IN IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JOSÉ ROSADO MANGUAL, et al.

Plaintiffs,

v.

XEROX CORPORATION,

Defendant.

CIVIL NO. 15-3035 (PAD)

APPENDIX

Xerox Corporation filed a motion for summary judgment (Docket No. 44), which plaintiffs opposed (Docket No. 54), including as part of the opposition a request to strike various documents (Exhibits E, J, L, V, W, X, Y, AA, BB, CC and EE) that Xerox used in support of its motion. Id. at p. 6. For the reasons explained below, the request to strike must be denied.

I. EXHIBIT E

Plaintiffs challenge Xerox's use of Exhibit E (Docket No. 45-8), Rosado's Student Learning History, a record of trainings he took while at Xerox, claiming that Xerox failed to properly authenticate the exhibit (Docket No. 54, p. 6). Authentication is "a condition precedent to admissibility." United States v. Safavian, 435 F.Supp.2d 36, 38 (D.D.C. 2006). To authenticate documents, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." United States v. Blanchard, 867 F.3d 1, 5 (1st Cir. 2017). This "is not a particularly high hurdle." United States v. Ortiz, 966 F.2d 707, 716 (1st Cir. 1992). The standard is satisfied if there is "enough support in the record to warrant a reasonable person in determining that the evidence is what it purports to be." Blanchard, 867 F.3d at 5. The proponent

does not have to "rule out all possibilities inconsistent with authenticity." Blanchard, 867 F.3d at 5.

Authentication can be accomplished "without the direct testimony of either a custodian or a percipient witness." United States v. Paulino, 13 F.3d 20, 23 (1st Cir. 1994). Thus, it may be established through "circumstantial evidence." United States v. Crosgrove, 637 F.3d 646, 658 (6th Cir. 2011). To that end, Fed.R.Evid. 901(b)(4) of the Federal Rules of Evidence explains that documents may be authenticated with evidence of their "appearance, contents, substance, internal patterns, and other distinctive characteristics of the item, taken together with all the circumstances." Id.

During his deposition, Rosado admitted that the document was his training record and recognized its content (Docket No. 45-1, p. 47 L. 5 – p. 49 L. 9).[1] Further, the document's top line reads "Xerox Worldwide Learning Services-Learning Management System" and is sub-titled "G12 Student Learning History by Organization" (Docket No. 45-8 at p. 1). Under the column reading, "Employee Name," the document repeatedly reads "Rosado, Jose A." And it lists training names, their start and completion dates, as well as the completion status of each training. Id. This is sufficient for a reasonable person to conclude that Exhibit E is what it purports to be: Rosado's training record with Xerox.

Plaintiffs contend that as a record created by computer software, the document should have been authenticated as stated in Fed.R.Evid. 901(b)(9) or 902(13) (Docket No. 73, p. 4). Rule 901(b)(9) provides that the results of a process or system is authenticated by a two-part foundation. First, evidence must be provided that describes that process or system. Second, it must be shown

[1] Responding to questions by his counsel, Rosado tried to qualify his testimony stating he was assuming that the document was his training record. But he recognized the document for what Xerox proffered.

that the process or system produces an accurate result. Rule 902(13) deals with authentication of certified records of an electronic process or system, setting forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness.

As the Court recognized in United States v. Meienberg, 263 F.3d 1177 (10th Cir. 2001), computer printouts are "not the result of a process or system used to produce a result, but merely printouts of preexisting records that happened to be stored on a computer." Id. at 1181 (internal citations omitted). In consequence, to authenticate them the proponent only has to present evidence sufficient to support a finding under Fed.R.Evid. 901(a), that the document is what the proponent claims the document is. Id. (rejecting argument that computer printout must be authenticated in accordance with Fed.R.Evid. 902(9)). And as stated in the 2017 Advisory Committee Notes to Fed.R.Evid. 902(13), nothing in the rules was intended to limit a party from establishing authentication of electronic evidence on any ground provided in the Rules of Evidence. In this manner, Exhibit E was properly authenticated to support a finding that it is what Xerox proffered.

II. EXHIBITS J AND L

Plaintiffs argue that Exhibits J and L (Dockets No. 45-17; 45-19), two memoranda in Rosado's personnel file, should be excluded because they were not properly authenticated and contain inadmissible hearsay (Docket No. 54, p. 7). Exhibit J is a memorandum, dated June 16, 2000, from one of Rosado's former managers, informing him about a generalized negative perception in the Puerto Rico office about his interactive skills and asking him to maintain a healthy work environment (Docket 45-17). Exhibit L is a memorandum, dated April 3, 2001, from another of Rosado's former supervisors, informing him that Xerox's employees had the right to

use the Company's Open Door Policy and that Rosado was expected to adhere to Xerox's anti-retaliation rule (Docket No. 45-19).

First, Xerox produced certifications under penalty of perjury from the custodians of Rosado's personnel records attesting that they were true and exact copies (Docket No. 65-3). While plaintiffs question the sufficiency of the certifications because they do not specifically identify Exhibits J and L (Docket No. 73, pp. 5-6), an independent review of the exhibits provides adequate indicia of authenticity based on their distinctive characteristics. Both memoranda were prepared on Xerox's letterhead; the same letterhead Rosado himself used in his memorandum of December 7, 2000, submitted as Exhibit K (Docket No. 45-18), which authenticity plaintiffs do not contest. Both memoranda show the same font type and format that Rosado used in the header of Exhibit K. And all three documents (the contested memoranda and Exhibit K) share a common topic: personnel matters. Moreover, Docket No. 45-21, which Rosado signed, references Exhibits J and L. Taken together with the totality of circumstances, there is an adequate basis to consider the exhibits properly authenticated. See, New Orleans Saints v. Griesedieck, 612 F.Supp. 59, 62 (E.D.La. 1985)(interoffice memorandum on company letterhead admissible under Fed.R.Evid. 901); Barry Wright Corp. v. ITT Grinnell Corp., 1981 WL 2032, at *2 (D.Mass. Feb. 26, 1981)(sufficient authentication of document to allow it to be considered in the motion for summary judgment where memorandum was addressed from one company employee to another and bore a stamp identifying that it originated in manager's office).

Second, by definition, "hearsay" consists of "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). Generally, hearsay evidence is not admissible at trial or for summary judgment purposes, unless it falls within one of the exceptions specified in the Federal

Rules of Evidence. See, Ramírez-Rodríguez v. Boehringer Ingelheim Pharmaceuticals, Inc., 425 F.3d 67, 76 (1st Cir. 2005)(stating proposition). But not "all out of court statements are inadmissible as hearsay." Morgan v. Massachusetts General Hosp., 901 F.2d 186, 190 (1st Cir. 1990). And whether a particular statement falls within a hearsay exception is relevant "only if the statement is, in fact, hearsay." Ramírez-Rodríguez, 425 F.3d at 76.

The court considerers Exhibits J and L solely as proof that Rosado's supervisors had sent him these letters in connection with the perception in the Puerto Rico office about Rosado's interactive skills and Xerox's Open Door Policy and anti-retaliation rule, not as evidence that what the letters state is true. In consequence, these exhibits are not hearsay. See, Ramírez-Rodríguez, 425 F.3d at 76-77 (sales analyst's report and physician statements not considered hearsay because they were not used to prove that plaintiff in fact engaged in the practice of over-sampling or violated company policies, but to show that this was the information defendant had before it).

III. EXHIBITS V, W, X, Y, AA, BB, CC, EE

Plaintiffs argue that Exhibits V, W, X, Y, AA, BB, CC and EE should be excluded on grounds of authenticity and/or hearsay (Docket No. 54, pp. 7-8). To facilitate review and place the exhibits in context, the court describes them in chronological sequence:

1. Exhibit Y. It consists of: (a) an email of January 29, 2014 from María Orfanidis Kelly from Human Resources (Docket No. 55-10, p. 17 L. 7 – p. 18 L. 1) to Marlene Williams (Rosado's immediate superior in the sales organization), asking Williams for a summary on what the collections manager (Luz Negrón) reported to her, and stating that once Angela Lisath (Human Resources Manager) had the summary she would get in touch with Williams and more than likely corporate security to start the investigative process; (b) an email of February 3, 2014 from Orfanidis to William following up on

the previous email; (c) an email of February 3, 2014 from Williams to Lisath with copy to, among other individuals, Orfanidis, apologizing for a misunderstanding and attaching the requested report (Exhibit X, described below); and (d) an email of February 5, 2014 from Lisath to Del Hernández (a Xerox Brand Protection Investigator) referencing the thread.

2. Exhibit X. An email of February 3, 2014 from Luz Negrón, Xerox's Credit Supervisor, to Williams, summarizing the information she received regarding the incident involving the telephone conversation Rosado allegedly had with a customer on "Stop Service/Stop Supplies" status.

3. Exhibit W. It consists of: (a) an email of February 19, 2014 from Nancy Pena on behalf of Marlene Williams to Lisath and Hernández, a Xerox Brand Protection Investigator, including the date Rosado made the call in question and his office and cell numbers; (b) an email of February 20, 2014 to from Listah to Williams and Hernández thanking Williams for the email and asking for feedback from collectors; (c) an email of February 20, 2014 from Lisath to Hernández asking him to let her know what he found on the phone numbers and if there was a way to approach the customer on this matter; and (d) an email of February 26, 2014 from Lisath to Hernández asking him for an update.

4. Exhibit V. It consists of: (a) an email of February 19, 2014 from Hernández to Cindy A. Bozilleri (Program Manager, Wireless Deployment and Support), requesting cell phone information for the dates between 1/26/2013 to 1/28/2013 for Rosado's cell number; (b) an email of February 20, 2014 from Borzillery to Hernández and the Wireless Administrator, asking if the call detail could be obtained for Hernández; and

(c) an email of February 20, 2014 from Wireless Administrator to Borzillery and Hernández, attaching the call detail requested.

5. Exhibit AA. It consists of: (a) an e mail of February 19, 2014 from Hernández to Borzilleri asking for a call log for dates between 1/26/2013 and 1/28/2013 on Rosado's cell number; (b) an email of February 20, 2014 from Borzilleri to Hernández and Wireless Administrator asking for the detail for Hernández; (c) an e mail of February 21, 2014 from Hernández to Borzilleri and Wireless Administrator with the call dates; (d) an email of February 21, 2014 from Wireless Administrator to Hernández and Borzilleri asking Hernández if he needed the December call detail; (d) an email of February 21, 2014 from Hernández to Wireless Administrator and Borzilleri stating that he needed the three day period from 12/26/2013 to 12/28/2013; and (e) an email of February 21, 2014 from Wireless Administrator to Hernández and Borzilleri attaching the call detail requested.

6. Exhibit BB. It consists of: (a) an email of February 21, 2014 from Hernández to Williams and Leath regarding phone records with attachments; (b) an email of February 21, 2014 from Lisath to Hernández and Williams asking that those records be checked against the customer phone number called on 1/27 and see if it could be narrowed down to the time of day the call was made to the customer and what other customers were called shortly thereafter; (c) an email of February 22, 2014 from Williams to Hernández and Lisath pointing out that she could call a number to identify the owner of that number if it helped; (d) an email of February 24, 2014 to Williams and Lisath with numbers that Williams might help identify; (e) an email of February 27, 2014 to Williams and Lisath with five active number that were called "between the time in

question;" (f) an email of February 27, 2014 from Williams to Hernández and Lisath stating that they knew everyone on the list except for two cases and pointing out she would like to bring this to closure in fairness to the employees involved; (g) an email of February 27, 2014 from Hernández to Williams and Lisath stating they did not have anything then on Rosado other than what (a co-employee heard) at that point is was he-said-she said and if Williams and Lisath did not want to pursue anything further they could close the case; and (h) an email of February 27, 2014 from Williams to Hernández and Lisath informing that they would set up a call early the following week to agree on next steps.

7. Exhibit CC. It consists of: (a) an email of February 25, 2014 from Robert Mulhern to Rosado with copy to Williams, regarding Rosado's expired license; (b) an email of March 5, 2014 from Williams to Lisath with the notice from Mulhern; and (c) an email of March 6, 2014 from Lisath to Hernández asking him to call her ASAP on the thread.
8. Exhibit EE. It consists of: (a) an email of February 25, 2014 from Mulhern to Rosado, with copy to Williams, concerning Rosado's expired license; (b) an email of March 6, 2014 from Mulhern to Rosado, with copy to Williams and Lisath, following up on the email of February 25, 2014, stating that Mulhern had not received a response, asking for a reply with license status by end of business day that day, directing Rosado to renew the license the same day in order to continue driving on Xerox business; (c) an email of March 6, 2014 from Rosado to Mulhern, with copy to Williams and Lisath, stating that he was in the process of renewing the license, stating the offices that expedited renewals in Puerto Rico were closed from November until the last week of January, lines for renewals were very long, and he expected to have his license renewed

asap; (d) an email of March 6, 2014 from Lisath to Hernández with the emails referred to; and (e) an email of March 6, 2014 from Hernández to Lisath noting that the website said nothing of closing that time period, three of the five locations were open on Saturdays from 9-1 and people had to the option to renew licenses online, so there was no reason for not having a valid license.

A. Authentication[2]

The emails show that Hernández, Lisath and/or Williams are the purported authors and/or recipients of the emails. These witnesses have personal knowledge of the email threads and the attachments and can properly attest as to their authenticity. Xerox produced the material with an accompanying declaration under penalty of perjury by Hernández, who asserted that the documents in question are emails he maintained in his files as part of his investigation into Rosado's alleged policy violations (Docket No. 65-4). And the emails contain the name of the sender and recipient in the bodies of the emails, in the "To:" and "From:" headings and/or in the signature blocks at the end of the emails. Also, their content authenticates them as being from the purported sender and to the purported recipient, containing, as they do, discussions of identifiable matters involving Rosado, matters linked to the purported policy violations which led to the investigations to which the emails are directly related. The texts include earlier messages and responses, hence their content and substance serve to identify the threads in the exhibits as an exchange of emails between Xerox personnel. Considering all these elements, the emails have

[2] Plaintiffs contend it was Xerox's burden to authenticate the documents in its motion for summary judgment not via Reply (Docket No. 73, p. 4 n.12). It is unclear whether they only refer to the exhibits mentioned in the argumentative statement (Exhibits W and CC) or to all exhibits. While the burden is on the proponent of the evidence to make a sufficient showing that any particular piece of evidence is admissible, "evidentiary objections must first be raised by the opposing side." Fenje v. Feld, 301 F.Supp.2d 781, 810 (N.D.Ill. 2003), *aff'd* 398 F.3d 620 (7th Cir. 2005). There is no rule preventing a party moving for summary judgment "from responding to evidentiary objections in its reply." Id.

been properly authenticated. See, Safavian, 435 F.Supp.2d at 40-42 (finding emails properly authenticated where, *inter alia*, the names of the senders or recipients of the emails were included in either the email content or signature blocks, and some parts of the texts led to responses such that the contents and substance of the exhibits served to identify them); 5 Mueller and Kirkpatrick, *Federal Evidence* § 9.9, pp. 390-394 (4th ed. 2014)(relevant circumstances for email authentication under Fed.R.Evid. 910(b)(4) include indicators in the message itself of its source-whether name, phone number or URL – connections between the statements in the communication itself and known facts about the sender, behavior by the sender and recipient that point toward the two as being the sender an recipient, and content given in reply to an earlier email message, as often an email will include the message to which it is responding as an attachment or in the body of the message).

B. Hearsay

1. Telephone Call Logs

Plaintiffs object to Exhibits V, AA and EE on hearsay grounds (Docket No. 54, pp. 7-8; Docket No. 73, p. 7). Exhibits V and AA are email threads involving Hernández, Borzilleri and Xerox's Wireless Administrator in connection with Hernández's inquiry into Rosado's company phone records, as part of the Optimatica-related policy violation investigation. The exhibits in question include, as attachments, telephone call logs that the Wireless Administrator provided to Hernández. Plaintiffs challenge the logs, and Xerox claims they are admissible under Fed.R.Evid. 803(6) (Docket No. 65, p. 14).

Fed.R.Evid. 803(6) allows records kept in the course of a regularly conducted activity of a business to be introduced in evidence as an exception to the hearsay exclusion rule. For this purpose, the term "business" includes business, institution, association, profession, occupation,

and calling of every kind, whether or not conducted for profit. The form which the "record" of a regularly conducted business activity may assume has been described broadly as a "memorandum, report, record, or data compilation in any form. See, Advisory Committee Notes to Paragraph 6 of Proposed Rule 803 (1972). The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form, including but not limited to electronic computer storage. Id.

To invoke the exception, the proponent must demonstrate that the proffered record was: (1) made at or near the time of the act or event recorded; (2) by- or from information transmitted by -someone with knowledge; (3) kept in the course of a regularly conducted activity of the business; and (4) made as part of the regular practice of that activity. See, Ira Green, Inc. v. Military Sales and Service Co., 775 F.3d 12, 20 (1st Cir. 2014)(listing requirements). Foundation for the application of Rule 803(6) may be laid by the custodian or other qualified witness or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification. See, United States v. Butler, 635 Fed.Appx. 585, 589 (11th Cir. 2015)(addressing proponent's burden).

To be an "other qualified witness," it is not necessary that "the person laying the foundation for the introduction of the business record have personal knowledge of their preparation." Dyno Const. Co. v. McWane, Inc., 198 F.3d 567, 576 (6th Cir. 1999). All that is required of the witness is that he or she be familiar with the manner in which "records are made and kept." U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust v. Jones, 925 F.3d 534, 538 (1st Cir. 2019). A person qualified to lay foundation in connection with Fed.R.Evid. 803(6) need not even be an employee of the entity keeping the records, "as long as the witness understands the system by which they are made." Dyno Const. Co., 198 F.3d at 576. Compliance with these requirements ensures admissibility in conformity with Fed.R.Evid. 803(6) "unless the source of information or

the method or circumstances of preparation indicate lack of trustworthiness." United States v. Moore, 923 F.2d 910, 925 (1st Cir. 1991).

Xerox argues that the telephone logs are admissible as business records because Hernández was responsible for participating in employee policy violation investigations; in that role maintained electronic files about a policy violation investigation regarding Rosado; and printed out a true and exact copy of the files maintained in the ordinary course of business (Docket No. 65, p. 14; Docket No. 65-4). This may suffice to introduce the email exchange, but "hearsay exceptions can be layered." Cameron v. Otto Bock Orthopedic Industry, Inc., 43 F.3d 14, 16 (1st Cir. 1994).

A record that would require analysis via Fed.R.Evid. 805 of multiple levels of hearsay outside the business records context will not require such analysis if introduced under Fed.R.Evid. 803(6), so long as each hearsay level originates from a regular practice of one employee within the business relating information to another, all in the regular course of business. See, 30B Wright and Bellin, *Federal Practice and Procedure: Evidence* § 6866, p. 361 (discussing topic). For that reason, that Hernández referred to an investigation does not necessarily bypass the hearsay character of an attachment. See, Willco Kuwait (Trading) v. deSavary, 843 F.2d 618, 628 (1st Cir. 1988)("That deSavary referred to Seraphim's investigation did not waive the hearsay character of the telex"). And while telephone call logs may be considered business records for purposes of Fed.R.Evid. 803(6), Park-N-Ticket, Inc. v. Fireman's Fund Insurance Company, 2013 WL 11927706, *2 (N.D.Ga. May 8, 2013)(so recognizing), Hernández's testimony, standing alone, does not satisfy the requirements of Fed.R.Evid. 803(6).

Hernández did not state that he was familiar with phone-record keeping practices in Xerox, the circumstances under which those entries were recorded, and whether the entries were made at

or near the time of the events recorded. See, United States v. Laster, 258 F.3d 525, 529 (6th Cir. 2001)(evidence not admissible under Fed.R.Evid. 803(6) because witness had no personal knowledge or familiarity with record keeping practices of company that produced records and did not indicate whether the documents were prepared simultaneously with the transactions reflected thereon). Compare with, United States v. Atchley, 699 F.2d 1055, 1058 (11th Cir. 1983)(customer telephone records from phone company introduced through phone company's security assistant, who testified that records were kept in the ordinary course of business, it was her ordinary course of business to make and keep such records, the records were made on or about the time of the transactions reflected in the records, the original record was sent to the subscriber, and copies were made from microfiche records kept in her office under her supervision); Butler, 635 Fed.Appx. at 589 (contractor testified that, based on his work experience with AT&T as well as his discussion with the records custodian, the cell phone records at issue were made at or near the time by someone with knowledge, were kept in the course of regular business activity, and making the record was the regular practice of that activity).

Yet this is only part of the story, for Fed.R.Evid. 801 defines "declarant" as the "person who made the statement." And the telephone logs here appear to be machine generated rather than generated by a person, and thus, non-hearsay. See, United States v. Channon, 881 F.3d 806, 810-811 (10th Cir.), *cert. denied* 139 S.Ct. 138 (2018)(spread sheets with data created at the point of sale, transferred to OfficeMax servers and then passed to third-party data base deemed machine-generated non-hearsay); United States v. Lamons, 532 F.3d 1251, 1262-1264 (8th Cir. 2008)(machine-generated compact disc of data collected from telephone calls made at airline's corporate toll-free number not testimonial statement within meaning of Confrontation Clause); 5 Weinstein's *Federal Evidence* (2019) § 900.07[1][9], p. 900-77 (computer-generated data, which

includes metadata, automatic teller machine transactions and direct-dial telephone calls are not hearsay). "In those circumstances, there is no declarant making the statement, as the computer is itself performing the transaction that is at issue").[3] In any event, at this point the evidentiary significance of these non-hearsay logs in the present litigation is null, given that, as explained in the Opinion and Order, the call in question was not made in December, hence would not be reflected in the December log, and the January log was not examined until after Xerox decided to let Rosado go.

2. Emails on Expired Driver's License

Plaintiffs claim Exhibit EE should be excluded as inadmissible hearsay (Docket No. 73, p. 8). As previously mentioned, the exhibit consists of various emails, but plaintiffs focus their attention on one of them: Murlhern's email of February 25, 2014 to Rosado. Id. Xerox argues the email is admissible on account of Fed.R.Evid. 801 (d)(2)(B), pursuant to which a statement is not hearsay when offered against a party who "manifested that it adopted or believed [the statement] to be true." The exhibit reads:

> **You recently had your Motor Vehicle Report completed on you as part of your inclusion in the Company's Car Program. The results show that your license is currently expired as of 6/25/23. Please validate your license ASAP. Once completed, please forward me a copy of your renewed license. If you have any questions, feel free to contact me. Thank you.**

[3] See also, United States v. Moon, 512 F.3d 359, 361-362 (7th Cir. 2008)(pointing out that data or readings taken from instruments are not a "statement" in any useful sense, nor is a machine a witness against anyone: "If the readings are 'statements' by a 'witness against' the defendants, then the machine must be the declarant. Yet how could one cross examine a gas chromatograph?"); State v. Schuette, 44 P.3d 459, 463 (Kan. 2002)("Schuette's argument that caller ID evidence constitutes inadmissible hearsay appears to run contrary to every jurisdiction that has broached this matter. Each court has held that caller ID displays are merely computer generated read outs and not hearsay statements or persons or electronically regenerated hearsay statements")(citations omitted).

Rosado did not respond to the email, which led Mulhern to send another email to Rosado on March 6, 2014, as follows:

> **I sent you an email on 2/25/14, and have not received a response. Please reply with your license status by the end of business today, 3/6/14. You are currently driving on an expired license and must renew your license today in order to continue driving for Xerox business. I have attached your MVR that was conducted on you as part of the company car program. If you have any questions, feel free to contact me. Thank you.**

Rosado responded later that same day, stating:

> **Robert, I am on the process of renewing my license. In PR the offices that expedite the renewals [were] closed from November until the last week of January. Lines for renewals are very long. I expect to have my license renew[ed] asap. I will let you know once it is renewed.**

The Federal Rules of Evidence "treat admissions by party-opponents as non-hearsay under Fed.R.Evid. 801(d)(2) rather than as admissible hearsay." United States v. Ferber, 966 F.Supp. 90, 97 n. 7 (D.Mass. 1997). Rule 801(d)(2)(B) extends the non-hearsay status for opposing party statements to statements the opposing party makes indirectly by adopting or acquiescing in the statement of another. Thus, when a party "explicitly agrees with the factual statement of another, the party typically can be characterized as adopting the other person's statement," and it can consequently be introduced against the party as non-hearsay through Fed.R.Evid. 801(d)(2)(B). 30 Wright and Bellin, *supra* at § 6774, p. 185. Plaintiffs contend Rosado did not respond to the February 25th email, and therefore, did not adopt Mulhern's statement (Docket no. 73, p. 8). Three aspects of this issue merit discussion.

First, with respect to statements contained in a message, the failure to reply may be introduced as an admission of the statements contained in the message "when the receiver … remains silent in a situation where a response would seem natural or expected." Tober v. Graco

Children's Products, Inc., 431 F.3d 572, 576 (7th Cir. 2005). For that reason, if a "written statement is communicated by another person to a party in the litigation containing assertions of fact which if untrue the party would under all circumstances naturally be expected to deny, his failure to speak is receivable against him as an adoptive admission" in accordance with Rule 801(d)(2)(B). M. Graham, *supra* at § 7021, p. 222. In those circumstances, the statement is taken as a non-hearsay admission by the party opponent in line with Fed.R.Evid. 801(d)(2)(B). Considering the organizational setting Malhern and Rosado were in at the time of Mlhern's message, his factual statement concerning Rosado's expired license was one to which a denial from Rosado would have been expected, if the statement had not been true. The failure to so respond was so unnatural that it supports the inference that Rosado acquiesced in the statement. And therefore, Rosado's lack of response to the February 25th email is an admission that Mulher's statement was truthful, as in fact it was.

Second, when Rosado responded to Mulhern's follow up email of March 6th, Rosado explicitly admitted that he had not renewed his driver's license, further representing that he would renew it. And during his deposition, he testified about this exchange of emails with Mulhern, acknowledging that his license had expired as Mulhern had stated. From this perspective, by explicitly agreeing with the statement Rosado adopted it, taking the statement beyond the realm of hearsay under Rule 801(d)(2)(B). See, Vázquez v. López-Rosario, 134 F.3d 28, 35 (1st Cir. 1998) (statement of which party has manifested belief in its truth not hearsay).

Third, in the February 2014 message Mulhern also directed Rosado to validate the license ASAP and to forward him a copy of the renewed license. Commands cannot be offered for their truth because they are not assertive speech, that is, propositions that can be proven true or false. See, United States v. Rodríguez-López, 565 F.3d 312, 314 (6th Cir. 2009)(examining topic). As

such, they are not hearsay- an "out of court statement offered for its truth" -much less inadmissible hearsay. See, United States v. Keane, 522 F.2d 534, 558 (7th Cir. 1975)("In one sense, Swibel's statement is similar to an order, and is not capable of being true or false …"); Calloway v. Commonwealth, 2014 WL 5421256 *7 (Ky Oct. 24, 2014)(unpublished)("The statement 'come outside' is a command offered to show that the statement was made and is not a proposition that can be proven true or false. Neither statement sent to Calloway violated the rule against hearsay").

IV. CONCLUSION

For the reasons stated, plaintiffs' request to strike Exhibits E, J, L, V, W, X, Y, AA, BB, CC and EE of Xerox's motion for summary judgment is DENIED.

SO ORDERED.

In San Juan, Puerto Rico, this 27th day of December, 2019.

s/Pedro A. Delgado Hernández
PEDRO A. DELGADO HERNÁNDEZ
United States District Judge