IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAKAN LANS,

Plaintiff

Civil Action No.: 97-2523 (JGP)
Civil Action No.: 97-2526 (JGP)

v.

GATEWAY 2000, INC.
DELL COMPUTER COMP.,

Defendants

UNIBOARD AKTIEBOLAG

Plaintiff,

Civil Action No.: 99-3153 (JGP)

v.

ACER AMERICA CORP., ET AL.

Defendants.

INTERVENORS' REPLY TO LANS' OBJECTION TO EXHIBIT 3

Dated: May 11, 2005

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I. INTRODUCTION

On May 4, 2005, Plaintiffs Håkan Lans and Uniboard Aktiebolag (collectively "Lans") filed an Objection to Exhibit 3[1] to Intervenor's Post-Hearing Brief ("Objection") premised on the notion that the document is inadmissible because it purportedly "does not evidence that Berg's files were not accessible to the lawyers charged with investigating the facts provided by their client." *Id.* at 4. Lans' Objection, however, mischaracterizes the purpose for which Intervenors seek to use Exhibit 3 and misinterprets the fundamental legal authority that governs its admissibility. As more fully discussed below, the draft interrogatory response (which is the subject of Exhibit 3) is admissible as relevant non-hearsay under Federal Rule of Evidence 402 and as a party admission under Rule 801(d)(2)(A)-(D). In the alternative, the interrogatory response should be admitted under the residual exception of Rule 807. For these reasons, Lans' Objection should be rejected and Intervenors should be permitted to use Exhibit 3 to support this Court's original finding that "Lans chose to conceal all information about the assignment, possibly even from his attorneys." *Lans v. Gateway 2000, Inc.*, 84 F. Supp.2d 112, 122 (D.D.C. 1999).

[1] Lans refers to the draft interrogatory response as "Exhibit 3" in its Objection. *See, e.g.*, Objection at 1. In actuality, Exhibit 3 includes five pages of documents Bates numbered AMS 267137-41. The draft interrogatory response in question is number 3 on AMS 267140. Lans has not indicated that he objects to the email correspondence (AMS 267137-38) accompanying the draft interrogatory response; so, therefore, that correspondence should be deemed admitted irrespective of the ruling on the instant objection.

II. ARGUMENT

A. Exhibit 3 Is Probative of Mr. Mastriani's Belief Regarding the Availability of Documents from Gunnar Berg

Rule 402 of the Federal Rules of Evidence provides, in relevant part, that "[a]ll relevant evidence is admissible. . .." FED. R. EVID. 402. In turn, evidence is considered relevant, "if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *United States v. Edwards*, 388 F.3d 896, 899 (D.C. Cir. 2004) (quoting FED. R. EVID. 401). As discussed in Intervenor's Post-Hearing Brief, on March 24, 2005, Lans testified for the first time that he had informed Mr. Mastriani of the assignment of the patent and had instructed Mr. Mastriani to obtain documents related to the assignment from Mr. Berg. *See* Intervenor's Post-Hearing Brief at 2. This new testimony directly contradicted this Court's previous finding that Lans had concealed information regarding the patent assignment "until confronted with irrefutable evidence that the assignment had occurred." *Lans*, 84 F. Supp.2d at 122. Thus, Lans' statement during the hearing squarely placed the question of Mr. Mastriani's knowledge and/or awareness of the availability of the assignment files at issue.[2] Accordingly, the draft discovery response in Exhibit 3 is relevant within the meaning of Rule 401 because it specifically relates to the disagreement over whether Lans informed Mr. Mastriani of the existence of the Berg files and the availability of documents therein.

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[2] Lans attempts to support his new testimony in the Objection implying that Mastriani could only know about Berg if Mr. Lans told him at, or prior to, the September 1996 meeting. Objection at 3, n. 9. Mr. Mastriani directly contradicts this implication in his hearing testimony stating that Lans never mentioned Berg at this meeting and it was sometime after that AMS first learned of Berg. *See* March 25, 2005, Hearing Tr. at 149:6-15. In fact, AMS learned of Berg from Delphi, not Mr. Lans. *See id.* at 11-12; 150:1-11.

The draft discovery response is circumstantial evidence of the effect of Lans' testimony on Mr. Mastriani's understanding at the time the response was circulated and reviewed. Lans correctly notes in its Objection that "[a] statement is not hearsay under the Federal Rules if it is not admitted for the truth of the matter asserted." Objection at 3 (citing *Crockett v. Abraham*, 284 F.3d 131, 134 (D.C. Cir. 2002)). Further, "[a]n out-of-court statement that is offered to show its effect on the hearer's state of mind is not hearsay, under Rule 801(c)." *United States v. Thompson*, 279 F.3d 1043, 1047 (D.C. Cir. 2002). In the case at bar, Exhibit 3 is admissible as circumstantial evidence because it supports the permissible inference that Mr. Mastriani did not know, nor could have known, that Lans was able to obtain files from Mr. Berg. *See id.* (holding that it would not have been hearsay for the defendant to offer an out-of-court statement as proof of their effect on the hearer, and that it would have been permissible for the jury to draw inferences therefrom).

Further, Exhibit 3 is admissible as evidence of Lans' knowledge and acquiescence to the statements contained in the interrogatory response in question. Lans argues in his Objection that he never adopted the statements contained in the interrogatory response in Exhibit 3. *See* Objection at 2. However, statements "evincing knowledge, notice, consciousness or awareness of some fact, which fact is established by other evidence in the case," are permitted to show state of mind, if state of mind is at issue. *United States v. Muscato,* 534 F. Supp. 969, 975 (E.D.N.Y. 1982) (quoting McCormick, Evidence § 249, 592 (2d Ed. 1972)) (emphasis added). Such a statement would be admissible at trial "over hearsay objection if it were adduced from a person having personal knowledge of the statement." *Evans v. Port Auth. of New York & New Jersey*, 192 F. Supp.2d 247, 262 (S.D.N.Y. 2002). Using the same analysis, Exhibit 3 is admissible to show that Lans knew of, and reviewed, the draft of the interrogatory response and its substance.

The email confirms that Lans was included in the communications between the attorneys, and that he remained silent throughout. *See* Exhibit 3 at AMS 267137-38.

B. Exhibit 3 is an Admission by a Party-Opponent

Pursuant to Federal Rule of Evidence 801(d)(2), a statement is not hearsay if it is offered against a party and is:

> (A) the party's own statement, in either an individual or a representative capacity or
>
> (B) a statement of which the party has manifested an adoption or belief in its truth, or
>
> (C) a statement by a person authorized by the party to make a statement concerning the subject, or
>
> (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship.

Fed. R. Evid. 801(d)(2)(A)-(D). Under this Rule, the statement that, "[m]any of those documents were kept by Gunnar Berg, who refused me access to them both before and after our relationship was terminated," is admissible if it meets one of the categories listed above. *See* Exhibit 3 at AMS 267140.

1. The Draft Interrogatory Responses Constitute Statements Made by Lans

This Court has stated, "there is no better example of an admission of a party opponent, which is admissible because it is not hearsay, than an answer to an interrogatory." *Melius v. Nat'l Indian Gaming Comm'n*, No. Civ.A. 98-2210, 2000 WL 1174994, at *1 (D.D.C. July 21, 2000).[3] In its Objection, Lans contends that the draft interrogatory response is not a party

[3] That the interrogatory response in question was not ultimately served is not determinative regarding admissibility or use in connection with a determination on a motion for reconsideration. As explained in *(continued ...)*

admission because "Talbot Lindstrom of Delphi, not Dr. Lans, created the draft interrogatory answers." Objection at 2. Although superficially appealing, this contention is unsupported in law or fact. For example, the hearing testimony detailing the interaction between Lans and his attorneys in the preparation of interrogatory responses demonstrates that Lans played the predominant role in crafting interrogatory responses. Mr. Mastriani explained:

> All discovery requests were sent to Mr. Lans care of Delphi per his instructions when they were received. . . . Delphi was working with Mr. Lans, particularly Tal Lindstrom, to draft responses to those interrogatories.

March 25, 2005, Hearing Tr. at 88:11-20.

> Q: Did there come a time that you received input from Lans in order to prepare – prepare the answers for him to look at and sign?
>
> A: Yes. What occurred is that Delphi attorneys, primarily Mr. Utterstrom and Mr. Lindstrom, would meet with Mr. Lans and interview him on – on every – on every interrogatory that asked him for particular information, and he would respond to them, and they would take notes, and they would draft answers.

March 25, 2005, Hearing Tr. at 90:24-91:11. Further, after initial drafting was complete, all discovery responses were sent to Lans for his approval. *See, e.g.,* Exhibit 3 at AMS 267137. Therefore, rather than "create" responses to discovery, Lans' attorneys did little more than transcribe his oral answers. This is further evinced by the fact that the response in question was drafted as a first-person narrative and explained all of the facts known to Lans. *See* Exhibit 3 at AMS 267140 ("I can find no documents . . . I have retained some hard disks . . . I have no computer . . . ."). Lans does not allege, much less prove, that the discovery response in Exhibit 3 details the answers of anyone other than himself. As such, the draft interrogatory response in

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(... continued)
more detail below, there was no incentive or reason under the Federal Rules of Evidence for Lans or Delphi to misstate the facts relayed in the draft response and Lans has not objected to its accuracy.

question is a statement made by Lans, and, therefore, a party admission under Federal Rule of Evidence 801(d)(2)(A).

2. The Draft Interrogatory Responses Are Party Admissions Even if Created by Lans' Attorneys

Assuming, *arguendo*, that the subject discovery response in Exhibit 3 does not constitute a party admission under Federal Rule of Evidence 801(d)(2)(A), it is still admissible under Rule 801(d)(2)(B)-(D). First, under Rule 801(d)(2)(B), a "statement [that] is offered against a party and is . . . a statement of which the party has manifested an adoption or belief in its truth," is not hearsay. FED. R. EVID. 801(d)(2)(B). Acquiescence or adoption of the statement "'can be manifested by any appropriate means, such as language, conduct, or silence.'" *Tracinda Corp. v. DaimlerChrysler AG,* 362 F. Supp.2d 487, *8 (D. Del. 2005) (quoting *Horvath v. Rimtec Corp.*, 102 F.Supp.2d 219, 223 n.3 (D.N.J. 2000)) (emphasis added). *See also* FED. R. EVID. 801(d)(2)(B) Advisory Comm. Notes ("Under established principles an admission may be made by adopting or acquiescing in the statement of another. . . . . Adoption or acquiescence may be manifested in any appropriate manner."). As previously discussed, Lans reviewed each draft discovery response prepared by his attorneys.[4] Indeed, Exhibit 3 reflects the fact that Lans reviewed and approved of the discovery response in question. *See* Exhibit 3 at AMS 267137. Mr. Lindstrom wrote to Mr. Adkins of AMS: "I am sending you now the draft responses to the Interrogatories, which should also serve as the basis for you [sic] responses to the document request. I had these prepared on Monday, ***but have been awaiting Håkan's review of them, which I just received.***" *Id.* (emphasis added). Further, Lans was copied on the correspondence between his attorneys and raised no objections thereto. *See id.* Based on the foregoing, Lans had

[4] Lans was cc'd on the email communications between Delphi and AMS concerning the draft interrogatory responses. *See* Exhibit 3 at AMS 267137-38.

ample opportunity to object to the content of the interrogatory response in question, but instead chose to remain silent. This silence indicates his adoption of the response, and thus, renders the document admissible under Rule 801(d)(2)(B). *See United States v. Central Gulf Lines, Inc.*, 974 F.2d 621, 628 (5th Cir. 1992) (holding that sufficient evidence exists that a party adopted statements made in a report drafted by a third-party, where the party had ample opportunity to object to the reports but remained silent.)

Second, Exhibit 3 would also be admissible under Rule 801(d)(2)(C) and/or (D), which state that a statement is admissible as a party admission if it is "a statement by a person authorized by the party to make a statement concerning the subject, or a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." FED. R. EVID. 801(d)(2)(C)-(D). If one accepts Lans' contention that the draft interrogatory response in Exhibit 3 is not a statement made by Lans because it was "created" by Mr. Lindstrom of Delphi, the statement logically should be attributed to Mr. Lindstrom and Delphi.[5] *See* Objection at 1-2. Therefore, if the draft discovery response was created during Delphi's employment and concerns a matter within that employment, it is a party admission. *See, e.g., Bensen v. Am. Ultramar Ltd.*, No. 92 Civ. 4420, 1996 WL 422262 (S.D.N.Y. July 29, 1996) (draft answers written by attorney constitute party admission under Rule 801(d)(2)(C)); *United States v. Margiotta*, 662 F.2d 131, 142 (2d Cir. 1981) ("Statements made by an attorney concerning a matter within his employment may be admissible against the

[5] Lans carelessly cites *BCCI Holdings (Luxembourg), Societe Anonyme v. Khalil*, 184 F.R.D. 3, 5-6 (D.D.C. 1996), for the proposition that "[a]s a statement by Delphi, Exhibit 3 does not fall within any hearsay exception." Objection at 3. *BCCI Holdings*, however, is inapposite to the present issue. In that case, the court was forced to determine "whether, and to what extent, a witness during testimony can adopt or incorporate a prior statement such that the prior statement becomes one 'made by the declarant while testifying.'" 184 F.R.D. at 6.

party retaining the attorney."); *Dailey v. Societe Generale*, 915 F. Supp. 1315 (S.D.N.Y. 1996) (general counsel's statement is admission under Rules 801(d)(2)(C) and (D)).

The court's decision in *Bensen* is particularly instructive. In that case, plaintiff sought to introduce an attorney's draft answers to questions posed by his client. *Bensen*, 1996 WL 422262 at *3. The court applied the criteria identified in Rule 801(d)(2)(C) and concluded that the draft answers were party admissions. *Id.* at *10. Specifically, the court found that defendant "reposed in that partner the authority to make the statements for the [client]." *Id.* In reaching its conclusion, the court stated that

> attorneys have *prima facie* 'speaking authority' to make relevant judicial admissions related to the management of litigation. Yet, attorneys do not have authority to make admissions for their clients in all circumstances. Rather, the issue of whether an attorney's out-of-court statements are receivable as admissions against a client under Rule 801(d)(2)(C) should be treated as a question of whether the attorney has authority to act as agent and whether the statements were made in the course of exercising that authority.

Id. The Court found the authority to exist because the defendant retained the attorney to assist with its defense. As such, "[t]he statements at issue concern issues surrounding that defense, and thus were made within the scope of employment and agency." *Id.* at 11.

It is beyond dispute that Delphi represented Lans during the time period reflected in Exhibit 3. It is also beyond dispute that Lans hired the Delphi firm to represent it in licensing and litigating the '986 patent. Therefore, because the statement in question derives from a response to an interrogatory by Gateway 2000 which stated: "Identify each communication between you and/or your counsel with members of the Investor Group concerning in any way the '986 patent," the content of the response was clearly within the purview of Delphi's representation.

C. The Trustworthiness of Exhibit 3 is Not in Dispute

Assuming, *arguendo*, that the draft interrogatory response in Exhibit 3 is not admissible as non-hearsay or under any previously discussed hearsay exception, Exhibit 3 is nevertheless admissible under the residual exception to the hearsay rule. Federal Rule of Evidence 807 provides, in relevant part:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 807.

In determining the applicability of this Rule, the court must evaluate whether the evidence is relatively free from "the four classes of risk peculiar to hearsay evidence, which are insincerity, faulty perception, faulty memory and faulty narration...." *Steinberg v. Obstetrics-Gynecological & Infertility Group, P.C.*, 260 F. Supp.2d 492, 495 (D. Conn. 2003) (citing *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 232 (2d Cir. 1999)). This does not mean, however, that a statement must be entirely free from all four categories of risk. *See id.*

There are strong indicia of reliability and trustworthiness regarding the interrogatory response in Exhibit 3. First, the communications between Lans, Delphi and AMS all transpired within the framework of an ongoing professional relationship and the draft interrogatory response was circulated for review to all of the parties involved. *See Alexander v. F.B.I.*, 198 F.R.D. 306, 320 (D.D.C. 2000) (finding trustworthiness of statements made during an ongoing professional relationship). Delphi and AMS both represented Lans and his interests; hence, "the circumstantial guarantees of trustworthiness show a lack of incentive to lie . . . ." *Id. See also*

Steinberg, 260 F.Supp. 2d at 496 (admitting into evidence a letter from one attorney to another summarizing the activity in the case). Second, the draft response in Exhibit 3 was created during the ordinary course of Lans' litigation against Gateway 2000. Though this version of the response was never served, there would have been no reason for Lans or Delphi to misstate the facts relayed therein at the time it was drafted and reviewed.

Rule 807 also requires that the statements pertain to a material fact. *See* FED. R. EVID. 807. In the instant case, the contents of Exhibit 3 satisfy this requirement. First, the draft discovery response refutes surprise testimony by Lans that he directed Mr. Mastriani to obtain essential documents from Mr. Berg. *See* Intervernor's Post-Hearing Brief at 4. Second, Exhibit 3 pertains to the issue of Mr. Mastriani's awareness of the patent assignment and the documents in Mr. Berg's files. As noted above, Lans' testimony placed Mr. Mastriani's state of mind at issue when he testified that he had told Mr. Mastriani of the assignment agreement with Uniboard and "where to find it." March 24, 2005 Hearing Tr. at 61:20-21.

Moreover, Lans made this statement for the first time during the hearing on March 24, 2005. Post-Hearing Briefs were due on April 29, 2005. As such, Intervenors did not have an opportunity to investigate the matter beyond the documents and information that where already available. Thus, in view of Lans' surprise testimony and the unavailability of further discovery, it was reasonable for Intervenors to rely on the documents in Exhibit 3.

At footnote 14 of its Post-Hearing Brief, Lans claims that "AMS could have obtained some corroboration of Mastriani's statement from Delphi, but has offered none." Lans' Post-Hearing Brief at 9. First, Exhibit 3 represents the precise variety of corroboration of Mr. Mastriani's belief in the unavailability of documents from Mr. Berg based on communications from Delphi, that Lans considers dispositive. Second, Intervenors attempted, but were

unsuccessful, in their effort to elicit testimony from Delphi attorney Peter Utterstrom. *See* April 1, 2005, email message from R. Sweetland to Clagett, attached hereto as Exhibit A. Delphi is apparently reluctant to participate in the proceedings due to the personal jurisdiction arguments it raised in its motion to dismiss in the malpractice case.

Finally, the interests of justice would not be served by excluding Exhibit 3, particularly in light of the indicia of credibility and trustworthiness. Intervenors should be afforded the opportunity to rebut Lans' testimony, and Intervenors have done so by providing an exhibit that does not suffer from any of the classes of risk particular to hearsay evidence.

III. CONCLUSION

For the foregoing reasons, the draft discovery response contained in Exhibit 3 is admissible as non-hearsay, both as a party admission, and as evidence of Mr. Mastriani's knowledge relating to the availability of the files.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2005, I electronically filed the foregoing Reply using the CM/ECF system which sent notification of such filing to the following:

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/s/
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Rodney Sweetland

From: Rodney Sweetland
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Subject: Utterstrom Declaration

Brooke:

In follow up to our conversations, this is to request a declaration from Peter Utterstrom to be filed with Judge Penn confirming that Hakan Lans made a material misstatement of fact during his March 24, 2005, examination when he testified that he had informed Messrs. Utterstrom and Mastriani during a meeting in September of 1996 that there were documents that should be obtained from Mr. Gunnar Berg related the Lans/Uniboard license with IBM.

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