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 CORP.	)	
	)	
Defendant.	)	
	)	
UNIBOARD AKTIEBOLAG	)	
	)	
Plaintiff,	)	**Civil Action No. 99-3153 (JGP)**
	)	
v.	)	
	)	
ACER AMERICA CORP. et al.	)	
	)	
Defendants.	)	
	)	

MEMORANDUM ORDER

This matter is before the Court pursuant to **Plaintiffs' Objection to Exhibit 3 to Intervenor's Post-Hearing Brief** [#s 218, 169, 210]. On March 24 and 25, 2005 evidentiary hearings were held in which Hakan Lans and Louis Mastriani testified before the Court. On March 29, 2005, the Court issued an order directing the parties to file post-hearing briefs. Attached as Exhibit 3 to the Posthearing Brief of Intervenors [#s 215, 167, 208] is an e-mail from Delphi attorney Talbot Lindstrom to Adduci, Mastriani & Shchaumberg ("AMS"), copy to Hakan Lans and Peter Utterstrom, enclosing a document titled "Lans Answers to Gateway 2000 First Set of Interrogatories." The answer to Interrogatory No. 3 states, in relevant part,

> " I can find no documents in my files relating to this question and therefore can not identify such communications. Many of those documents were kept by Gunnar Berg, who refused me access to them both before and after our relationship was terminated."

Intervenors offered the exhibit to disprove Mr. Lans' evidentiary hearing testimony that he had instructed Mr. Mastriani to contact Gunnar Berg to obtain documents related to the assignment of United States Patent No. 4,303,986 ("986 patent). See Posthearing Brief of Intervenors at 4.

Plaintiffs argue that Exhibit 3 is inadmissible hearsay, and hence cannot be admitted to prove that Gunnar Berg's files were inaccessible to AMS. Plaintiffs contend that the document is only admissible to confirm that AMS knew that Gunnar Berg had documents relating to the 986 patent. Conversely, Intervenors argue that Exhibit 3 is admissible either as a party admission, non-hearsay offered to prove Mr. Mastriani's state of mind, or under the residual exception to the hearsay rule.

I.. Fed.R.Evid. 801(d)(2)

Federal Rule of Evidence 801(c) defines hearsay as an out of court statement offered in evidence to prove the truth of the matter asserted. Hearsay is not admissible except as provided by the federal rules of evidence or "by rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Fed.R.Evid. 802. Admissions by party opponents, however, are not considered hearsay. Fed.R.Evid. 801(d)(2). To qualify as an admission by a party opponent, a statement must be offered against a party and must be

> "(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."

There is no indication that Mr. Lans adopted the proposed interrogatory answers attached as Exhibit 3.[1] The e-mail was composed by a Delphi attorney, Talbot Linderstrom, and sent to AMS. Although Mr. Lans was copied on the e-mail, there is no attached reply from Mr. Lans that would indicate that he adopted the statements. Hence, Exhibit 3 does not qualify as a party admission pursuant to Rule 801(d)(2).[2]

II Fed.R.Evid. 803(3)

Rule 803(3) is an exception to the hearsay rule that allows the admission of "a statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition." Intervenors claim that Exhibit 3 is admissible to prove Mr. Mastriani's state of mind; specifically that Mr. Mastriani believed that Mr. Lans was unable to obtain files related to the 986 patent from Gunnar Berg. However, Mr. Mastriani is not the alleged "declarant" with respect to the statements at issue. Therefore, the state of mind exception does not apply.

III. Fed.R.Evid. 807

Rule 807 is the residual exception to the hearsay rule. The residual exception allows the admission of statements "not specifically covered by Rule 803 or 804 but having equivalent circumstantial guaruntees of trustworthiness." Therefore, courts apply the residual exception "very sparingly." Boca Investerings Partnership v. United States, 128 F.Supp.2d 16, 22 (D.D.C.

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[1]See Fed.R.Civ.P. 33(b) requiring that answers to interrogatories be signed by the person making them.

[2]The Court will not address provisions C or D of Fed.R.Evid. 801(d)(2) because the existence of an agency relationship between Mr. Lans and AMS is a matter of dispute in both this case and Lans v. Adduci, Mastriani, & Schaumberg, et. al., Civil Action No. 02-2165.

2000) . The party arguing for admission of a statement pursuant to Rule 807 "bears a 'heavy burden to come forward with indicia of both trustworthiness and probative force.'" Id. at 22, quoting United States v. Washington, 323 U.S.App.D.C. 125, 194, 106 F.3d 983, 1002 (1997).

Exhibit 3 does not meet the requirements for admissibility under Rule 807. The trustworthiness of this document is questionable as there is no signature and no tangible indication that it was actually received or accepted by Mr. Lans. Moreover, Rule 807 requires that the declarant be unavailable. See United States v. Hsia, 87 F.Supp.2d 10, 16 (D.D.C. 2000); Dang v. Inn At Foggy Bottom, 85 F.Supp.2d 39, 44 n.4 (D.D.C. 2000) . Since the alleged declarant, Mr. Lans, was available to testify on March 24 and 25, 2005, Exhibit 3 is not admissible under Rule 807.

Accordingly, Exhibit 3 to the Posthearing Brief of Intervenors shall not be admitted into evidence.

SO ORDERED.

Date: June 2, 2005

JOHN GARRETT PENN
United States District Judge