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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re IDEARC INC., et al., Debtors.	Chapter 11 Case No.:09-31828 (BJH) (Jointly Administered)

JUDGMENT CREDITORS' OBJECTIONS TO THE DECLARATION OF

NORMAN WHITE

IN SUPPORT OF DEBTORS' MOTION TO ASSUME CERTAIN OPERATING AGREEMENTS, FILED ON MAY 20, 2009

IN THIS ACTION

OBJECTION NO. 1: Lacks authentication – Fed. R. Evid. 901, "best evidence rule" – Fed. R. Evid. 1002, hearsay – Fed. R. Evid. 802.

"Attached as Exhibit A is a List of Traffic Partner Contracts the Debtors seek to assume, with corresponding cure amounts. These contracts are in writing, executed, active, and have not expired or been terminated." (Declaration of Norman White, Paragraph 2, Page 1; Exhibit A.)

Grounds for objection: Lacks authentication – Fed. R. Evid 901, "best evidence rule" – Fed. R. Evid 1002, hearsay

Lacks authentication, "best evidence rule" – Fed. R. Evid. 901, 1002. If a document is being introduced, the document must be relevant and authenticated. Authenticating the document means that its foundation must be laid, i.e., it is demonstrated to be what it is purported to be. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." (Fed. R. Evid. 901.) Moreover, it must comply with the "best evidence rule," (Fed. R. Evid. 1002) and not be privileged or hearsay. Where the contents of a writing are at issue, the best evidence rule requires the originals to be used or they must be shown to be unavailable through no fault of its proponent (Fed. R. Evid. 1002)."[This] rule requires that parties that seek to prove what the contents of a writing are must produce the original writing...." (*Maxwell Macmillan Realization Liquidating Trust v. Aboff* (1995) 186 B.R. 35, 47, citing *Herzig v. Swift & Co.* (1945) 146 F. 2d 444, 445.)

Here, Mr. White cites to Exhibit A which appears to be a summary of various alleged contracts[1] with Idearc's Traffic Partners. The motion that Mr. White's declaration supports seeks to summarize details of these various contracts and thus only indirectly refers to the contracts. Because the dollar amounts of the cited contracts are at issue, then the "best evidence rule" applies. Mr. White's failure to provide the original document

[1] Idearc makes the legal conclusion that there are, in fact, legally binding contracts without any factual support as to their existence. A contract is a legally binding agreement that requires an offer, acceptance, and consideration. Here, Idearc has neither produced the contract in its original form (hence the following objections pursuant to Fed. R. Evid. 901 and 1002), nor has Idearc provided evidence that a legally binding contract exists. This is a convenient maneuver for Idearc, since citation to a legally binding contract, a writing of independent legal significance, effectively inoculates it from a hearsay objection under Fed. R. Evid 802.

may be excusable, pursuant to Rule 1006[2], if Mr. White provided evidence that the original contract is so voluminous or complex as to render it impracticable to produce in court, in which case Mr. White's summary of the contracts in question would have been appropriate under Rule 1006. But here, Mr. White has produced a summary of the various cited contracts without an explanation of why, pursuant to Rule 1006, the originals would be impracticable to produce.

Therefore, Mr. White must comply with Rules 901 and 1002 and produce the original copies of the contracts whose contents – i.e., the "cure amounts" – are here at issue.

Hearsay – Fed. R. Evid. 802. Hearsay is an out-of-court statement offered for the truth of the matter asserted. Under Rule 801(a), a "statement" is "(1) an oral *or written assertion*...." (Fed. R. Evid. 801(a). Emphasis added.) Generally, absent some exclusions, exemptions, or exceptions, hearsay is not admissible.

Here, the information provided in Exhibit A by Idearc is cited from some other contracts, i.e., the various Traffic Partner contracts, and are thus written statements that were made out-of-court. Here, the references to various contracts are asserted to be true. Accordingly, these hearsay statements are inadmissible. The contracts as between the Traffic Partners and Idearc are cited with respect to "cure amounts." This is a written statement that was made out-of-court. It is being asserted as a true statement as to the claimed fact that the prices set forth in the agreement are "below market rates for like

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[2] An exception to the "best evidence rule" is Fed. R. Evid. 1006 which allows "[t]he contents of voluminous writings, records, or photographs [that] cannot conveniently be examined in court [to] be presented in the form a chart, summary, or calculation." (Fed. R. Evid. 1006.) Moreover, Rule 1006 mandates that "[t]he originals, or duplicates, shall be made available for examination ... by other parties at reasonable time and place." In determining the applicability of Rule 1006, the court in *Leonard v. Mylex Corp.* ((1999) 240 B.R. 328) explained that "[t]he failure to provide a full copy [of the document, when requested by the opposing party,] with the court reporter's certification is ... fatal." (*Leonard*, at 355.) No exception applies here, and even if proponent of the evidence sought to avail itself of the exception, Idearc has not complied with foundation prerequisites.

volumes under similar terms and conditions and take volume into account" (Declaration of Norman White, Page 1, Paragraph 2; Exhibit A.); it is therefore offered for the truth of the matter being asserted. Accordingly, the statements are inadmissible hearsay.

Court's Ruling on Objection #1: Sustained _____ Overruled _____

OBJECTION NO. 2: Lacks personal knowledge – Fed. R. Evid. 602, calls for speculation – Fed. R. Evid. 602, assumes facts not in evidence – Fed. R. Evid. 611(a)

"[A]n interruption in the traffic payment process will have a negative impact on the cash flow of our Partners. Additionally such a payment interruption may cause valuable and long-time – but smaller – Traffic Partners substantial distress. Where payment interruptions have already occurred, the Debtors have already experienced reduced traffic and thus reduced revenue for Idearc Search Marketing clients." (Declaration of Norman White, Paragraph 7, Page 2.)

Grounds for objection: Lacks personal knowledge – Fed. R. Evid. 602, calls for speculation – Fed. R. Evid. 602, assumes facts not in evidence – Fed. R. Evid. 611(a).

Lacks personal knowledge – Fed. R. Evid. 602. "A witness may not testify to a matter unless the witness has personal knowledge of the matter." (*Granahan v. Christian* (2007) 2007 Bankr. LEXIS 926, citing Fed. R. Evid. 602.) Nothing in the statement supports Mr. White's personal knowledge regarding (a) the negative impact on the cash flow of Idearc's partners if there were an interruption in the traffic payment process; or (b) the "substantial distress" that would impact the Traffic Partners if there were an interruption in payment.

Calls for speculation – Fed. R. Evid. 602. A witness may not testify as to a guess or speculation. First, Mr. White's statement, without more, calls for speculation. There is

no evidence provided that supports Mr. White's claim regarding the potential long-time "substantial distress" (Declaration of Norman White, Paragraph 7, Page 2) that would befall various Traffic Partners in the event of a payment interruption. Second, the word choice "such a payment interruption *may* cause" is, by definition, speculation.

Assumes facts not in evidence – Fed. R. Evid. 611(a). The statement assumes facts not in evidence. Mr. White's statement that "an interruption in the traffic payment process will have a negative impact on the cash flow of our Partners" (*Id.*) is drawing a conclusion based upon facts which, absent any evidence of their existence, here leads to an inappropriate statement as its validity relies upon the evidence of such facts. Similarly, the statement that "the Debtors have already experienced reduced traffic and thus reduced revenue for Idearc Search Marketing clients" (*Id.*) also assumes facts not in evidence: Mr. White should have produced evidence demonstrating such claims, namely (a) the reduced traffic and (b) resultant reduced revenue.

Court's Ruling on Objection #2: Sustained _____ Overruled _____

OBJECTION NO. 3: Vague and ambiguous – Fed. R. Evid. 611(a); lacks personal knowledge – Fed. R. Evid. 602, calls for speculation – Fed. R. Evid. 602, assumes facts not in evidence – Fed. R. Evid. 611(a).

"And with the online portion of the Debtors' expected to be a growth engine of the company, it is critical that this network remains uncompromised and growing. Any payment interruption could easily put such an outcome in jeopardy." (Declaration of Norman White, Paragraph 8, Page 2.)

Grounds for objection: Vague and ambiguous – Fed. R. Evid. 611(a); lacks personal knowledge – Fed. R. Evid. 602, calls for speculation – Fed. R. Evid. 602, assumes facts not in evidence – Fed. R. Evid. 611(a).

Vague and ambiguous – Fed. R. Evid. 611(a). The first sentence in this statement contains an incomplete sentence: "[w]ith the online portion of *the Debtors' expected to be a growth engine....*" (Declaration of Norman White, Paragraph 8, Page 2. Emphasis added.) There is a subject missing following the possessive form of "Debtors," and as it reads, is logically incomprehensible and thus vague and ambiguous.

Lacks personal knowledge – Fed. R. Evid. 602. There is nothing in the statement that supports Mr. White's personal knowledge with respect to the claim that the "Debtors' ['something' is] expected to be a growth engine of the company." (*Id.*)

Calls for speculation – Fed. R. Evid. 602. There is no evidence provided that supports Mr. White's claim that "[a]ny payment interruption *could* easily put such an outcome in jeopardy." (*Id.* Emphasis added.) Moreover, the word choice "could" indisputably demonstrates Mr. White's speculation, rather than conviction, on the matter.

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Assumes facts not in evidence – Fed R. Evid. 611(a). There are no facts provided that support Mr. White's claim that "the online portion of the Debtors' ['something' is] expected to be a growth engine of the company." (*Id.*)

Court's Ruling on Objection #3: **Sustained _____** **Overruled _____**

Date: May 31, 2009

The McMillan Law Firm, APC

/s/ Scott A. McMillan

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Scott A. McMillan
Attorneys for Judgment Creditors
Sean Ryan and The McMillan Law Firm, APC

CERTIFICATE OF SERVICE

I certify that on May 31, 2009, a true and correct copy of the foregoing pleading was served (1) electronically by the Court's ECF system, or (2) according to the orders specific to this case – by sending an email copy to the persons who have supplied email address, or otherwise (3) by first class mail upon those persons identified by the ECF system as having requested notice appeared but not receiving electronic notices.

/S/ SCOTT A. MCMILLAN

BY: _____

Scott A. McMillan