

1 Scott A. McMillan, Cal. Bar. No. 212506

2 Evan Kalooky, Cal. Bar. No. 247851

3 **THE MCMILLAN LAW FIRM, APC**

4 4670 Nebo Drive, Suite 200

5 La Mesa, California 91941-5230

6 (619) 464-1500 x 14

7 Fax: (206) 600-5095

8 E-mail: scott@mcmillanlaw.us

9 Lawyers for Sean Ryan and The McMillan Law Firm, APC, appearing Pro Hac Vice.

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

13 In re

14 IDEARC INC., et al.,
15 Debtors.

16 Chapter 11

17 Case No.:09-31828 (BJH)
18 (Jointly Administered)

19 **JUDGMENT CREDITORS' OBJECTIONS TO THE DECLARATION OF**
20 **MIKE WOOD**

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

23 **IN THIS ACTION**

24 **OBJECTION NO. 1: Lacks personal knowledge – Fed. R. Evid. 602, lacks**

25 **authentication – Fed. R. Evid. 901, “best evidence rule” – Fed. R. Evid. 1002.**

26 “This declaration is provided in support of the Debtor’s Motion to Assume Certain
27 Operating Agreements Pursuant to 11 U.S.C. §365 and Federal Rule of Bankruptcy
28 Procedure 6006 to explain why Idearc Media LLC (“Idearc”) seeks assumption of the
printing and publishing contract detailed below.” (Declaration of Mike Wood, Page 1,
Paragraph 2.)

///

1 **Grounds for objection: Lacks personal knowledge – Fed. R. Evid. 602, lacks**
2 **authentication – Fed. R. Evid. 901, “best evidence rule” – Fed. R. Evid. 1002.**

3 **Lacks personal knowledge – Fed. R. Evid. 602.** “A witness may not testify to a
4 matter unless the witness has personal knowledge of the matter.” (*Granahan v. Christian*
5 (2007) 2007 Bankr. LEXIS 926, citing Fed. R. Evid. 602.) Here, there are no facts to
6 support Mr. Wood’s personal knowledge of the document. Moreover, the document is not
7 self-authenticating.

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

21 Here, Mr. Wood cites to a printing and publishing contract, but does not provide or
22 authenticate the document.¹ The motion that Mr. Wood’s declaration supports, seeks to
23

24 ¹ An exception to the “best evidence rule” is Fed. R. Evid. 1006 which allows “[t]he contents of
25 voluminous writings, records, or photographs [that] cannot conveniently be examined in court [to] be
26 presented in the form a chart, summary, or calculation.” (Fed. R. Evid. 1006.) Moreover, Rule 1006
27 mandates that “[t]he originals, or duplicates, shall be made available for examination ... by other parties
28 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

1 explain details of Idearc’s printing and publishing contract, and states that the contract is
2 “detailed below,” which it is not; therefore, the contents of the document are plainly at
3 issue. Mr. Wood’s failure to provide the original document may be excusable, pursuant to
4 Rule 1006, if Mr. Woods provided evidence that the original contract is so voluminous or
5 complex as to render it impracticable to produce in court, in which case Mr. Wood may
6 have at least provided a summary of the contract as Rule 1006 allows. But Mr. Wood has
7 produced neither the original contract nor a summary of its contents.

8 Therefore, the “exception” that Rule 1006 effectively provides to Rule 1002 is
9 inapplicable, and thus Mr. Woods must comply with Rules 901 and 1002 and produce the
10 original copy of the contract.

11 **Court’s Ruling on Objection #1:** **Sustained** _____ **Overruled** _____

12
13 **OBJECTION NO. 2: Lacks personal knowledge – Fed. R. Evid. 602, lacks**
14 **authentication – Fed. R. Evid. 901, “best evidence rule” – Fed R. Evid 1002.**

15 “Idearc has a written, executed printing contract with RR Donnelley & Sons
16 Company (“RR Donnelley”). The contract^[2] between RR Donnelley and Idearc is dated
17 February 22, 2006, expires on February 21, 2016 and provides for RR Donnelley to print
18 all of Idearc’s telephone directories.” (Declaration of Mike Wood, Page 1, Paragraph 4.)

19 **Grounds for objection: Lacks personal knowledge – Fed. R. Evid. 602, lacks**
20 **authentication – Fed. R. Evid. 901, “best evidence rule” – Fed R. Evid 1002.**

21 _____
22 exception, Idearc has not complied with foundation prerequisites.

23 ² Idearc has taken the liberty of providing this succinct legal conclusion that there is, in fact, a
24 legally binding contract as between Idearc and RR Donnelley without any proof as to its existence. A
25 contract is a legally binding agreement that requires an offer, acceptance, and consideration. Here, Idearc
26 has neither produced the contract in its original form (hence the following objections pursuant to Fed. R.
27 Evid. 901 and 1002), nor has Idearc provided even the slightest modicum of evidence that a legally
28 binding contract exists, instead expecting the Court to take for granted that their legal conclusion is
accurate, i.e., that there is a valid contract as between Idearc and RR Donnelley. 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.

1 **Lacks personal knowledge – Fed. R. Evid. 602.** There are no facts to support Mr.
2 Wood’s personal knowledge of the document. Moreover, the document is not self-
3 authenticating.

4 **Lacks authentication, “best evidence rule” – Fed. R. Evid. 901, 1002.** Mr.
5 Wood has again cited the contract between RR Donnelley and Idearc dated February 22,
6 2006, but failed to lay the foundation for this document. Here, the contents of the
7 document are at issue because the motion that Mr. Wood’s declaration supports, seeks to
8 explain details of Idearc’s printing and publishing contract. Moreover, the Rule 1006
9 “exception” to Rule 1002 has not been satisfied. Therefore, Rule 901 and the “best
10 evidence rule” require the original document to be produced.

11 **Court’s Ruling on Objection #2:** **Sustained** _____ **Overruled** _____

12
13 **OBJECTION NO. 3: Lacks personal knowledge – Fed. R. Evid. 602, calls for**
14 **speculation – Fed. R. Evid. 602, assumes facts not in evidence – Fed. R. Evid. 611(a),**
15 **Expert opinion– Fed. R. Evid. 701.**

16 “There are only two printers in North America with the capability to produce
17 Idearc’s telephone directories at the necessary quantity, quality and specifications.”)
18 (Declaration of Mike Wood, Page 1, Paragraph 4.)

19 **Grounds for objection: Lacks personal knowledge – Fed. R. Evid. 602, calls**
20 **for speculation – Fed. R. Evid. 602, assumes facts not in evidence – Fed. R. Evid.**
21 **611(a), inadmissible expert opinion with insufficient preliminary foundational facts**
22 **demonstrated – Fed. R. Evid. 701.**

23 **Lacks personal knowledge – Fed. R. Evid. 602.** Nothing in the statement
24 supports Mr. Wood’s personal knowledge regarding (a) what defines a viable printer for
25 Idearc’s purposes; or (b) the total number of viable printers in North America with the
26 required capabilities to print Idearc’s telephone directories; or (c) why those two printers
27 are the only viable printers for Idearc’s purposes.
28

1 **Calls for speculation – Fed. R. Evid. 602.** A witness may not testify as to a guess
2 or speculation. First, Mr. Wood’s statement, without more, calls for speculation. There is
3 no evidence provided that supports Mr. Wood’s claim regarding the number of viable
4 printers in North America is little more than a guess.

5 **Assumes facts not in evidence – Fed. R. Evid. 611(a).** The statement assumes
6 facts not in evidence. There is no evidence indicating the number of such commercial or
7 industrial printers in North America or their various printing capabilities, nor is there any
8 evidence present to support how and why these referenced printers are the only two such
9 viable printers for Idearc’s printing purposes.

10 **Calls for expert opinion – Fed. R. Evid. 701.** Under Fed R. Evid. 701, “[i]f the
11 witness is not testifying as an expert, the witness’ testimony in the form of opinions or
12 inferences is limited to those opinions or inferences which are (a) rationally based on the
13 perception of the witness, and (b) helpful to a clear understanding of the witness’
14 testimony or the determination of a fact in issue, and (c) not based on scientific, technical,
15 or other specialized knowledge within the scope of Rule 702.”

16 Here, nothing in the facts supports a finding that Mr. Wood has been qualified as
17 an expert with respect to industrial printers. Indeed, Mr. Wood’s own declaration
18 describes him as “Senior Staff Consultant for Contract and Vendor Management and
19 Category Manager of Print and Distribution for Idearc Media,” and that his duties have
20 “included negotiating the prices and drafting the terms and conditions of Idearc’s printing
21 purchasing agreements.” This statement does not qualify Mr. Wood as an expert.

22 Accordingly, Mr. Wood is a lay witness, and nothing in the statement indicates that Mr.
23 Wood’s knowledge of the printers is rationally based on his own perception. Moreover,
24 while arguably helpful to understanding the issue, the information relies on technical or
25 specialized knowledge which Mr. Wood has not been qualified to possess. Therefore,
26 because Rule 701 requires each of the above three elements to be satisfied to allow a lay
27 witness’ testimony, the above declaration statement is objectionable.

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

1 **OBJECTION NO. 4: Lacks personal knowledge – Fed. R. Evid. 602, calls for**
2 **speculation – Fed. R. Evid. 602, assumes facts not in evidence – Fed. R. Evid. 611(a),**
3 **lacks authentication – Fed. R. Evid. 901, “best evidence rule” – Fed. R. Evid. 1002,**
4 **calls for expert opinion – Fed. R. Evid. 701, hearsay – Fed. R. Evid. 802.**

5 “The prices specified in the contract are below market rates for like volumes under
6 similar terms and conditions and take volume into account. Renegotiation of the contract
7 would most likely result in Idearc paying a higher cost per unit because all of RR
8 Donnelley’s costs under the contract, such as ink and labor, have increased since the date
9 of the contract.” (Declaration of Mike Wood, Page 1, Paragraph 5.)

10 **Grounds for objection: Lacks personal knowledge – Fed. R. Evid. 602, calls**
11 **for speculation – Fed. R. Evid. 602, assumes facts not in evidence – Fed. R. Evid.**
12 **611(a), lacks authentication – Fed. R. Evid. 901, “best evidence rule” – Fed. R. Evid.**
13 **1002, calls for expert opinion – Fed. R. Evid. 701, hearsay – Fed. R. Evid. 802.**

14 **Lacks personal knowledge – Fed. R. Evid. 602.** Nothing in the statement
15 supports Mr. Wood’s personal knowledge regarding (a) the market rates for like volumes
16 under similar terms and conditions or (b) that renegotiation of the contract would be
17 detrimental to Idearc insofar as causing it to pay a higher cost due to the increase in costs.
18 Finally, there is nothing to support Mr. Wood’s claimed personal knowledge that costs
19 under the contract have increased since the date of the contract.

20 **Calls for speculation – Fed. R. Evid. 602.** First, Mr. Wood’s statement, without
21 more, calls for speculation: “Renegotiation of the contract would *most likely* result in
22 Idearc paying a higher cost...” Emphasis added. (Declaration of Mike Wood, Page 1,
23 Paragraph 5.) Here, the qualifying adverb “most likely” proves speculation on Mr.
24 Wood’s part and thus this objection is proper. Moreover, there is no evidence provided
25 that supports Mr. Wood’s claim regarding the prices specified in the contract and the
26 market rates.

27 **Assumes facts not in evidence – Fed. R. Evid. 611(a).** The statement assumes
28 facts not in evidence. There is no evidence demonstrating that the prices in the contract

1 are below market rates for like volumes or that they take volume into effect, nor is there
2 any evidence indicating the various cost increases in supplies and labor that Mr. Wood
3 cites.

4 **Lacks authentication, “best evidence rule” – Fed. R. Evid. 901, 1002.** Mr.
5 Wood has again cited the contract between RR Donnelley and Idearc dated February 22,
6 2006, but has failed to lay the foundation for this document. Here, the declaration is citing
7 specific terms in the contract, and therefore the contents of the contract are at issue.
8 Therefore, the “best evidence rule” (Fed. R. Evid. 1002) requires the original document
9 to be produced. Moreover, there are no facts to support Mr. Wood’s personal knowledge
10 of the document, and the document is not self-authenticating.

11 **Calls for expert opinion – Fed. R. Evid. 602.** Here, nothing in the facts supports
12 a finding that Mr. Wood has been qualified as an expert with respect to the micro- and
13 macroeconomic trends of the entire printer market generally. Indeed, Mr. Wood’s own
14 declaration describes him as “Senior Staff Consultant for Contract and Vendor
15 Management and Category Manager of Print and Distribution for Idearc Media,” and that
16 his duties have “included negotiating the prices and drafting the terms and conditions of
17 Idearc’s printing purchasing agreements.” Without more, this statement does not qualify
18 Mr. Wood as an expert. Accordingly, Mr. Wood must be qualified a lay witness. As such,
19 nothing in the statement indicates that his knowledge of current market prices, including
20 the increase in costs of supplies and labor, is rationally based on his own perception.
21 Moreover, while arguably helpful to understanding the issue, the information relies on
22 technical or specialized knowledge which Mr. Wood has not been qualified to possess.
23 Therefore, because Rule 701 requires each of the above three elements to be satisfied to
24 allow a lay witness’ testimony, the above declaration is objectionable.

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

1 **Lacks personal knowledge – Fed. R. Evid. 602.** Nothing in the statement
2 supports Mr. Wood’s personal knowledge regarding the additional costs required to
3 secure another supplier.

4 **Calls for speculation – Fed. R. Evid. 602.** Mr. Wood’s statement, without more,
5 calls for speculation. Here, there is no evidence provided that supports Mr. Wood’s claim
6 that, absent the benefit of the printing contract, production of Idearc’s telephone
7 directories would be delayed and cause additional costs to be incurred to secure another
8 supplier is little more than a guess.

9 **Assumes facts not in evidence – Fed. R. Evid. 611(a).** In addition, the statement
10 assumes facts not in evidence. There is no evidence demonstrating that Idearc would
11 incur delays and additional costs in order to secure another printer. Without further
12 evidence, there is nothing to preclude the possibility that Idearc has alternate viable
13 avenues of printing that would not necessarily burden Idearc with delays and costs.

14 **Lacks authentication, “best evidence rule” – Fed. R. Evid. 901, 1002.** Mr.
15 Wood has again cited the contract between RR Donnelley and Idearc dated February 22,
16 2006, but has failed to lay the foundation for this document. Here, the contents of the
17 document are at issue because the motion that Mr. Wood’s declaration supports, seeks to
18 explain details of Idearc’s printing and publishing contract. Therefore, the “best evidence
19 rule” (Fed. R. Evid. 1002) requires the original document to be produced. Moreover, there
20 are no facts to support Mr. Wood’s personal knowledge of the document, and the
21 document is not self-authenticating.

22 **Court’s Ruling on Objection #5:** **Sustained** _____ **Overruled** _____

23
24 **OBJECTION NO. 6: Lacks personal knowledge – Fed R. Evid. 602, lacks**
25 **authentication – Fed. R. Evid. 901, “best evidence rule” – Fed. R. Evid. 1002,**
26 **hearsay – Fed. R. Evid. 802**

27 “As of March 31, 2009, (the “Petition Date”): Idearc was not in default under this
28

1 contract; The unpaid amount due from Idearc to RR Donnelley is \$1,210,387.53; and The
2 contract has not expired or terminated.” (Declaration of Mike Wood, Pages 1-2,
3 Paragraph 7.)

4 **Grounds for objection: Lacks personal knowledge – Fed R. Evid. 602, lacks**
5 **authentication – Fed. R. Evid. 901, “best evidence rule” – Fed. R. Evid. 1002,**
6 **hearsay – Fed. R. Evid. 802**

7 **Lacks personal knowledge – Fed. R. Evid. 602.** There are no facts to support Mr.
8 Wood’s personal knowledge of the document. Moreover, the document is not self-
9 authenticating.

10 **Lacks authentication, “best evidence rule” – Fed. R. Evid. 901, 1002.** Mr.
11 Wood has again cited the contract between RR Donnelley and Idearc dated February 22,
12 2006, but has failed to lay the foundation for this document. Here, the contents of the
13 document are at issue because the motion that Mr. Wood’s declaration supports, seeks to
14 explain details of Idearc’s printing and publishing contract. Therefore, the “best evidence
15 rule” (Fed. R. Evid. 1002) requires the original document to be produced.

16 ///

17 ///

18 ///

19

20

21

22

23

24

25

26

27

28

