

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

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HÅKAN LANS,	)	
	)	Case No. 97-2523 (JGP)
	)	Case No. 97-2526 (JGP)
Plaintiff,	)	
	)	
v.	)	
	)	
GATEWAY 2000, INC., and DELL	)	
COMPUTER CORP.,	)	
	)	
Defendants.	)	

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UNIBOARD AKTIEBOLAG,	)	Case No. 99-3153 (JGP)
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ACER AMERICA CORP., et al.,	)	
	)	
Defendants.	)	

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**OBJECTION TO EXHIBIT 3 TO INTERVENOR'S POST-HEARING BRIEF**

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## **OBJECTION TO EXHIBIT 3 TO INTERVENOR'S POST-HEARING BRIEF**

Håkan Lans and Uniboard Aktiebolag object to Exhibit 3 to Intervenor's Post-Hearing Brief. The document is inadmissible hearsay with respect to Dr. Lans and cannot be admitted to prove that Gunnar Berg's files were somehow inaccessible to AMS and Delphi. However, the document is admissible to confirm that both AMS and Delphi knew that Berg had documents in his files relating to the '986 Patent.

### **I. EXHIBIT 3 IS NOT ADMISSIBLE TO PROVE THAT GUNNAR BERG'S FILES WERE NOT ACCESSIBLE**

Apparently to address undisputed evidence that neither AMS nor Delphi bothered even to attempt to search Gunnar Berg's files until after Gateway filed its motion to dismiss, AMS submits an unauthenticated proposed interrogatory answer that Dr. Lans never adopted and that was never served. The statement is offered to prove that Gunnar Berg refused Dr. Lans access to client files both during and after Berg's representation of Lans.<sup>1</sup> The statement is inadmissible for the offered purpose.

A "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" is hearsay and, unless otherwise provided in the Federal Rules of Evidence, inadmissible.<sup>2</sup> AMS tries to shoehorn Delphi's statement into one of the hearsay exceptions<sup>3</sup> by claiming that it was drafted and sent by Dr. Lans.<sup>4</sup> The face of the document, however, reveals that Talbot Lindstrom of Delphi, not Dr. Lans, created the draft interrogatory answers.<sup>5</sup> Dr. Lans never adopted Delphi's statement since

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<sup>1</sup> Posthearing Brief of Intervenor Adducci, Mastriani & Schaumberg, LLP, and Louis S. Mastriani, Esq. (Intervenor's Posthearing Brief), at Ex. 3.

<sup>2</sup> Fed. R. Evid. 801(c), 802.

<sup>3</sup> See Fed. R. Evid. 801(d)(2) (removing an admission by a party opponent from the definition of hearsay).

<sup>4</sup> See Intervenor's Posthearing Brief, at 4 (claiming that "Lans also sent Intervenor a draft interrogatory response").

<sup>5</sup> Intervenor's Posthearing Brief, Ex. 3 at AMS 267137.

the interrogatory response that he actually signed did not mention his ability to get documents from Berg.<sup>6</sup> As a statement by Delphi, Exhibit 3 does not fall within any hearsay exception.<sup>7</sup>

## **II. EXHIBIT 3 IS ADMISSIBLE ONLY TO CONFIRM THAT AMS AND DELPHI KNEW THAT GUNNAR BERG HAD FILES RELATED TO THE '986 PATENT**

A statement is not hearsay under the Federal Rules if it is not admitted for the truth of the matter asserted.<sup>8</sup> By referring to Berg's files, Exhibit 3 demonstrates that AMS and Delphi knew that Berg possessed files related to the '986 patent. AMS' and Delphi's knowledge of Berg's files is relevant to a material issue of fact before the Court, *i.e.*, whether Dr. Lans informed AMS about Berg's files.<sup>9</sup> The fact that Delphi drafted for AMS an interrogatory referring to Berg and his prior representation of Dr. Lans confirms the hearing record that Dr. Lans informed AMS and Delphi that Berg had files relating to the '986 Patent.<sup>10</sup>

## **III. CONCLUSION**

Exhibit 3 to Intervenor's Post-Hearing Brief is admissible only to confirm that AMS and Delphi knew that Gunnar Berg had files relating to the '986 Patent. The document may not be

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<sup>6</sup> See Plaintiff's Response to Defendant Gateway 2000, Inc.'s Second Set of Interrogatories, at 7-8 (attached as Exhibit A). In the final document, AMS referred to Gateway's interrogatories as the "second set" because it argued that, since Gateway adopted Compaq's first set of interrogatories, Compaq's interrogatories were Gateway's first set of interrogatories as well.

<sup>7</sup> See *BCCI Holdings (Luxembourg), Societe Anonyme v. Khalil*, 184 F.R.D. 3, 5-6 (D.D.C. 1999).

<sup>8</sup> Fed. R. Evid. 801(c); *Crockett v. Abraham*, 284 F.3d 131, 134 (D.C. Cir. 2002)

<sup>9</sup> AMS cites Exhibit 3 to dispel Dr. Lans' supposed testimony that "he instructed Mastriani to obtain documents from" Berg's files. But Dr. Lans never testified that he instructed Mastriani to get documents from Berg and the transcript pages cited by AMS are devoid of any support for its contention.<sup>9</sup> Dr. Lans testified that he told Mastriani, in response to Mastriani's questions about the IBM-Uniboard agreement, that he could find documents related to that agreement in Gunnar Berg's files. (Day 1 at 51).

The fact that Dr. Lans told AMS that Berg had documents related to the IBM-Uniboard agreement should come as no surprise to AMS. See Intervenor's Posthearing Br. at 2 (arguing that Dr. Lans testified for the first time that he instructed Mastriani to get documents related to the IBM-Uniboard agreement from Berg). In Mastriani's affidavit, sworn to May 10, 2004 (AMS 1, Tab 1), Mastriani claimed that he instructed Delphi in September 1996 to obtain IBM-Uniboard documents from the widow Berg (even though she was not yet then a widow). The only way that Mastriani could have known about Berg is if Dr. Lans told him.

<sup>10</sup> Fed. R. Evid. 401 (defining relevant evidence as "having 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").

admitted and does not evidence that Berg's files were not accessible to the lawyers charged with investigating the facts provided by their client.

Dated: May 4, 2005

/s/

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