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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92047433
Party	Defendant Jay-Y Enterprise Co., Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GADO S.R.L.,

Petitioner,

v.

JAY-Y ENTERPRISE CO., INC.,

Respondent.

AND RELATED COUNTERCLAIM.

Cancellation No. 92047433

RESPONDENT'S RESPONSE TO PETITIONER'S EVIDENTIARY OBJECTIONS TO
EVIDENCE OFFERED BY RESPONDENT

Respondent Jay-Y Enterprise Co., Inc. ("Jay-Y") hereby responds to the evidentiary objections submitted by petitioner Gado S.R.L. ("Gado") with regard to certain evidence presented by Jay-Y.

I. INTRODUCTION

Gado's objections to Jay-Y's sales records and summaries reflect both a misunderstanding of the manner by which the documents were created as well the purpose underlying the hearsay and best evidence rules. As discussed below, the hearsay rule is intended to preserve the right to cross-examine a witness (or evidence) in order to test the reliability and credibility of the information being presented. The rule is not applied slavishly, but rather is applied to exclude evidence that is inherently unreliable. The best evidence rule simply does not apply in situations where, as here, the documents at issue are computer records.

The evidence of sales presented by Jay-Y not only is not hearsay, but when viewed in its overall context is far more reliable than any of the information presented by Gado to support its petition. Jay-Y's evidence of its sales figures was taken from its computerized accounting records, records that were created contemporaneously with its purchases and sales and which could not be altered in any manner once created.

In brief, Jay-Y's evidence is inherently reliable and Gado's objections should be overruled. Gado has objected to the invoices presented by Jay-Y on grounds of hearsay and best evidence, and to the summaries of those invoices on grounds of hearsay. Because all of Gado's objections are premised on a mischaracterization of the manner by which the documents were created, Jay-Y addresses their creation first, and the specific objections second.

II. THE INFORMATION REFLECTED IN THE INVOICES AND SUMMARIES WAS INPUT IN THE NORMAL COURSE OF BUSINESS

During trial, Jay-Y's witnesses spent considerable time explaining how Jay-Y created the invoices and summaries that were submitted as exhibits to the Deposition of Teresa Chen. Because of the technical nature of the operation of Jay-Y's accounting system, the description of it was presented primarily through the testimony of Michael Ou, a computer consultant that began working with Jay-Y in 1993, when Jay-Y first sold sunglasses under its DG Marks. (Ou Depo. 10:3-7; T. Chen Depo. 57:17-20.)

Specifically, in 1993 Mr. Ou installed the "SBT accounting system" on Jay-Y's computers. (Ou Depo. 11:6-18.) While Jay-Y changed accounting systems in 2007, the original data from the SBT system remained on Jay-Y's servers. (Id. at 11:19-12:12.)

The SBT accounting software was used by Jay-Y for order entry, inventory control, to generate invoices, and to track purchase orders, accounts receivable and accounts payable. (Ou Depo. 12:22-14:1; T. Chen Depo. 57:21-58:7.) While Ms. Chen testified in general terms regarding the operation of the SBT accounting software (T. Chen Depo. 58:9-23), Mr. Ou described in some detail the manner by which the software operated and how an order was entered into the system.

First, a Jay-Y sales person would type in a customer number (a series of letters or numbers), and the system would fill in information about that customer (*e.g.*, address, sales person, payment terms). (Ou Depo. 16:2-22; T. Chen Depo. 59:18-60:4.)¹

Second, the sales person would enter into the computer system the customer's purchase order number, the desired item number and the quantity. (*Id.* at 18:1-19:8.) Each item would be entered, with the quantity desired, until the order was complete. (*Id.* at 19:23- 22:7.)

Third, after the order information was entered, the order was sent to the warehouse to be fulfilled. (Ou Depo. at 23:1-25:15.)

Finally, after the warehouse had input the shipping quantity and related charges, the SBT system generated and printed an invoice to be sent to the customer. (*Id.* at 25:21-26:6.) Because invoices were sent with orders, all of these actions were completed in the normal course of business contemporaneously with the order being taken and fulfilled.

¹ Mr. Ou testified that the software would access a file on the system in order to obtain the customer information. Unlike the actual inventory and sales information which could not be altered (Ou Depo. 76:12-18), the customer name files could be changed, or a customer removed. (*Id.* at 16:23-17:18.) It is for this reason that a few of the print outs submitted as evidence reflect "INVALID CUSTOMER NAME" where the customer had been removed in the 10+ years between the original entry of the data and printout of the information. (*Id.* at 75:23-76:11, 76:24-77:10.) As discussed herein, the fact that the customer name was deleted does not impact the fact that the sale had been made to that customer.

After the invoice was generated, the SBT system “locked down” the information related to the invoice. As a result, after the invoice was generated, the invoice number and date could not be changed, the customer number could not be changed, the item number(s) for the sunglasses that had been shipped could not be changed, the quantity shipped could not be changed, the price per item could not be changed, and the total invoice amount could not be changed. (Ou. Depo. 39:24-40:6; 41:10-42:9.) As Mr. Ou testified, because all of this information is “formal financial information,” the software did not allow it to be altered in any manner after an order was completed. (*Id.* at 40:7-18.) As a result, there is no dispute that the data in Jay-Y’s SBT computer system was created in the normal course of business, and has not been altered.

With regard to purchases made by Jay-Y of inventory, that information was also input into the SBT accounting software. (Ou Depo. 54:1-6.) Like invoice data, after Jay-Y received inventory and input the data related to that purchase in the SBT system, it could not be altered because it was “related to [Jay-Y’s] financial statement.” (Ou Depo. 55:6-19.)

Moreover, the purchase and sales information in the SBT accounting software was further safeguarded by both month-end and year-end closings. (Ou Depo. 56:5-57:22 (“Once the data was moved from the Current file to the History file, could it be changed? No”). In brief, the data underlying the purchase and sales data is inalterable and reliable.

III. THE PURCHASE AND SALES SUMMARIES AND THE INVOICES WERE PRINTED FROM THE INALTERABLE DATA IN THE SBT ACCOUNTING SYSTEM

Mr. Ou testified that he was asked by Jay-Y, in 2009, to search for purchase and sale records related to specific model numbers. (Ou Depo. 61:1-11.) That list consisted of the

models of Jay-Y's sunglasses that Jay-Y was able to confirm had been sold under one of Jay-Y's DG Marks. (T. Chen Depo. 51:24-52:3; 77:4-78:2.)

Using the list of model numbers, Mr. Ou created lists of both the purchase records and sales records from the SBT accounting system that included each of those models. (Ou Depo. 69:2-22; T. Chen Depo. 78:3-79:4.) Jay-Y then used the lists of invoices from the report created by Mr. Ou, and printed out copies of those invoices from the SBT computer software. (T. Chen Depo. 94:13-95:4; W. Chen Depo. 51:19-53:15.)

IV. THE PURCHASE AND SALES SUMMARIES ARE ADMISSIBLE

Turning to Gado's objections, Gado asserts that, because the summaries of Jay-Y's purchases and sales of sunglasses under Jay-Y's DG Marks were created for purposes of litigation, they are inadmissible hearsay. Not only does this objection reflect a misunderstanding of the law, it also misrepresents the facts.

As discussed above, the purchase and sales summaries are nothing more than reports of data stored in Jay-Y's computers, and specifically data kept in the ordinary course of business through Jay-Y's use of the SBT accounting software. Courts regularly permit such records to be admitted under Fed. R. Evid. 803(6). *See e.g., United States v. Moore*, 923 F.2d 910, 914 (1st Cir. 1991); *United States v. Catabran*, 836 F.2d 453, 457 (9th Cir. 1988); *United States v. Cestnik*, 36 F.3d 904, 909-10 (10th Cir. 1994) ("Computer business records are admissible if (1) they are kept pursuant to a routine procedure designed to assure their accuracy, (2) they are created for motives that tend to assure accuracy (e.g., not including those prepared for litigation), and (3) they are not themselves mere accumulations of hearsay"); *United States v. Briscoe*, 896 F.2d 1476, 1494 (7th Cir. 1990) (computer-stored records are admissible business records if they "are kept in the course of regularly conducted business activity, and [it] was the regular practice

of that business activity to make records, as shown by the testimony of the custodian or other qualified witness.”). It is plain that the data stored in the SBT computer software meets these standards for being admissible.

Moreover, the printout of computer data itself may be produced in anticipation of litigation without running afoul of the business records exception. The requirement that the record be kept “in the course of a regularly conducted business activity” refers to the underlying data, not the actual printout of that data. *See United States v. Fujii*, 301 F.3d 535, 539 (7th Cir. 2002); *United States v. Sanders*, 749 F.2d 195, 198 (5th Cir. 1984). This is logical, given that there is no manner for the evidence stored in the computer records to be introduced absent printing that information to a human readable form.

As Gado notes, the Board should focus on whether there are “indicia of reliability” sufficient to assure the Board that the information set forth in Jay-Y’s exhibits is trustworthy. A brief review of the evidence demonstrates that Gado’s objections are meritless.

Jay-Y first obtained samples of sunglasses sold under the DG Marks. Photographs of those sunglasses are reflected in Exhibit Nos. 100-130, to which Gado has not objected. Using the model numbers reflected *on* the sunglasses shown in Exhibit Nos. 100-130, Mr. Ou queried the SBT software to create reports of all purchases and sales of those model numbers. Jay-Y then used the invoice numbers reflected on the reports to print copies of the invoices that reflected the sales of the sunglasses.

While Gado postulates that the data on the purchase and sales reports “could have been changed,” it fails to explain how such a change could impact the veracity of the reports. Because all of the data in the SBT software was “locked down” years ago, even if someone altered one of the summary reports to reflect a non-existent sale, it would not have been possible to create an

invoice that reflected that sale. In short, Gado has not pointed to any evidence that “calls into question whether the data on the summaries accurately reflects the information in Jay-Y’s ‘SBT’ system.” Its objection to the purchase and sales summary reports should be overruled.

V. THE INVOICES ARE ADMISSIBLE

Gado also asserts that, because Jay-Y printed reports from its SBT accounting software (as opposed to trying to locate invoices that had been printed from the same software more than a decade earlier), those reports are inadmissible hearsay. As discussed above, the exhibits that reflect invoices are nothing more than human readable reports of data stored in Jay-Y’s computer system. Because the underlying data is admissible – it is noteworthy that Gado has not objected to the data itself – the printouts of that data are also admissible. *See United States v. Fujii*, 301 F.3d at 539; *United States v. Sanders*, 749 F.2d at 198.²

VI. GADO’S BEST EVIDENCE OBJECTION SHOULD BE OVERRULED

In a last ditch attempt to avoid the facts reflected in Jay-Y’s business records, Gado asserts that the invoices should be excluded by operation of the best evidence rule, citing Fed. R. Evid. 1002 and two Board cases. The rule and the cases have no applicability here.

While Rule 1002 requires presentation of the “original” of a writing, Rule 1001(3) provides that, “[i]f data is stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ‘original.’” Because the invoices presented as exhibits to Ms. Chen’s deposition were nothing more than printouts of data stored on Jay-Y’s computer, they are considered originals and the best evidence rule does not apply.

² Curiously, Gado cites to an unpublished and un-citable (*see* Fed. R. App. 32.1(a)) case – *U.S. v. Smart*, 1998 WL 833605, *2 (9th Cir. 1998) – for the proposition that the court sustained a hearsay objection. In reality, the court found that the records at issue were non-hearsay and therefore properly admitted. *Id.*

See Mag Instrument, Inc. v. The Brinkmann Corp., 96 USPQ2d 1701, 1707 (TTAB 2010) (overruling best evidence objection based on alleged “fail[ure] to produce or make available any of the original invoices or other sales database information that was used to prepare the sales summary information set forth in the [objected exhibits]”); *Time Ins. Co. v. Estate of White*, 2011 U.S. App. LEXIS 21843, **8-9 (5th Cir. Oct. 26, 2011) (overruling best evidence objection where documents “were maintained by [party’s] computers in the regular course of business and are inalterable”); *cf. Cake Divas v. Charmaine Jones*, Opp. No. 91177301 (Feb. 23, 2011) (sustaining best evidence objection where party simply testified regarding contents of web page instead of producing copy thereof).

Because the computer records from which Jay-Y’s invoices and summaries were printed were created in the ordinary course of business and were inalterable once created, Gado’s objection should be overruled.

VII. CONCLUSION

The invoices presented by Jay-Y are printouts of information stored on a computer, information that was created in the ordinary course of Jay-Y’s business and which could not be materially altered once created. Moreover, the summaries of purchases and sales were created from the same data, and there is no indication that the summaries do not accurately reflect the data reflected in either the printed invoices or the actual purchase orders taken from Jay-Y’s physical files.

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2011, I served the foregoing RESPONDENT'S RESPONSE TO PETITIONER'S EVIDENTIARY OBJECTIONS TO EVIDENCE OFFERED BY RESPONDENT on the Petitioner by depositing a true copy thereof in a sealed envelope, postage prepaid, in First Class U.S. mail addressed to Petitioner's counsel as follows:

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/s/ Kenneth L. Wilton

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