UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re COMPUTER AIDED SYSTEMS, INC., Debtor.	Case No. LA 99-52454 TD Chapter 11 MEMORANDUM OF DECISION RE MILLER NASH LLP EVIDENTIARY OBJECTIONS TO ANDERSON DECLARATION Date: 3/15/07 Time: 11:00 a.m. Courtroom: 1345

INTRODUCTION

Miller Nash LLP (MN) filed evidentiary objections on February 21, 2007, to the declaration of Charles Richard Anderson filed June 22, 2006, on behalf of Computer Aided Systems, Inc. (CASI), in partial opposition to the MN interim fee application.

The following is my ruling. It outlines my reasons for overruling (in large part) the MN objections.

FEDERAL RULE OF EVIDENCE 807

Rule 807 provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and

> the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

1. Is The Anderson Declaration Trustworthy?

A witness's death is not enough to justify discarding the trustworthiness requirement of Rule 807, the residual hearsay exception. See, Stolarczyk ex rel. Estate of Stolarczyk v. Senator Intern. Freight Forwarding, LLC, 376 F.Supp.2d 834, 842 (N.D.Ill., 2005). Thus, I have evaluated the trustworthiness of Anderson's declaration independently of the fact that he died on August 8, 2006, 47 days after executing and filing his declaration.

Rule 807 provides a basis for permitting introduction of hearsay statements possessing "circumstantial guarantees of trustworthiness equivalent to those present with respect to the twenty-three specific exceptions contained in Rule 803 and the five hearsay exceptions contained in Rule 804." 30B MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE §7095 (2006). When looking at "circumstantial guarantees," the focus is on the "circumstances that 'surround the making of the statement and that render the declarant particularly worthy of belief.'" Id. (quoting Idaho v. Wright, 497 U.S. 805, 819 (1990)). Courts tend to look at four factors when evaluating "circumstantial guarantees."

These include:

> (1) certainty that the statement was made; (2) assurance of personal knowledge of the declarant of the underlying event; (3) practical availability of the declarant at trial for meaningful cross-examination concerning the underlying event; and finally (4) an *ad hoc* assessment of reliability based upon the totality of the surrounding circumstances including corroborating and inconsistent facts and an assessment of credibility of the out of court declarant,

> considered in light of the class-type exceptions to the hearsay rule supposed to demonstrate such characteristics.

BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL 1455 (2007).

The fact that the Anderson declaration was made by Anderson is not in dispute. Anderson's personal knowledge is not in question, though obviously, after his death on August 8, 2006, Anderson was not available for cross-examination. Thus, the fourth factor, an *ad hoc* assessment of reliability based on the totality of the surrounding circumstances becomes the test that is of the greatest importance here.

To make this *ad hoc* assessment courts have considered such things as: "(A) the declarant's partiality, i.e. interest, bias, corruption, or coercion, (B) the presence or absence of time to fabricate, (C) suggestiveness brought on by the use of leading questions, and (D) whether the declarant has ever recanted or reaffirmed the statement." Id. at 1455-1456. Since the test is the "totality of the circumstances," no one factor will make the declarant trustworthy or untrustworthy per se. See, e.g., Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 112 -113 (3rd Cir. 2001)(weighing many factors when determining trustworthiness).

Before Anderson died, he did not recant or reaffirm his declaration. However, in U.S. v. Valdez-Soto, 31 F.3d 1467, 1471 (9th Cir. 1994), the Ninth Circuit found that it would be appropriate to look at "corroborating evidence" where it "is a valid consideration in determining the trustworthiness of out-of-court statements for purposes of Rule 803(24)," the predecessor to Rule 807. The fact that the Anderson declaration under the circumstances present here has been both challenged and corroborated by other declarations, letters, depositions, and e-mails leads me to conclude that the declaration is trustworthy. In addition, the Anderson declaration provides important extrinsic evidence that I am required to consider in determining the intent of the parties in entering into the Agreement I approved by my order

entered in this case on April 2, 2002, since many important communications took place exclusively between Anderson and various MN attorneys. The extrinsic evidence would be severely (and, I believe, inappropriately) limited if the records were deprived of most of the Anderson declaration.

This case does not present the concern of suggestive questioning because the issue here relates to a declaration signed and sworn to by Anderson, unlike a deposition. I note that Anderson apparently prepared the declaration and signed and filed it on June 22, 2006, shortly after MN filed and served its fee application on June 15, 2006. The declaration seems to me to be level-headed and balanced. It has been challenged extensively in various respects by later-filed opposing declarations, documentary evidence, and briefs filed on behalf of MN.

I note that all the evidence relating to the MN fee application was introduced by written declaration under oath, including several from the applicant and several from the opposing parties. No one asked for the opportunity to cross examine any declarant at an evidentiary hearing. Although some post-declaration deposition testimony was introduced, I did not find that any such written testimony was central to my decision making process. I also note that there is not much structural difference between the content of the Anderson declaration and the content of most of the other written declarations filed in this matter, not only by Alan Tippie and Elissa Miller for CASI, but also by Dennis Rawlinson, James Jordan and Daniel Brown for MN. Each recounts his or her participation, thoughts, motivation and recollections of the negotiations concerning the fee agreement in question, the drafting and approval process, and the surrounding circumstances in which the agreement was made. Under the circumstances as outlined here, I believe it would be unfair to exclude the Anderson declaration. Even though he passed away before MN had a chance to

depose him, MN had ample opportunity to review and investigate every aspect of the documentary record and the chronological details and content of the Anderson declaration story, though MN did not have the opportunity to confront Anderson personally to ask him questions about his story with a court reporter taking down the questions and answers.

MN's main basis for attacking the credibility of Anderson lies in the fact that he was an agent [not to mention shareholder] of CASI at the time he wrote the declaration and, as such, had a financial interest in the outcome of the fee dispute. In Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 112 -113 (3rd Cir. 2001), the court examined several factors in determining the trustworthiness of an affidavit. Although the court noted that "(5) the declarant was not employed by the plaintiff at the time of the statements, and thus had no financial interest in the litigation's outcome", as being a factor that militated in favor of trustworthiness, the court was also persuaded by the following additional facts: "(1) the declarant was known and named, (2) the statement was made under oath and penalty of perjury, (3) the declarant 'was aware of the pending litigation at the time he made the declaration and thus knew that his assertions were subject to cross examination,' (4) the statements were based on personal observation . . . (6) the affidavit was corroborated, partially, by minutes of directors meetings (some statements Jonsson said were made match others' notations), and (7) his position and background qualified him to make the assertions." Id. at 112-113. Evidence to support findings similar to factors (1) – (4) and (6) – (7), above, has been established by CASI with respect to the Anderson declaration and support a finding of trustworthiness based on the totality of the surrounding circumstances, generally, and, thus, admissibility of the Anderson declaration.

Another case that examined financial bias was ID Sec. Sys. Canada, Inc. v. Checkpoint Sys., Inc., 198 F.Supp.2d 598, 625 (E.D.PA 2002). In that case the court was forced to weigh the "interests of justice" against trustworthiness (the affidavit was of a witness who was now unavailable who was the only participant who was present at the event in dispute other than the representative of the adverse party and who had direct knowledge of the parties' two year relationship). In ID Sec. Sys., the court looked at the same seven factors that were examined in Bohler-Uddeholm. Id. at 626. The ID Sec. Sys. court determined that the case before it was distinguishable from the Third Circuit Bohler-Uddeholm case because of the fifth factor. Id. In ID Sec. Sys., the court noted that "at the very moment that he [the declarant] swore the affidavits, he was employed by the party on whose behalf he filed the affidavits and therefore had a 'financial interest' in the outcome of the case." Id. But financial interest alone was not the factor that persuaded the court to conclude that the affidavit was not trustworthy. In ID Sec. Sys., the court said:

> Also troubling is Haneda's refusal to cooperate in this case and the reason advanced for not cooperating. Haneda's refusal to cooperate with the parties in the instant case, apparently as a result of an employment dispute with Checkpoint, does not speak well of Haneda's regard for legal proceedings. This apparent willingness to withhold testimony to fit his purpose is probative of the trustworthiness of his earlier testimony. To put it another way, if Haneda is now willing to thumb his nose at the legal system to fit his purpose (i.e. to withhold testimony to punish a party who terminated his employment), the court may legitimately question the trustworthiness of his testimony in an earlier proceeding where he also had an incentive to shape his testimony to fit his purpose.

Id. at 626; footnote omitted.

What is significant in Bohler-Uddeholm and ID Sec. Sys., is that both decisions address potential financial bias as one factor among several to be evaluated when considering the issue of trustworthiness. Here, most of the factors discussed weigh strongly in favor of Anderson's reliability, especially considering the

corroborating evidence. I conclude that under the circumstances of this case, the Anderson declaration is trustworthy for purposes of Rule 807, particularly in light of MN's challenging declarations and the legal requirement for me to consider extrinsic evidence regarding the intentions of the parties as expressed in the Agreement approved April 2, 2002.

2. Was Hearsay Offered As Evidence Of A Material Fact?

For a statement to be offered as evidence of a material fact "not only must the fact the statement is offered to prove be relevant, Rule 401, but . . . the fact to be proved [must] be of substantial importance in determining the outcome of the litigation." 30B GRAHAM, supra §7095. Here, some Anderson hearsay statements were being offered as evidence of material facts. Anderson sets forth his understanding of the meaning of the MN fee agreement (as do the MN declarants) which is the ultimate issue before me. Anderson supports his declaration by reference to contemporaneous documentary evidence at the time the Agreement was presented to him for approval in early 2002.

3. How Probative Is The Anderson Declaration?

The Anderson declaration is offered as extrinsic evidence of the circumstances surrounding the Agreement approved by my April 2, 2002 order. In this case, the Anderson declaration is more probative on this point than any other evidence that CASI could procure because when CASI and Miller Nash were negotiating, Anderson was CASI's primary, and often, sole, employee. Because Anderson is no longer alive and no other person exists who has anything approaching the same level of personal knowledge and authority from CASI's perspective about some events leading up to the drafting of the Agreement and its submission to him and the court for approval, I conclude that the Anderson

declaration is highly probative.

4. Are The General Purposes Of The Rules Of Evidence And The Interests Of Justice Best Served By The Admission Of The Anderson Declaration?

I believe that admission of the Anderson declaration here best serves the interests of justice by providing important extrinsic evidence to balance out the extrinsic evidence introduced by MN. In addition, I note that Graham points out that this requirement is "largely a restatement of Rule 102 and as such is of little practical importance in determining admissibility." 30B GRAHAM, supra §7095.

5. Did CASI Give Miller Nash Sufficient Notice?

MN argues that this requirement of Rule 807 has not been met because Anderson died shortly after the Declaration was filed and it was therefore "impossible" for MN to depose Anderson. However, MN overstates. Rule 807 does not require that the opponent have an opportunity to depose the declarant. Rather, courts have said: "There is no particular form of notice required under the rule. As long as the party against whom the document is offered has notice of its existence and the proponent's intention to introduce it–and thus has an opportunity to counter it and protect himself against surprise–the rule's notice requirement is satisfied." U.S. v. Munoz, 16 F.3d 1116, 1122 (11th Cir. 1994), cert. denied 513 U.S. 852 (1994). That standard has been met more than adequately here.

MN was on notice of the Anderson declaration as of June 22, 2006, when it was served and filed with the court. Although MN may not have had a lengthy or

adequate opportunity to attack Anderson's credibility by deposing him[1], because MN was on notice of the existence of the Anderson declaration, this gave MN sufficient time to challenge the declaration by other means. See, e.g., Piva v. Xerox Corp., 654 F.2d 591, 596 (9th Cir. 1981)(finding that the fact that the opponent "had more than a year after the admission of the evidence until the end of the trial on her individual claims to move to strike the exhibit or to rebut it with additional evidence" weighed in favor of finding that notice was sufficient).

In this case, Anderson was well known to MN from 1998 or 1999 on, by MN's admission; he was the chairman of the board of MN's client CASI. He was also CASI's sole employee for most of the time after CASI's chapter 11 bankruptcy was filed in late 1999 and when MN's fee application was filed, facts that are not disputed here and that seem to me to be consistent with my experience with CASI in prior hearings in this case and related litigation hearings that have come before me.

The Anderson declaration contains a straightforward discussion of the history of the MN involvement in the CASI/Nike litigation, including Anderson's role in managing CASI's relationship with MN. Most of the facts set forth in the Anderson declaration are not disputed; some are disputed by MN declarations that amply set forth the MN perspective with respect to the facts to counter balance and leaven Anderson's statements.

More than that, MN had time to conduct discovery relating to the documents

[1] The Anderson Declaration was served and filed on June 22, 2006. Anderson died on August 8, 2006. However, according to the MN Reply brief filed March 12, 2007, an order was entered on July 5, 2006, precluding MN from taking deposition discovery under the approved protocols for handling the issues in the MN fee application. I find MN's position on the point unpersuasive since the order was predicated on a MN stipulation with the opposing parties.

introduced by the Anderson declaration. The period of MN's discovery was extended to February 6, 2007, by several stipulations of the parties including two stipulations entered into after Anderson's August 8, 2006, death. I conclude that MN had "a fair opportunity to prepare to meet" the Anderson declaration with evidence to challenge the veracity of Anderson's recollections or documentary evidence. Indeed, MN did so with several additional declarations of its own lawyers filed in early 2007.

CONCLUSION

I conclude that the hearsay statements within Anderson's Declaration fall within the residual hearsay exception found in Rule 807. The MN objections are overruled, except as follows:

Notwithstanding my decision to overrule the MN hearsay objection to the Anderson declaration generally, I will strike as argument or improper opinion the two following portions of the declaration:

Paragraph 2, line 11, beginning with the words: "The estate is not liable . . ." through the end of paragraph 2, and

Paragraph 9, line 22, beginning with the words: "The retainer agreement . . ." through the end of paragraph 10.

Otherwise, the Anderson declaration recites and documents important elements of CASI's understanding, decision making process, and CASI's decision with respect to the approval of the Agreement at issue here and the MN fee application by extrinsic evidence that I am required by law to consider (as set forth in my separate accompanying memorandum of decision filed herein). The Anderson declaration thereby contributes as a helpful (although not exclusively conclusive) piece of evidence to my understanding of the circumstances surrounding the MN Agreement approved by my April 2, 2002 order entered herein.

So ordered.

DATED: 5/4/07

/s/
THOMAS B. DONOVAN
United States Bankruptcy Judge

NOTICE OF ENTRY OF JUDGMENT OR ORDER
AND CERTIFICATE OF MAILING

TO ALL PARTIES IN INTEREST LISTED BELOW:

1. You are hereby notified that a judgment or order entitled:

MEMORANDUM OF DECISION RE MILER NASH LLP EVIDENTIARY OBJECTIONS TO ANDERSON DECLARATION was entered on 5/7/07.

2. I hereby certify that I mailed a true copy of the order or judgment to the persons and entities listed below on 5/7/07.

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