

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN**

Cite as: [unpublished]

Airadigm Communications, Inc., Debtor
Bankruptcy Case No. 06-10930-11

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

September 17, 2007

Kathryn A. Pamentier, Ronald Barliant, Goldberg Kohn et al., Chicago, IL for Debtor
Sheree G. Dandurand, Madison, WI for U.S. Trustee

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

Airadigm, TDS, and the FCC dispute the interpretation of the July 8, 2004 settlement agreement. A trial has been scheduled to resolve the dispute. The FCC objects to TDS's introduction of three exhibits and has moved to bar their admission.

TDS seeks to introduce into evidence three emails between the parties (the "exhibits") for the purpose of confirming "the timing and context of the execution of the Settlement Agreement by TDS and OEDA." The FCC has objected on two grounds. First, the admission is barred by the parol evidence rule. Second, the exhibits were filed after the deadline set by this court's scheduling order. As to the latter grounds, the court has ruled that the FCC has not been prejudiced by the untimely filing of the exhibits because the trial was adjourned; therefore, that objection was overruled.

The parole evidence rule¹ is a substantive rule and not a rule of evidence. Federal Deposit Ins. Corp. v. First Mortgage Investors, 76 Wis. 2d 151, 156 (1977). Thus, the parole evidence rule does not bar the admission of the exhibits. However, because the rule is substantive, if the exhibits fall within the parole evidence rule, they may be irrelevant and their admission may raise concerns that awareness of their contents would improperly affect the court's decision.

Parole evidence can be used to explain an ambiguous term of a written instrument. O'Connor Oil Corp. v. Warner, 30 Wis. 2d 638 (1966). Parole evidence is also admissible to explain a latent ambiguity. Stevens Constr. Corp. v. Carolina Corp., 63 Wis. 2d 342, 354 (Wis. 1974). A latent ambiguity arises when the agreement is clear on its face, but ambiguous in the context of surrounding circumstances. Id.

The FCC and TDS disagree on whether an ambiguity exists in the settlement agreement. The controversial provision in the settlement agreement is simply a release of present and future claims. It states that OEDA does "fully, finally and completely release, acquit and forever discharge the parties . . . from any and all present and future claims, actions, causes of action, demands, rights, damages, costs, losses, expenses and compensations whatsoever, that OEDA directly or indirectly now has . . . or accrue against the Other Parties on account of or in any way relating to the Plan or Airadigm, [even if] contingent as of this time." Although the language is unambiguous on its face, TDS argues that there are two distinct interpretations of the language in the actual execution of the settlement. In other words, there exists a latent ambiguity. The ambiguity arises because different parties executed the release at different times: OEDA and TDS executed the release several days before Airadigm "joined" in the release. Under the first interpretation of the settlement, all of OEDA's claims were assigned to TDS, and, several days later, OEDA and Airadigm mutually released one another for "peace of mind." In the second interpretation, the OEDA released its claims against Airadigm and then assigned the released claims to TDS.

¹ The parole evidence rule is codified in Wisconsin Statute § 402.202:

Final written expression: parole or extrinsic evidence. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

By course of dealing or usage of trade (s. 401.205) or by course of performance (s. 402.208);

1. By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Because ambiguity of a contract may arise from the context in which the language was chosen, Id., the parties may present evidence of that context (in this case, matters of fact relating to the time and order of signing) to establish that there is an ambiguity. It is unclear which claims were released and when. The exhibits, emails sent between the parties before Airadigm's accession and after OEDA's and TDS's, may assist the court in determining whether there is ambiguity and how it ought to be resolved. Therefore, the motion to exclude the exhibits as irrelevant must be denied.