condition of
27 fact, the court shall admit it upon, or subject to, the
introduction of evidence sufficient to support a finding of
fulfillment of the condition.

28 Fed. R. Evid. 104(a)-(b).

1 In particular, determination of the sufficiency of authentication
2 of evidence rests in the sound discretion of the trial court and
3 is reviewed for abuse. Id.³

4 Under the abuse of discretion standard of review, we would
5 reverse only if the court applied an incorrect standard of law or
6 made a clearly erroneous factual determination or if we have the
7 firm and definite conviction that the court made a clear error of
8 judgment. SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001);
9 cf. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400-05 (1990).

10 It follows that a trial court that is finicky about settled
11 authentication requirements will be sustained unless we have the
12 firm and definite conviction that there was a clear error of
13 judgment in rejecting the proffered authentication. Thus,
14 American Express must persuade us that we should have a firm and
15 definite conviction that there was a clear error of judgment in
16 rejecting its exhibits.

17 A

18 The basic elements for the introduction of business records
19 under the hearsay exception for records of regularly conducted
20 activity all apply to records maintained electronically.

22 ³ Because this appeal involves a bench trial in which the
23 roles of court and trier of fact are merged, we need not address
24 the differences between Rules 104(a) and (b). There is authority
25 that authenticity implicates Rule 104(b) "relevancy conditioned
26 on fact" as to which the court makes a preliminary ruling and
27 leaves to the trier of fact the ultimate resolution of the
28 authenticity question. 5 JOSEPH M. McLOUGHLIN ED., WEINSTEIN'S FEDERAL
EVIDENCE 2D § 900.06[1][c][i] (2005) ("WEINSTEIN"), citing Fed. R.
Evid. 901 advisory committee's note. Since the functions were
merged and the court was not persuaded that the records were
authentic, the distinction makes no difference in this appeal.

1 Such records must be: (1) made at or near the time by, or
2 from information transmitted by, a person with knowledge; (2)
3 made pursuant to a regular practice of the business activity; (3)
4 kept in the course of regularly conducted business activity; and
5 (4) the source, method, or circumstances of preparation must not
6 indicate lack of trustworthiness. Fed. R. Evid. 803(6);⁴
7 Catabran, 836 F.2d at 457.

8 These elements must either be established by the testimony
9 of the custodian or other qualified witness or must meet
10 prescribed certification requirements. Fed. R. Evid. 803(6).

11 Such records, however, will not be admitted unless the court
12 is also persuaded by their proponent that they are authentic.
13 Ordinarily, because the business record foundation commonly
14 covers the ground, the authenticity analysis is merged into the
15 business record analysis without formal focus on the question.
16 5 Weinstein § 900.06[2][a].

17
18 ⁴ The pertinent hearsay exception is:

19 (6) Records of Regularly Conducted Activity. - A
20 memorandum, report, record, or data compilation, in any
21 form, of acts, events, conditions, opinions or diagnoses,
22 made at or near the time by, or from information transmitted
23 by, a person with knowledge, if kept in the course of a
24 regularly conducted business activity, and if it was the
25 regular practice of that business activity to make the
26 memorandum, report, record or data compilation, all as shown
27 by the testimony of the custodian or other qualified
28 witness, or by certification that complies with Rule
902(11), Rule 902(12), or a statute permitting
certification, unless the source of information or the
method or circumstances of preparation indicate lack of
trustworthiness. The term "business" as used in this
paragraph includes business, institution, association,
profession, occupation, and calling of every kind, whether
or not conducted for profit.

Fed. R. Evid. 803(6).

1 The primary authenticity issue in the context of business
2 records is on what has, or may have, happened to the record in
3 the interval between when it was placed in the files and the time
4 of trial. In other words, the record being proffered must be
5 shown to continue to be an accurate representation of the record
6 that originally was created.

7 B

8 Authenticating a paperless electronic record, in principle,
9 poses the same issue as for a paper record, the only difference
10 being the format in which the record is maintained: one must
11 demonstrate that the record that has been retrieved from the
12 file, be it paper or electronic, is the same as the record that
13 was originally placed into the file. Fed. R. Evid. 901(a).⁵

14 Hence, the focus is not on the circumstances of the creation
15 of the record, but rather on the circumstances of the
16 preservation of the record during the time it is in the file so
17 as to assure that the document being proffered is the same as the
18 document that originally was created.

19 In the case of a paper record, the inquiry is into the
20 procedures under which the file is maintained, including custody,
21 access, and procedures for assuring that the records in the files
22 are not tampered with. The foundation is well understood and
23

24 ⁵ The authentication rule provides:

25 (a) General provision. The requirement of
26 authentication or identification as a condition precedent to
27 admissibility is satisfied by evidence sufficient to support
28 a finding that the matter in question is what its proponent
claims.

Fed. R. Evid. 901(a).

1 usually is easily established. See EDWARD J. IMWINKELRIED,
2 EVIDENTIARY FOUNDATIONS § 4.03[1] (5th ed. 2002) ("IMWINKELRIED");
3 5 WEINSTEIN § 900.07[1][b][i].

4 The paperless electronic record involves a difference in the
5 format of the record that presents more complicated variations on
6 the authentication problem than for paper records. Ultimately,
7 however, it all boils down to the same question of assurance that
8 the record is what it purports to be.

9 The logical questions extend beyond the identification of
10 the particular computer equipment and programs used. The
11 entity's policies and procedures for the use of the equipment,
12 database, and programs are important. How access to the
13 pertinent database is controlled and, separately, how access to
14 the specific program is controlled are important questions. How
15 changes in the database are logged or recorded, as well as the
16 structure and implementation of backup systems and audit
17 procedures for assuring the continuing integrity of the database,
18 are pertinent to the question of whether records have been
19 changed since their creation.

20 There is little mystery to this. All of these questions are
21 recognizable as analogous to similar questions that may be asked
22 regarding paper files: policy and procedure for access and for
23 making corrections, as well as the risk of tampering. But the
24 increasing complexity of ever-developing computer technology
25 necessitates more precise focus.

26 Some of these questions are becoming more important as the
27 technology advances. For example, digital technology makes it
28 easier to alter text of documents that have been scanned into a

1 database, thereby increasing the importance of audit procedures
2 designed to assure the continuing integrity of the records. See
3 George L. Paul, The "Authenticity Crisis" in Real Evidence, 15
4 PRAC. LITIGATOR No. 6, at 45-49 (2004). This adds an extra
5 dimension to consideration of whether the computer was "regularly
6 tested" for errors. See 5 WEINSTEIN § 901.11[2] (2005).

7 This ever-expanding complexity of the cyberworld has
8 prompted the authors of the current version of the Manual for
9 Complex Litigation to note that a judge should "consider the
10 accuracy and reliability of computerized evidence" and that a
11 "proponent of computerized evidence has the burden of laying a
12 proper foundation by establishing its accuracy." MANUAL FOR COMPLEX
13 LITIGATION (FOURTH) § 11.446 (2004),⁶ citing with approval, Gregory
14 P. Joseph, A Simplified Approach to Computer-Generated Evidence
15 and Animations, 43 N.Y.L. SCH. L. REV. 875 (1999-2000).

16 In effect, it is becoming recognized that early versions of
17 computer foundations were too cursory, even though the basic
18 elements covered the ground. For example, it has been said that
19 a qualified witness must testify as to the mode of record
20 preparation, that the computer is the standard acceptable type,

21 _____
22 ⁶ A fuller description of the problem is:

23 In general, the Federal Rules of Evidence apply to
24 computerized data as they do to other types of evidence.
25 Computerized data, however, raise unique issues concerning
26 accuracy and authenticity. Accuracy may be impaired by
27 incomplete data entry, mistakes in output instructions,
28 programming errors, damage and contamination of storage
media, power outages, and equipment malfunctions. The
integrity of data may also be compromised in the course of
discovery by improper search and retrieval techniques, data
conversion, or mishandling.

MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446.

1 and that business is conducted in reliance upon the accuracy of
2 the computer in retaining and retrieving information. BARRY
3 RUSSELL, BANKRUPTCY EVIDENCE MANUAL ¶ 803.17 (2005) ("RUSSELL"); cf. 5
4 WEINSTEIN § 900.07[1][c]. These several elements, however,
5 subsume a number of constituent elements.

6 Rule 901(b)(9), which is designated as an example of a
7 satisfactory authentication, describes the appropriate
8 authentication for results of a process or system and
9 contemplates evidence describing the process or system used to
10 achieve a result and demonstration that the result is accurate.
11 Fed. R. Evid. 901(b)(9).⁷ The advisory committee note makes
12 plain that Rule 901(b)(9) was designed to encompass computer-
13 generated evidence and also that it did not preclude taking
14 judicial notice in appropriate circumstances.⁸

15 Indeed, judicial notice is commonly taken of the validity of
16 the theory underlying computers and of their general reliability.
17 IMWINKELRIED § 4.03[2]; RUSSELL § 901.9. Theory and general

18 ⁷ The rule provides:

19 (9) Process or system. Evidence describing a process or
20 system used to produce a result and showing that the process
21 or system produces an accurate result.

22 Fed. R. Evid. 901(b)(9).

23 ⁸The Advisory Committee Note explains:

24 Example 9 is designed for situations in which the accuracy
25 of a result is dependent upon a process or system which
26 produces it. X rays afford a familiar instance. Among more
27 recent developments is the computer, as to which see
28 Transport Indemnity Co. v. Seib, 178 Neb. 253, 132 N.W.2d
871 (1965); [other citations omitted]. Example (9) does
not, of course, foreclose taking judicial notice of the
accuracy of the process or system.

Fed. R. Evid. 901(b)(9) advisory committee's note.

1 reliability, however, represent only part of the foundation.

2 Professor Imwinkelried perceives electronic records as a
3 form of scientific evidence and discerns an eleven-step
4 foundation for computer records:

- 5 1. The business uses a computer.
- 6 2. The computer is reliable.
- 7 3. The business has developed a procedure for
8 inserting data into the computer.
- 9 4. The procedure has built-in safeguards to ensure
10 accuracy and identify errors.
- 11 5. The business keeps the computer in a good state of
12 repair.
- 13 6. The witness had the computer readout certain data.
- 14 7. The witness used the proper procedures to obtain
15 the readout.
- 16 8. The computer was in working order at the time the
17 witness obtained the readout.
- 18 9. The witness recognizes the exhibit as the readout.
- 19 10. The witness explains how he or she recognizes the
20 readout.
- 21 11. If the readout contains strange symbols or terms,
22 the witness explains the meaning of the symbols or
23 terms for the trier of fact.

24 IMWINKELRIED § 4.03[2].

25 Although this is a generally serviceable modern foundation,
26 the fourth step warrants amplification, as it is more complex
27 than first appears. The "built-in safeguards to ensure accuracy
28 and identify errors" in the fourth step subsume details regarding
computer policy and system control procedures, including control
of access to the database, control of access to the program,
recording and logging of changes, backup practices, and audit
procedures to assure the continuing integrity of the records.

1 With that qualification, we evaluate American Express'
2 exhibits through the prism of the Imwinkelried foundation.

3 C

4 The foundational problem encountered by American Express
5 during the trial related primarily to authentication.

6 1

7 The testimony of the records custodian at trial regarding
8 the computer equipment used by American Express was vague,
9 conclusory, and, in light of the assertion that "[t]here's no way
10 that the computer changes numbers," unpersuasive.⁹

11 Similarly, the testimony of the records custodian regarding
12 software indicated lack of knowledge on that subject as well.¹⁰

13 _____
14 ⁹ The records custodian's testimony regarding the computer
was:

15 Q. You indicated previously that there was a mainframe
16 computer keeping these records; is that correct?

17 A. Correct.

18 Q. And is this a - what type of system would this be?
Do you have any -

19 A. You know, I don't - I couldn't testify to exactly
20 what - what the model is or anything like that. It's - you
21 know, our computer system that we've used for, you know,
22 quite some time to produce the documents, to gather the
23 information, to store the information and then, you know,
24 produce the statements to the card members. And we - you
know, it's highly accurate. It's based on the fees that go
in. There's no way that the computer changes numbers or so.
It's all what is presented to it from the electronic feeds
from the service merchants or establishments where the
charges were made.

25 Tr. 3/25/04 at 12-13.

26 ¹⁰ The records custodian's testimony regarding the software
was:

27 Q. Did the software that this used is - what type of a
28 software is it? Is it accounting software or is it billing
software? What kind of software is it?

A. It's - I don't know exactly what it is. I mean,
(continued...)

1 We do not perceive error in the trial court's assessment of
2 this testimony as indicating that the records custodian did not
3 seem to know anything "of any consequence either about the
4 software or the hardware."¹¹ We certainly cannot say that we
5 have a definite and firm conviction that there was a clear error
6 of judgment in rejecting the exhibits based on this testimony.

7 2

8 The trial court held the record open to permit the filing of
9 a declaration by a witness qualified to complete the foundation
10 for the admission of the electronic records.

11 The admissibility of evidence is a preliminary question for
12 the court to resolve, which may be done on declaration without
13 being bound by the rules of evidence other than privilege rules.
14 Fed. R. Evid. 104(a).

15 Indeed, Federal Rules of Evidence 803(6) and 902(11) were
16 amended in 2000 expressly to authorize self-authentication of a
17 business record by "written declaration of its custodian or other
18 qualified person" in certain circumstances. Fed. R. Evid. 803(6)
19 ("qualified witness") & 902(11) ("qualified person"). Hence, the
20 court's authorization of completing the foundation by declaration
21 of a "qualified" witness was appropriate.

22 The trial court concluded that the declaration in the post-
23 trial submission was doubly defective. First, the declaration

24 ¹⁰(...continued)

25 it's a combination of both because it does take the charges
26 as mentioned, electronic files, puts them together in a
27 mode. It sorts them, puts them to the correct account
28 numbers, the correct accounts, and then the billing
statements are produced from that.

Tr. 3/25/04 at 13-14.

¹¹ Tr. 3/25/04 at 14.

1 did not establish that the declarant was "qualified" to provide
2 the requisite testimony. Second, the declaration did not contain
3 information sufficient to warrant a conclusion that the "American
4 Express computers are sufficiently accurate in the retention and
5 retrieval of the information contained in the documents."

6 The qualifications of the declarant were particularly
7 important because the assertions regarding reliability and
8 accuracy of the American Express computers were fundamentally
9 conclusory and in the nature of opinion. While a "qualified"
10 witness or person under Rules 803(6) and 902(11) need not be an
11 expert, there needs to be enough information presented to
12 demonstrate that the person is sufficiently knowledgeable about
13 the subject of the testimony. See 5 WEINSTEIN § 900.07[1][d].

14 Here, the declarant merely asserted that he is employed by
15 American Express and is personally familiar with the hardware and
16 software and computer record-keeping systems in use in the credit
17 card industry. He did not indicate his job title or anything
18 about his training and experience that would import an aura of
19 verisimilitude to his assertions.¹²

20 The trial court ruled that this was not adequate
21 qualification of the witness because the "declaration contains no
22

23 ¹² The declarant's putative qualifications were:
24

25 I am employed by American Express Travel Related
26 Services Company, Inc. ("American Express"), plaintiff
27 herein. The facts stated are within my personal knowledge.
28 I am personally familiar with the computer hardware and
software used by American Express in its billing and
cardmember information system. I am also personally
familiar with the credit card industry and the computer
record keeping systems generally in use in the industry.

Declaration, 4/1/04, at 1.

1 information at all about [declarant's] background and training or
2 whether and to what extent he is knowledgeable about the American
3 Express computers, or how he obtained such information."¹³ Since
4 it is apparent that the trial court did not know whether the
5 declarant was a seasoned professional manager of computer records
6 or a janitor, we perceive no error in this ruling and do not have
7 a definite and firm conviction that there was a clear error of
8 judgment in rejecting the declaration on this ground.

9 Regardless of the question of the declarant's
10 qualifications, the trial court also ruled that the declaration
11 was deficient as to basic foundational requirements for admission
12 of electronic records, noting particularly the need to show the
13 accuracy of the computer in the retention and retrieval of the
14 information at issue.

15 The declaration merely identified the makes and models of
16 the equipment, named the software, noted that some of the
17 software was customized, and asserted that the hardware and
18 software are standard for the industry, regarded as reliable, and
19 periodically updated.¹⁴ There is no information regarding

20
21 ¹³ Findings of Fact and Conclusions of Law at 3.

22 ¹⁴ The pertinent portion of the declaration in the post-
23 trial submission was:

24 Storage of the cardmember information is on an IBM
25 Mainframe Z390 Computer. American Express has 22 of these
26 computers currently in operation. The billing software is
27 mainly performed using the "Triumph" software package
28 purchased from Arthur Anderson. In addition to the
"Triumph" software there is also the "Legacy" software
package.

 The system that tracks and stores the Record's [sic] of
Charges, (ROC's), is the World Wide Card Authorization
System, (WWCAS). This system was written by American
Express based on IBM structure guidelines.

(continued...)

1 American Express' computer policy and system control procedures,
2 including control of access to the pertinent databases, control
3 of access to the pertinent programs, recording and logging of
4 changes to the data, backup practices, and audit procedures
5 utilized to assure the continuing integrity of the records. All
6 of these matters are pertinent to the accuracy of the computer in
7 the retention and retrieval of the information at issue.

8 In view of the cursory nature of the declaration and the
9 lack of basic information that would provide assurance that the
10 record reproduced from the electronic media is identical to the
11 record that was originally stored, we perceive no error and do
12 not have a definite and firm conviction that there was a clear
13 error of judgment in determining that the evidentiary foundation
14 was inadequate.

15 II

16 The court's refusal to admit the monthly billing statements
17 in evidence left American Express with only evidence of the
18 debtor's statement in entries on Schedule F (Creditors Holding
19 Unsecured Nonpriority Claims) that showed amounts owed that were
20 not designated as disputed.

21 These entries on the debtor's verified schedules constitute
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¹⁴(...continued)

24 A Kodak Imaging System is used to image payments,
25 correspondence, etc. for use in the American Express
network.

26 The hardware and software is reliable and has been in
27 use for some time and is periodically updated. The IBM
mainframes are standard for the industry and are known for
28 their reputation for reliability. The software is
recognized in the industry as appropriate and reliable for
this use.

1 statements by (or adopted by) a debtor that qualify, when offered
2 against the debtor, as admissions by a party opponent that are
3 not hearsay. Fed. R. Evid. 801(d); RUSSELL § 801.13.

4 The limitation of the evidence to these admissions created
5 two hurdles for American Express. First, as the admissions were
6 only as to total amounts owed, there was no evidence regarding
7 the details of charges as to number, amounts, dates, and nature
8 of expenses. Second, the \$3,245.00 admitted to be owed on the
9 gold card was less than the \$5,617.16 that American Express
10 conceded to be dischargeable with respect to that card account,
11 which hurdle became particularly aggravating to American Express
12 when the court noted that, if the gold card statements were in
13 evidence, it would have excepted from discharge most of the
14 remaining \$19,868.76 owed on the gold card.¹⁵

15 III

16 We reject as lacking in merit the two assigned errors in
17 which American Express contends that the court was required to
18 enter a default judgment and was not permitted to dismiss the
19 action without a trial. The essential problem is that American
20 Express transmogrifies the record in order make such assertions.

21 Procedurally, what occurred was a trial, not a default
22 judgment hearing. The clerk's docket entry from the December 23,
23 2003, status hearing noted "Ruling: Trial - 2-19-04 at 10:00
24 a.m." The docket entry reflecting continuation to the ultimate
25

26 ¹⁵ As our resolution of the evidentiary issue regarding the
27 gold card is logically fatal to the count regarding the platinum
28 card as well, we need not address the assignment of error
questioning the trial court's ruling that American Express did
not justifiably rely on assumptions regarding the debtor's income
when it issued the platinum card.

1 trial date of March 25, 2004, was to the same effect: "Notice of
2 continued hearing Trial; Filed by: Dennis C. Winters, Attorney
3 for Plaintiff." Moreover, American Express' counsel believed he
4 was participating in a trial, as evidenced by his specific
5 reference to it as a trial during the proceeding.¹⁶

6 Although counsel now represents in his brief that he filed a
7 "Request and Application for Default Judgment," the docket does
8 not mention any such document. Nothing in the record suggests
9 that the court was being asked to enter a default judgment or
10 believed it was conducting a default judgment hearing.

11 In fine, it was plain at the time, and is still plain, that
12 the court conducted a trial on the merits of plaintiff's case on
13 March 25, 2004. There was no pending motion for default
14 judgment. American Express was fully apprised in advance that
15 the proceeding would be a trial and did not, at the time of
16 trial, object to the trial.

17 To be sure, American Express suffered the ignominy of losing
18 even though its opponent did not show up. There is, however,
19 little difference between that and the plaintiff who suffers an

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21 ¹⁶ Not only is the transcript titled "Trial Re Complaint To
22 Determine Dischargeability Of Debt," a relevant portion of the
transcript reads:

23 THE COURT: Very well, sir. We talked about having
24 another witness.

25 MR. WINTERS: Yes, your Honor. What I would request
26 is, since this is all your - what you basically asked for is
27 just information on the - on the type of computer and
28 software and the foundational issues, that for this matter
alone, if we could just adjourn the trial and allow me to
submit that on a declaration basis rather than bringing a
witness out simply to testify on that small a matter, that
could be the most expeditious way of handling that issue.

Tr. 3/25/04 at 49 (emphasis supplied).

1 adverse judgment on partial findings before the defense puts on
2 its case. Fed. R. Civ. P. 52(c). What is required is that
3 American Express have been fully heard on the issues of
4 nondischargeability, which happened.

5 When a court fixes a formal trial date in advance and says
6 at the time that it is conducting a trial, that means that it is
7 not a dress rehearsal and that the day has come for the
8 respective parties to present their cases once and for all.
9 American Express had its full due process opportunity to
10 establish that the debts should be excepted from discharge and
11 did not prevail. It is too late to reinvent the record.

12 Hence, there is neither factual basis nor substantial merit
13 in the other two assigned errors: "whether the Bankruptcy Court
14 erred when it dismissed the Appellants complaint, instead of
15 setting the matter for trial"; and "whether the Bankruptcy Court
16 erred as a matter of law when it refused to grant a default
17 judgment in favor of the Appellant when the Appellee did not
18 answer or otherwise defend the Complaint, thereby making certain
19 admissions." The record demonstrates that there was a trial and
20 that there was no motion for default judgment.

21 There was no procedural error.¹⁷

22 ***

23 We conclude that it was not an abuse of discretion for the
24 trial court to refuse to admit plaintiff's monthly billing

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26 ¹⁷ At oral argument of this appeal, counsel for American
27 Express conceded that the defendant may not have been served by
28 mail at the correct address. If this matter were to make its way
conduct the fact-finding probative of whether it had personal
jurisdiction. See Morris v. Peralta (In re Peralta), 317 B.R.
381, 386-87 (9th Cir. BAP 2004).

1 statements regarding the debtor, that without such evidence the
2 essential elements of American Express' case under § 523(a)(2)(A)
3 were not established, and that there was no other error.

4 AFFIRMED.

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