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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 ANTHONY PLEC 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, vague and ambiguous - Fed. R. Evid. 611(a), hearsay – Fed. R. Evid. 802.

"Attached as Exhibit A is a List of Traffic Partner Contracts Idearc would like to have assumed, with corresponding actual and estimated cure amounts. These contracts are in writing, executed, active, and have not expired or been termianted." (Declaration of Anthony Plec, Paragraph 2, Page 1; Exhibit A.)

Grounds for objection: Lacks authentication – Fed. R. Evid 901, "best

evidence rule" – Fed. R. Evid 1002, hearsay – Fed. R. Evid. 802.

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. Plec cites to Exhibit A which appears to be a summary of various alleged contracts[1] with Idearc's Traffic Partners. The motion that Mr. Plec'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. Plec's failure to provide the original document may be excusable, pursuant to Rule 1006[2], if Mr. Plec provided evidence that the original

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[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.

[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

contract is so voluminous or complex as to render it impracticable to produce in court, in which case Mr. Plec's summary of the contracts in question would have been appropriate under Rule 1006. But here, Mr. Plec 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. Plec 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 reference is to various contracts 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 volumes under similar terms and conditions and take volume into account" (Declaration of Anthony Plec, Page 1, Paragraph 2; Exhibit A.); it is therefore offered for the truth of the matter being asserted. Accordingly, the statements are inadmissible hearsay.

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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.

Vague and ambiguous – Fed. R. Evid. 611(a). Finally, Mr. Plec's declaration states that Exhibit A lists both the "*actual and estimated* cure amounts." (*Id.* Emphasis added.) However, Exhibit A, as attached, includes a column designed ambiguously as "CURE AMOUNTS." (*Id.*) It is unclear whether these are the "actual" or "estimated" cure amounts.

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

OBJECTION NO. 2: Assumes facts not in evidence – Fed. R. Evid. 611(a).

"As of May 2009, Traffic Partners accounted for a large majority of the pay-for-performance revenue streams generated by the debtors." (Declaration of Anthony Plec, Paragraph 6, 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).

Assumes facts not in evidence - Fed. R. Evid. 611(a). The statement assumes facts not in evidence. There are no facts presented in the declaration that support Mr. Plec's statement regarding Traffic Partners' contribution to the pay-for-performance revenue streams generated by the debtors.

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

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

"For instance, the Debtors understand that some competitors compensate their traffic partners almost exclusively in terms of a per search rate, for which there is

typically no guaranteed return on investment (i.e., for which there is no guaranteed "click")." (Declaration of Anthony Plec, 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), calls for expert opinion – Fed. R. Evid. 701.

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.) Here, there are no facts to support Mr. Plec's personal knowledge of competitors' method of compensating their traffic partners.

Calls for speculation – Fed. R. Evid. 602. A witness may not testify as to a guess or speculation. Mr. Plec's statement, without more, calls for speculation. There is no evidence provided that supports Mr. Plec's claim regarding competitors' method of compensating their traffic partners.

Assumes facts not in evidence – Fed. R. Evid. 611(a). The statement assumes facts not in evidence. There is no evidence provided supporting Mr. Plec's claim regarding competitors' method of compensating their traffic partners, i.e., that they "almost exclusively [rely upon] a per search rate." (*Id.*)

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

Here, nothing in the facts supports a finding that Mr. Plec has been qualified as an expert with respect to the various methods or effectiveness of compensation of traffic partners. Mr. Plec's statement merely describing his position and duties does not serve to

automatically qualify Mr. Plec as an expert. Accordingly, Mr. Plec is a lay witness, and nothing in the statement indicates that Mr. Plec's knowledge of the competitors' compensation methods is rationally based on his own perception. Moreover, while arguably helpful to understanding the issue, the information relies on technical or specialized knowledge at least with respect to the various competitors to which Mr. Plec is referring, which Mr. Plec has not been qualified to possess. Therefore, because Rule 701 requires each of the above three elements to be satisfied to allow a lay witness' testimony, the above declaration statement is objectionable.

Court's Ruling on Objection #3: Sustained _______ Overruled _______

OBJECTION NO. 4: 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 the Debtors' Partners. Additionally, such payment interruption may cause valuable and long-time – but smaller – traffic partners substantial distress. Where payment interruptions have already occurred, some partners have already reduced or eliminated their search traffic for the Debtors' advertisers." (Declaration of Anthony Plec, Paragraph 9, Page 3.)

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. Nothing in the statement supports Mr. Plec'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. Plec's statement, without more, calls for speculation. There is no evidence provided that supports Mr. Plec's claim regarding the potential long-time "substantial distress" (Declaration of Anthony Plec, Paragraph 9, Page 3) that would befall various Traffic Partners in the event of a payment interruption. Second, the word choice "such a payment interruption *may* cause" (*Id.* Emphasis added.) is, by definition, speculation.

Assumes facts not in evidence – Fed. R. Evid. 611(a). The statement assumes facts not in evidence. Mr. Plec's statement that "an interruption in the traffic payment process will have a negative impact on the cash flow of the Debtors' 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 "some partners have already reduced or eliminated their search traffic for the Debtors' advertisers" (*Id.*) also assumes facts not in evidence: Mr. Plec should have produced evidence demonstrating such claims, namely (a) the reduced traffic and (b) resultant reduced revenue.

Court's Ruling on Objection #4: Sustained _______ Overruled _______

OBJECTION NO. 5: Calls for speculation – Fed. R. Evid. 602, assumes facts not in evidence – Fed. R. Evid. 611(a).

"[Traffic Partners] could easily alter traffic patterns and/or advertiser placement on their Web properties, which would cause a reduction in advertiser impressions and the associated click-throughs that drive the Debtors' revenue."

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

Calls for speculation – Fed. R. Evid. 602. There is no evidence provided that

supports Mr. Plec's concerns that Traffic Partners would "alter traffic patterns and/or advertiser placement on their Web properties" ultimately resulting in a decrease of Debtors' revenue stream.

Assumes facts not in evidence – Fed. R. Evid. 611(a). This statement has two components: first, it acknowledges that Traffic Partners "may be obligated to continue to provide service to the Debtors during the restructuring." (*Id*.) It then suggests, however, that Traffic Partners are not only capable of, but may in fact engage in various acts in breach of their duties to Debtors under their contractual obligations. This is preemptively implying tortious interference with contractual obligations and interference with a business where no facts have been shown to support such contentions.

Court's Ruling on Objection #5: Sustained _______ Overruled _______

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OBJECTION NO. 6: Calls for speculation – Fed. R. Evid. 602.

"Any payment interruption could easily put such an outcome in jeopardy." (Declaration of Anthony Plec, Paragraph 10, Page 3.)

Grounds for objection: Calls for speculation – Fed. R. Evid. 602.

Calls for speculation – Fed. R. Evid. 602. There is no evidence provided that supports Mr. Plec'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. Plec's speculation, rather than conviction, on the matter.

Court's Ruling on Objection #6: **Sustained _______** **Overruled _______**

Date: The McMillan Law Firm, APC

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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.

BY: /S/ SCOTT A. MCMILLAN
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Scott A. McMillan