

E-Filed: April 22, 2014

1
2
3
4
5
6
7 NOT FOR CITATION
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 EVERFLOW TECHNOLOGY
12 CORPORATION,

No. C07-05795 HRL

13 Plaintiff,

**ORDER ON OBJECTIONS TO TRIAL
EXHIBITS**

14 v.

[Re: Docket Nos. 343, 344]

15 MILLENIUM ELECTRONICS, INC., ET
16 AL.,

Defendants.

17 At the Final Pretrial Conference, the Court heard motions in limine and reviewed the parties'
18 exhibit lists. The Court granted Plaintiff's motion to exclude documents requested but not produced
19 in discovery. The Court also ordered the parties to serve upon each other and lodge with the Court
20 copies of all trial exhibits and to file any objections thereto. Plaintiff objected to all but one of
21 Defendants' ten (10) exhibits based on relevance, hearsay, failure to disclose, and/or
22 incompleteness. *See* Dkt. No. 343. Defendants objected to many of Plaintiff's 107 exhibits on
23 grounds of relevance, hearsay, and privileges. *See* Dkt. No. 344.

24 A. Plaintiff's Objections

25 Plaintiff asserts that many of Defendants' exhibits or portions thereof, were not produced in
26 discovery despite requests for such documents. Defendants only express a general belief that they
27 were produced at some point. Unless Defendants can actually demonstrate beyond a mere belief
28 that they did produce the documents in question during discovery, the Court will not allow them to

1 be presented as exhibits at trial. Thus, in accordance with the aforementioned order on Plaintiff's
2 motion in limine, the following exhibits or portions thereof will be excluded: 201, 203, 205, 207,
3 208 (pages 1-16), 209 (pages 10-12), and 210.¹

4 As for the exhibits that were previously disclosed, Plaintiff objects to Exhibits 204 and 206
5 as hearsay. Exhibit 204 and portions of Exhibit 206 are emails from an employee of Plaintiff and do
6 not constitute hearsay. *See* Fed. R. Evid. 801(2)(D) (opposing party's statement). Whether the
7 remaining portions of Exhibit 206 are subject to the business records exception, as disputed by the
8 parties, will depend on the testimony of a custodian or other qualified witness to show that the
9 requirements of FRE 803(6) are satisfied. Thus, the Court defers its ruling on Plaintiff's hearsay
10 objection to Exhibit 206.

11 B. Defendants' Objections

12 Defendants assert that numerous exhibits are subject to attorney-client privilege. However,
13 the Court previously found that attorney-client privilege did not apply to these documents due to the
14 crime-fraud exception. Accordingly, Defendants' objection is overruled.

15 Defendants also raise objections on relevance grounds and argue that because the alleged
16 fraudulent intent must have formed by the time of the agreement, documents created after are
17 irrelevant to prove intent.² Notwithstanding that the documents may be relevant for another
18 purpose, subsequent actions and later created documents can evidence an earlier formed intent.
19 Thus, at this time, the Court declines to exclude the exhibits on that basis alone.

20 Exhibits 97 through 99 are the federal income tax returns for MEI and the Loros, and
21 Defendants assert the tax privilege recognized by California law. Any privilege applies to their
22 discovery, not their admissibility. If relevant, they may be admitted so long as personal identifiers
23 are redacted.

24 Exhibit 107 purports to be the entirety of MEI's responses to Plaintiff's first request for
25 production comprising nearly 300 pages. Defendants generally object on relevance and hearsay
26 grounds. While it is doubtful that the each document therein is relevant and not hearsay, the Court

27 ¹ Defendants numbered their exhibits 1 through 10. However, the parties had previously agreed that
28 Plaintiff would use exhibits 1 through 199, and Defendants were to start numbering their exhibits at
200. Accordingly, the Court will refer to Defendants' exhibits 1 through 10 as 201 through 210.

1 defers ruling on the exhibit's admissibility until the purpose for which Plaintiff seeks to introduce it,
2 or portions thereof, is apparent.

3 C. Conclusion

4 Exhibits 201, 203, 205, 207, 208 (pages 1-16), 209 (pages 10-12), and 210 are excluded for
5 failure to disclose, subject to Defendants' ability to demonstrate that the documents were in fact
6 produced in discovery. Plaintiff did not object to Exhibit 202 and its objection to Exhibit 204 is
7 overruled. The Court's ruling on objections to Exhibit 206 is deferred.

8 Defendants did not object to Exhibits 1-46, 60, 61, 63, 64, 68, 74-83, 85-96, 100-02, 104-06.
9 Defendants' objections based on attorney client privilege (Exhibits 47-53, 55-58, 62, 69-71) and tax
10 return privilege (Exhibits 97-99) are overruled. The Court defers until trial its ruling on Defendants'
11 relevance objections to Exhibits 47-59, 62, 65-67, 69-73, 84, 103, 107, as well as Defendants'
12 hearsay objections to Exhibits 97-99, 103, 107.

13 **IT IS SO ORDERED.**

14 Dated: April 22, 2014



15 HOWARD R. LOYD
16 UNITED STATES MAGISTRATE JUDGE
17
18
19
20
21
22
23
24
25
26
27
28

1 **C07-05795 HRL Notice will be electronically mailed to:**

2 David Ray Chamberlin chamberlin.calaw@gmail.com

3 Jonathan C. Do jonathando@comcast.net

4 Mark M Fang , Esq MFang@MarkFangAPC.com

5 Melva Loro j4ldef@yahoo.com

6 Richard John La Fleur rlafleur@lafleuryasin.com

7 **Counsel are responsible for distributing copies of this document to co-counsel who have not**
8 **registered for e-filing under the court's CM/ECF program.**

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28