

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION**

LUXPRO CORPORATION, a Taiwanese)	
corporation,)	
)	
Plaintiff,)	
)	Civil Action No. 4:08-CV-04092-HFB
vs.)	
)	
APPLE, INC. f/k/a Apple Computer,)	
Inc.,)	
)	
Defendant.)	

**PLAINTIFF’S RESPONSE AND OBJECTION TO DEFENDANT’S REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS THE SECOND
AMENDED COMPLAINT**

Plaintiff Luxpro Corporation (“Luxpro”) files its Response and Objection to Defendant’s Request for Judicial Notice in Support of Motion to Dismiss the Second Amended Complaint (the “Objection”) and respectfully shows the Court as follows:

I. ARGUMENT AND AUTHORITIES

In support of its Motion to Dismiss Luxpro’s Second Amended Complaint, Apple, Inc. (“Apple”) filed the Request for Judicial Notice purporting to request that this Court take judicial notice of

(1) an injunction issued by the Ninth Panel of the Braunschweig Regional Court in Braunschweig, Germany on March 14, 2005; (2) an injunction issued by the Shihlin District Court in Taipei, Taiwan on August 18, 2005; and (3) a July 7, 2009 decision of the Taiwan Supreme Court regarding Apple’s and Luxpro’s respective appeals from Taiwanese lower court decisions referenced in Luxpro’s complaint, which are cited in Apple’s Motion to Dismiss the Second Amended Complaint (“SAC”).

(Dkt. No. 69 at 1). In addition, Apple attached purported translations of these foreign language documents. (*Id.*; Dkt. No. 68 at Exs. 3, 5-6).

While Luxpro does not object to the Court introduction of evidence of the underlying court proceedings that took place between the parties, when appropriate for the Court's consideration, Luxpro respectfully submits they should not be considered at the pleadings stage of these proceeding. The Court is to consider the Plaintiff's Complaint in response to a motion to dismiss under Fed R. Civ. P. 12(b)(6) to determine the sufficiency of those pleadings under Rule 8. However, Apple is requesting the Court to consider evidence that is external to those pleadings in an attempt to ask the court to weigh the sufficiency of the evidence to support Luxpro's claims, or to consider evidence that would normally be submitted to support an affirmative defense to those claims Defendant that hasn't yet been asserted because Apple has not yet answered. The matters that Apple submits for judicial notice are more appropriately considered at trial or in support of a summary judgment motion, that should only be filed after all discovery has been completed. Accordingly, the request should be denied at this stage of the case.

Additionally, if the Court is inclined to take the proposed documents into consideration at this juncture, it should do so subject to strict compliance with the Federal Rules related to authenticity (which have not been satisfied by Apple).¹ Luxpro does object to Apple's purported *translations* of these proceedings, especially given that the translations are not certified and do not comply with the Federal Rules.

¹ See, e.g., Fed. R. Civ. P. 44(a)(2) (providing the admissibility of (1) an official publication of a foreign record or (2) a foreign record or a copy attested by an authorized person accompanied by a final certification of genuineness or a certification under an applicable treaty or convention); Fed. R. Evid. 902(3) (providing for the admissibility of foreign public documents without extrinsic evidence of authenticity in certain circumstances); see also *MDG Int'l, Inc. v. Australian Gold, Inc.*, 606 F. Supp. 2d 926, 939 n.21 (S.D. Ind. 2009) (noting that "[d]ocuments in a foreign language are widely considered not properly authenticated").

For example, Federal Rule of Evidence 604 states that “[a]n interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.” Fed. R. Evid. 604; *see also* Fed. R. Evid. 901 (“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”). As detailed recently by a district court in the Northern District of Illinois, when considering whether to admit testimony translated from Spanish to English:

Documentary evidence is admissible if authenticated “by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Fed. R. Evid. 901(a). Written translations are subject to this authentication requirement. *United States v. Noura*, No. 06-CR-135 (JBW), 2006 WL 2417245, at *2 (E.D.N.Y. Aug. 21, 2006) (Weinstein, J.); *see* Fed. R. Evid. 604 (“[a]n interpreter is subject to the provisions of [the Federal Rules of Evidence] relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.”). Therefore, “[w]itness testimony translated from a foreign language must be properly authenticated and any interpretation must be shown to be an accurate translation done by a competent translator.” *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 659 (N.D. Cal.1994) (citing Fed. R. Evid. 604 & 901).

Trapaga v. Cent. States Joint Bd. Local 10, No. 05 C 5742, 2007 WL 1017855, at *7 (N.D. Ill. March 30, 2007); *see also Davis v. SpeechWorks Int’l, Inc.*, No. 03-CV-0533S(F), 2006 WL 2828856, at *2 (W.D.N.Y. Sept. 29, 2006) (striking translation of foreign document that was not certified by the actual translator); *Jack*, 854 F. Supp. at 659 (excluding foreign language affidavits due to translator’s failure to properly certify the translation); *Kesel v. U.S. Parcel Serv., Inc.*, No. C 00-3741 SI, 2002 WL 102606, at *3 (N.D. Cal. Jan. 17, 2002) (same); *Sun v. Governmental Auths. on Taiwan*, No. C 94-2769SI, 2001 WL 114443, at * 5 (N.D. Cal. Jan. 24, 2001) (concurrently admitting translated documents that were properly authenticated and striking deposition transcripts for which “no authenticated English translation was provided”).

Unlike in the *Trapaga* case (and others)—where the court struck the translated affidavits even in light of the certifications provided—Apple’s purported translations include *no certification* as to their accuracy, no identification of the individual who purportedly did the translation, no identification of the translator’s qualifications, and no oath or affirmation. (Dkt. No. 68 at Exs. 3, 5-6). Accordingly, Apple’s translations should be stricken and/or disregarded by this Court in connection with its Motion to Dismiss the Second Amended Complaint.

Luxpro’s final objection relates to Apple’s attempt, here, to improperly cherry-pick which parts of the record in Germany and Taiwan it wants to use. Because review, analysis, and consideration of the multiple legal proceedings in both Germany and Taiwan is factually intensive and—as provided for herein, requires certified translations—the Court should have the benefit of the complete record, not just selected portions identified by one party. Accordingly, Luxpro also objects to Apple’s attempt to use selected, incomplete portions of the record of the legal proceedings as evidence in support of its motion to dismiss, as well as on the basis of optional completeness and best evidence.

II. CONCLUSION

Because Apple’s submission of purported translations of several documents does not comply with the Federal Rules, Luxpro respectfully requests that the Court strike Apple’s translations and/or disregard them in connection with its Motion to Dismiss.

Dated: March 29th, 2010.

Respectfully Submitted,

/s/ Phillip N. Cockrell

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV5(a)(3), this 29th day of March, 2009.

/s/ Phillip N. Cockrell _____
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