

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 **CAROL DESMOND-DONOHUE**
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:**

25 "Idearc currently owes the following amounts to each vendor for services
26 performed prior to March 31, 2009 (the "Petition Date"):

27 <u>Vendor</u>	28 <u>Amount Due</u>
Allied International Credit Corp.	\$80,822.26
Allied Interstate Inc.	\$30,871.08
CreditWatch Services LTD	\$84,512.42

1	Dun and Bradstreet, Inc.	\$17,239.94
2	Equifax Technology Solution, LLC	\$9,278.68
3	ER Solutions Inc.	\$13,576.11
4	Experian Information Solutions, Inc.	\$8,660.04
5	MCCR Inc.	\$0.00
6	Moore Wallace America Inc. /Moore Wallace DCS	\$82,910.01
7	Paymentech Merchant Services Inc.	\$0.00
8	Pinnacle Financial Group	\$35,738.32
9	Telcollect	\$12,355.20”

10 (Declaration of Carol Desmond-Donohue, Paragraph 8, Page 3.)

11 **Grounds for objection: Lacks authentication – Fed. R. Evid. 901, “best**
 12 **evidence rule” – Fed. R. Evid. 1002, hearsay – Fed. R. Evid. 802.**

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

26 Here, Ms. Desmond-Donohue states the various dollar amounts owed each vendor
 27 for services performed prior to March 31, 2009. These dollar values presumably came

1 from some document, computer file, or other memorialized medium, but Ms. Desmond-
2 Donohue does not lay the foundation for the source of these figures. Moreover, subject to
3 the “best evidence rule,” because these figures are at issue, the original must be produced.
4 Pursuant to Rule 1006¹, if Ms. Desmond-Donohue provided evidence that the original
5 document containing these figures is so voluminous or complex as to render it
6 impracticable to produce in court, Ms. Desmond-Donohue may have at least provided a
7 summary of the contract as Rule 1006 permits. But here, Ms. Desmond-Donohue has
8 produced neither the original contract² nor a summary of its contents.

9 Idearc must have statements from each of these vendors that demonstrate when the
10 debts were incurred. Otherwise, it might suggest that Idearc is “playing favorites”
11 between the unsecured creditors and not identifying what debts must, in fairness and
12 consonant with the doctrine of equality of distribution and treatment among unsecured
13 creditors, be identified in amount and by date incurred.

14 Therefore, the “exception” that Rule 1006 effectively provides Rule 1002 is
15 inapplicable, and thus Mr. Lenington must comply with Rules 901 and 1002 and produce
16 the original copy of the document containing the quoted figures.

17
18 ¹An exception to the “best evidence rule” is Fed. R. Evid. 1006 which allows “[t]he contents of
19 voluminous writings, records, or photographs [that] cannot conveniently be examined in court [to] be
20 presented in the form a chart, summary, or calculation.” (Fed. R. Evid. 1006.) Moreover, Rule 1006
21 mandates that “[t]he originals, or duplicates, shall be made available for examination ... by other parties
22 at reasonable time and place.” In determining the applicability of Rule 1006, the court in *Leonard v.*
23 *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.

24 ²Idearc has taken the liberty of providing this succinct legal conclusion that there is, in fact, a
25 legally binding contract as between Idearc and RR Donnelley without any proof as to its existence. A
26 contract is a legally binding agreement that requires an offer, acceptance, and consideration. Here, Idearc
27 has neither produced the contract in its original form (hence the following objections pursuant to Fed. R.
28 Evid. 901 and 1002), nor has Idearc provided even the slightest modicum of evidence that a legally
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 **Hearsay – Fed. R. Evid. 802.** Hearsay is an out-of-court statement offered for the
2 truth of the matter asserted. Under Rule 801(a), a “statement” is “(1) an oral *or written*
3 *assertion....*” (Fed. R. Evid. 801(a). Emphasis added.) Generally, absent some exclusions,
4 exemptions, or exceptions, hearsay is not admissible.

5 Here, the information provided by Idearc is cited from some other contracts, i.e.,
6 the various vendors with whom Idearc has engaged in business, and are thus written
7 statements that were made out-of-court. The figures are an assertion of fact: if they were
8 not asserted as true, then all claims made upon the figures would be an empty statement.
9 Here, the reference is to various contracts that are asserted as true. Accordingly, these
10 hearsay statements are inadmissible. The contracts as between the vendors and Idearc are
11 cited with respect to the amounts due those vendors by Idearc. This is a written statement
12 that was made out-of-court. It is being asserted as a true statement as to the claimed fact
13 that the prices set forth in the agreement are “below market rates for like volumes under
14 similar terms and conditions and take volume into account” (Declaration of Anthony Plec,
15 Page 1, Paragraph 2; Exhibit A.); it is therefore offered for the truth of

16
17 **Court’s Ruling on Objection #1:** **Sustained** _____ **Overruled** _____

18
19 **OBJECTION NO. 2: Lacks personal knowledge – Fed. R. Evid. 602, lacks**
20 **authentication – Fed. R. Evid. 901, “best evidence rule” – Fed. R. Evid. 1002,**
21 **hearsay – Fed. R. Evid. 802**

22 “The contracts are in writing and executed. The contracts are still active.”
23 (Declaration of Carol Desmond-Donohue, Paragraph 9, Page 3.)

24 **Lacks personal knowledge – Fed. R. Evid. 601.** There is nothing in the facts to
25 support Ms. Desmond-Donohue’s claim about the origin and status of these contracts.

26 **Lacks authentication, “best evidence rule” – Fed. R. Evid. 901, 1002.** Here, the
27 contents of the document are at issue and therefore the originals must be produced.

