UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SANMINA CORPORATION, Plaintiff, vs. DIALIGHT PLC, Defendant.	:	Case No. 1:19-cv-11710-KPF
	related to	
DIALIGHT PLC, Plaintiff, vs. SANMINA CORPORATION, Defendant.	:	Case No. 1:19-cv-11712-KPF

DIALIGHT'S RESPONSE TO SANMINA'S
OBJECTIONS TO DECLARATION OF SCOTT A. RADER

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Against the overwhelming evidence of fraud and willful misconduct set forth by Dialight, Sanmina has responded with a tactic that is at odds with the relevant rules: asking the Court not to consider Dialight's evidence attached to the declaration of Dialight's attorney on the basis of evidentiary rules that have not been in effect for over ten years. While prior to 2010 each piece of evidence submitted in a summary judgment objection needed to be authenticated, the practice in this Court and nationwide for more than a decade is that the evidence need only be capable of authentication. As to Sanmina's other evidentiary objections, they are misplaced. Dialight will be able to admit the challenged exhibits at trial; at this stage nothing more is required.[1]

I. An Attorney Declaration is a Proper Way to Submit Exhibits for Consideration at Summary Judgment

Sanmina argues in its Objection to the Declaration of Scott A. Rader that "Mr. Rader lacks the personal knowledge to state whether the document is indeed a true and correct copy of what he claims it to be" and "[s]uch documents therefore are not properly authenticated." Sanmina objects to twenty-four exhibits on this ground. But, despite Sanmina's claim, the only requirement at this stage is that exhibits are able to be authenticated at trial. *Brito v. Lucky Seven Rest. & Bar, LLC*, 2021 U.S. Dist. LEXIS 55822, at *19 (S.D.N.Y. March 24, 2021) (explaining that the admissibility question is "not whether defendants have presented [the evidence] in an admissible form, but whether they are capable of being presented in such a form at trial"); *Schertzer v. Bank of Am., N.A.*, 2022 U.S. Dist. LEXIS 62741, *18-19 (S.D. Cal. Apr. 4, 2022) ("BANA is not contending—and the court is not convinced—that the substance of this proffered evidence could not be presented in a form that would be admissible as evidence. BANA is also not arguing these

[1] This response is filed pursuant to this Court's Order (Dkt No. 115) granting Dialight's request to file a response to Sanmina's objections to the declaration of Scott Rader submitted in support of Dialight's opposition to partial summary judgment.

images are not what they purport to be. At this stage of the proceedings, the court, therefore, does not find BANA's objections on these grounds well-taken").

Accordingly, courts in this Circuit have regularly overruled objections on the ground that an attorney attaching exhibits to his declaration lacks personal knowledge because the personal knowledge requirement "applies slightly differently to declaration of attorneys, which are frequently allowed to function as 'vehicle[s] to introduce evidence produced in discovery into the record in a cohesive manner.'" *Cancel v. New York City Human Res. Administration/Department of Soc. Servs.*, 2014 U.S. Dist. LEXIS 154661, at *9 (S.D.N.Y. Oct. 31, 2014) (quoting *Genon Mid-Atl., LLC v. Sone & Webster, Inc.*, 2012 U.S. Dist. LEXIS 54680, at *7 (S.D.N.Y. Apr. 18, 2012)); *see also Hallett v. Stuart Dean Co.*, 517 F. Supp. 3d 260, 267-68 (S.D.N.Y. 2021) (finding that most of the objections submitted by the party opposing summary judgment were "frivolous" and explaining that attaching exhibits to a declaration by counsel "is the standard way of attaching documents to a summary judgment motion or response" and is acceptable).

Further, the *Hallett* court held that it would rely on counsel's "representation that each document is a 'true and correct copy' of a document produced or obtained in discovery" because "on that issue defense counsel is competent to testify because of his involvement in this litigation." *Hallett*, 517 F. Supp. 3d at 268. Indeed, a court in this District has stated that an attorney's use of an affidavit or declaration to submit exhibits is a requirement under the Local Rules. *See, e.g.*, *G.C.W. v. United States*, 2017 U.S. Dist. LEXIS 33223, at *10 n.10 (S.D.N.Y. March 8, 2017) (critiquing a party for annexing one set of exhibits to a brief and sending another set directly to the court because "***neither set of exhibits were submitted via an attorney affidavit or declaration, as is required under this Court's Rules***") (emphasis added).

Sanmina cites no cases to support its contention that an attorney declaration is insufficient to introduce the contested exhibits, and in fact acknowledges the existence of a case that makes clear that "changes to the Federal Rules of Civil Procedure in 2010 eliminated the requirement that evidence supporting a 56.1 statement must be authenticated" and "such supporting evidence must simply be in a form that, if authenticated, could be admissible at trial." *Archie MD, Inc. v. Elsevier, Inc.*, 2017 U.S. Dist. LEXIS 37141, at *3 n.2 (S.D.N.Y. March 14, 2017). The *Archie* case, acknowledged by Sanmina, accurately describes the governing law in this District. *See also Bruce Lee Enters., LLC v. A.V.E.L.A., Inc.*, 2013 U.S. Dist. LEXIS 31155, at *22 (S.D.N.Y. Mar. 6, 2013) (overruling defendants' objection to the exhibits attached to the declaration of plaintiff's attorney as lacking proper foundation because while the attorney "may not be able to testify regarding some of these exhibits at trial, the documents would be otherwise admissible, either via [a fact witness] or by cross-examination of [relevant] employees, or through other means"). Additionally, although Sanmina claims the documents at issue are not properly authenticated, it does not explicitly challenge the veracity of the documents, further defeating its objections. *See FDIC v. US Mortg. Corp.*, 132 F. Supp. 3d 369, 381 (S.D.N.Y. 2015) ("merely stating that counsel lacks personal knowledge of the documents, without specifically challenging their veracity, is insufficient to call their authenticity into question and prevent the Court from considering them").

II. Sanmina's Specific Evidentiary Objections are Misplaced

Sanmina more specifically claims in its Objection to the Declaration of Scott Rader that a number of exhibits Dialight relies on are hearsay. But "[h]earsay evidence is admissible at the summary judgment stage ***if the contents would otherwise be admissible at trial.***" *Auz v. Century Carpet, Inc.*, 2014 U.S. Dist. LEXIS 6751, at *2 n.1 (S.D.N.Y. Jan. 17, 2014) (emphasis added); *see also Smith v. City of New York*, 697 Fed. Appx. 88, 89 (2d Cir. 2017) ("materials relied on at

summary judgment need not be admissible in the form presented to the district court" if "the evidence in question will be presented in admissible form at trial"). Further, Sanmina's own emails are admissible as statements by a party opponent under Fed. R. Evid. 801(d)(2), and Dialight's emails are admissible at minimum as business records because they are maintained in the ordinary course, and they were sent and received by Dialight employees who could testify at trial about their authenticity and the underlying events cited therein. *See Smith*, 697 Fed. Appx. at 89 ("Here, the documents in question could readily be reduced to admissible form at trial through the testimony of the defendant officers as to the underlying events in question"); *Hallet*, 517 F. Supp. 3d at 268 ("The Court sees no reason why each cited document could [not] be introduced in evidence by an author or declarant and [Plaintiff] offers none."); *United States v. New York City Dep't of Educ.*, 407 F. Supp. 3d 365, 391 (S.D.N.Y. 2018) ("The portions cited to and relied upon in this opinion are properly relied upon because the relevant factual contents of those exhibits may be testified to at trial[.]").

The other evidentiary objections raised by Sanmina are unfounded. For example, Sanmina challenges Exhibit 215 attached to the Rader Declaration on the grounds that Dialight purportedly introduced an "Improper Expert Opinion" from a former Dialight engineer, Angel Escamilla. But the challenged exhibit is a report prepared contemporaneously by Mr. Escamilla in his capacity as a Dialight employee when analyzing safety lanyards produced by Sanmina in the course of the companies' contract manufacturing relationship. Because Mr. Escamilla contemporaneously prepared this report for the purpose of analyzing a Dialight product, it is therefore admissible. *See Bank of China v. NBM LLC*, 359 F.3d 171, 181 (2d Cir. 2004) ("[T]o the extent . . . testimony was grounded in the investigation he took in his role as a[n] . . . employee, it was admissible pursuant to Rule 701 of the Federal Rules of Evidence because it was based on his perceptions.").

Additionally, while Sanmina challenges Exhibit 65 on the grounds that Dialight did not provide a certified translation, Dialight only relies on the English portion of the document in its opposition. As to Exhibits 220-222, these are Sanmina's own produced documents that contain a combination of English, Spanish, and pictures. Dialight identified the source of its translations, and Sanmina does not contend that Dialight's translations of Sanmina' own documents are inaccurate. Further, the statements in these documents by Sanmina's own employees cannot be inadmissible hearsay under Fed. R. Evid. 801(d)(2) (which is how some courts treat foreign language documents without a certified translation) because they are admissions by a party opponent. These circumstances are thus markedly different from the foreign language documents in the initial case that Sanmina cites. *See Heredia v. Americare, Inc.*, 2020 U.S. Dist. LEXIS 122880, at *11 (S.D.N.Y. July 13, 2020) ("Plaintiffs have not, however, submitted certified translations, ***or any translations for that matter***, of any of the Spanish-language documents.") (emphasis added). In any event, Exhibits 220-222 also contain English language and pictures that can be considered by this Court, and a certified translation can be provided for each Exhibit at trial or earlier. *See Kasper Glob. Collection & Brokers, Inc. v. Glob. Cabinets & Furniture Mfrs., Inc.*, 952 F. Supp. 2d 542 (S.D.N.Y. 2013) (denying cross-motions for summary judgment where the parties provided only uncertified translations of a Polish-language contract that was the subject of the dispute, "without prejudice to renewal upon submission of certified translations").

III. Conclusion

For the reasons stated above, Dialight respectfully requests that this Court overrule Sanmina's Objections to the Declaration of Scott A. Rader.

Dated: New York, New York
July 29, 2022

Respectfully submitted,

MINTZ LEVIN COHEN FERRIS GLOVSKY AND POPEO, P.C.

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CERTIFICATE OF SERVICE

I, Scott A. Rader, hereby certify that on July 29, 2022, I caused to be served a true and correct copy of the foregoing document with the Clerk of the Court using the CM/ECF filing system, which will send notification of such filing to all attorneys on record.

Dated: July 29, 2022
New York, New York

/s/ Scott A. Rader
Scott A. Rader