UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

METROPOLITAN ENTERPRISE CORP., Plaintiff,	:	
v.	:	Civil No. 3:03cv1685 (JBA)
UNITED TECHNOLOGIES INT'L., et al., Defendants.	:	

RULING ON PLAINTIFF'S MOTION IN LIMINE TO ADMIT EXHIBIT 52 (WEI LETTER) [DOC. #117]

Plaintiff's proposed Exhibit 52 is a letter dated August 26, 2003 from CAL's President Philip Wei to Pratt & Whitney's President Louis Chênevert (attached as Ex. A to Plaintiff's Motion in Limine [Doc. # 117]). The letter explains CAL's reasons for rejecting P&W's bid and states that "[i]n all probability, a contract would have been awarded to P&W but for its sudden reduction of the A330 engine discount by 11%, which caused an increase of $37.5M to the purchase price." Plaintiff states that the letter was actually composed in English by MEC President Liu, in response to a request from Wei, who had "already written down all the main points" he wanted to make. See Peng Depo. at 25 (attached as Ex. B to Pl. Mot.). After Liu prepared the draft letter, Wei read it, approved it, and had it retyped on his own stationary to send to P&W. Pl. Mot. at 3-4. It is undisputed that Wei, who resides in Taiwan, is unavailable to testify at trial.

Plaintiff proffered this letter in opposition to the summary

judgment motion, arguing that it was admissible as a statement against CAL's interest. The Court rejected that rationale and refused to consider the letter in the summary judgment ruling. See Ruling on Mot. for Summary Judgment [Doc. # 102] at 15-16.

Metropolitan now contends that the letter is admissible at trial as a statement of then-existing state of mind under Rule 803(3), a business record under Rule 803(6), a past recollection recorded under Rule 803(5), or as otherwise trustworthy under the "catchall" exception in Rule 807. UTI has objected [Doc. # 125].

A. Then-Existing State of Mind

Under Rule 803(3), "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed," is an exception to the hearsay rule. Four requirements must be met before such a statement is admissible: it must be contemporaneous with the mental state; it must be timely such that the declarant had no time to fabricate; it must be relevant to an issue in the case; and it must relate to the declarant's own state of mind.

"[T]he reasons for the state of mind exception focus on the contemporaneity of the statement and the unlikelihood of deliberate or conscious misrepresentation." United States v. Harwood, 998 F.2d 91, 98 (2d Cir. 1993). Wei's letter is not

contemporaneous with the events discussed, having been written August 26, 2003, about two months after P&W's bid increase on June 30, 2003, and after further negotiations had failed to produce an agreement.

Moreover, to be admissible under Rule 803(3), a statement must be forward-looking. As the Second Circuit has held, a present-sense impression "may be introduced to prove that the declarant thereafter acted in accordance with the stated intent." United States v. Best, 219 F.3d 192, 198 (2d Cir. 2000) (emphasis added). Wei's letter does not express a future intention to act. Rather, it expresses his perception of past events. Therefore it is not admissible as a document reflecting his then-existing state of mind.

B. Business Record

Neither is the Wei letter admissible as a business record of China Air Lines under Rule 803(6). "[B]usiness records may be admitted notwithstanding the unavailability of the record's author, so long as a custodian or other qualified witness testifies that the document was kept in the course of a regularly conducted business activity and also that it was the regular practice of that business activity to make the record." Parker v. Reda, 327 F.3d 211, 214-15 (2d Cir. 2003) (internal citations and quotation marks omitted). "Business records are made reliable by systematic checking, by regularity and continuity

which produce habits of precision, by actual experience of business in relying upon them, or by duty to make an accurate record as part of a continuing job or occupation." Id. at 214 (internal citation and quotation marks omitted).

Although plaintiff argues that "CAL provided plaintiff with a copy of Wei's letter as a routine part of its business dealings with" UTI, see Pl. Mot. at 8, plaintiff has made no showing that it was a routine part of CAL's business to write letters such as Ex. 52 to its customers. Further, although plaintiff argues that it relied on CAL's statements in the letter, the test is whether CAL routinely relied on such records as part of its business, a showing plaintiff has not made. Finally, plaintiff cannot establish that CAL, UTI or Metropolitan had an interest in insuring the accuracy of the letter, and the fact that Liu assisted Wei in writing the letter does not lend confidence in the accuracy of the letter's contents as a reliable reflection of CAL's earlier state of mind with respect to the P&W contract as of June 30, 2003. Therefore Wei's letter is not admissible as CAL'S business record.

Plaintiff's alternative argument that it is admissible as a business record of P&W also misses the mark. If correspondence received by a party qualified as a business record of the recipient, to be admitted for the truth of the matter, this exception could swallow the hearsay rule entirely.

C. Past Recollection Recorded

Plaintiff argues that the Wei letter is admissible under Rule 803(5) as a past recollection recorded. To be admissible, such a document must be "a record concerning a matter about which a witness once had knowledge but now has insufficient recollection...." Fed. R. Evid. 803(5). In this case, the only person who can claim past knowledge concerning the matters in the Wei letter is Mr. Wei. Even if, as plaintiff argues, David Liu "was directly involved in the preparation of the letter," Pl. Mot. at 14, this does not mean that Liu ever had first-hand knowledge of CAL's reasons for refusing to select P&W as the winning bidder on the engine contract, or the probability of selecting P&W absent the price increase. Further, Ex. 52 is a letter from Wei to Chênevert and does not purport to record any recollections of David Liu. Therefore Liu's supposed lack of recollection of the contents of the letter is irrelevant; the letter only would be admissible as a recorded recollection of the signatory of the letter, Wei, who will not testify at trial.

D. Residual Hearsay Exception

Finally, Ex. 52 is not admissible under the residual hearsay exception of Rule 807, because it lacks the required indicia of trustworthiness. "To be admissible pursuant to the residual exception, the evidence must fulfill five requirements: trustworthiness, materiality, probative importance, the interests

of justice and notice." Parsons v. Honeywell, Inc., 929 F.2d 901, 907 (2d Cir. 1991) (citations omitted). For the reasons stated previously, Ex. 52 does not meet the test of trustworthiness. The letter was not prepared contemporaneously with the events in question. It was prepared at least in part by a party, David Liu, who has an interest in the outcome of this case. The author of the letter was not under oath and will not be available for cross examination. The testimony of CAL's Charles Peng that the contents of Wei's letter were "not 100 percent correct" because there were other reasons besides price that entered into CAL's decision in awarding the contract, see Peng Depo. at 29, indicates that cross examination of the author as to the accuracy of his letter is important in weighing and considering the significance of this letter, and underscores the precise purpose of hearsay exclusions.

The residual hearsay exception is to be "used very rarely, and only in exceptional circumstances." Id. (citation omitted). The Wei letter is not "exceptional" in any way; it is an ordinary piece of correspondence that does not meet any of the exceptions to the hearsay rule.

E. Conclusion

Accordingly, Plaintiff's motion in limine to admit Ex. 52 into evidence [Doc. # 117] is DENIED.

IT IS SO ORDERED.

/s/

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JANET BOND ARTERTON, U.S.D.J.

Dated at New Haven, Connecticut, February 28, 2006.