

430 Fed.Appx. 346, 2011 WL 2496686 (C.A.5 (Tex.))

(Not Selected for publication in the Federal Reporter)

(Cite as: 430 Fed.Appx. 346, 2011 WL 2496686 (C.A.5 (Tex.)))

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This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)

United States Court of Appeals,
Fifth Circuit.
SNAPT INC., a Florida Corporation,
Plaintiff–Appellant,
v.
ELLIPSE COMMUNICATIONS INC.; Ellipse
Communications I LP, Defendants–Appellees.

No. 10–11093
Summary Calendar.
June 23, 2011.

Background: Corporation brought action against business competitor, alleging state and federal claims based on unfair competition. The United States District Court for the Northern District of Texas dismissed some causes of action and subsequently granted summary judgment on the remaining state law claim. Corporation appealed.

Holdings: The Court of Appeals held that:

- (1) district court did not abuse its discretion in exercising supplemental jurisdiction over remaining state law claim after dismissing all federal claims;
- (2) corporation's expert witness affidavits were inadmissible to establish an issue of material fact precluding summary judgment on claim brought under the Texas harmful access by computer statute;
- (3) denial of corporation's motion for leave to supplement summary judgment evidence was not an abuse of discretion;
- (4) compact disks containing evidence indicating computer malfeasance constituted inadmissible

hearsay; and

(5) neither email sent from competitor's address nor email from a third party offering to allow competitor to scrape websites established a violation of the Texas harmful access by computer statute.

Affirmed.

West Headnotes

[1] Federal Courts 170B 18

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction

170Bk18 k. Validity or substantiality of federal claims and disposition thereof. **Most Cited Cases**

District court did not abuse its discretion in exercising supplemental jurisdiction over corporation's remaining state law claim against business competitor for harmful access by computer, after dismissing all federal claims, given potential ripeness of a summary judgment motion on the remaining state law claim and its familiarity with the ambiguous pleadings. 28 U.S.C.A. § 1367(c)(3).

[2] Federal Courts 170B 615

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review

170BVIII(D)1 Issues and Questions in Lower Court

170Bk615 k. Grounds of action. **Most Cited Cases**

Argument regarding Texas common law cause of action that was not presented to trial court would not be considered on appeal absent exceptional circumstances.

[3] Federal Courts 170B 915

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170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)7 Waiver of Error in Appellate Court

170Bk915 k. In general. **Most Cited**

Cases

Corporation's failure to contest district court's alternative ground for summary judgment in favor of business competitor, on appeal from grant of summary judgment on claim brought under the Texas harmful access by computer statute, constituted a waiver of the issue and allowed an affirmation of summary judgment.

[4] Federal Civil Procedure 170A ⚡2539

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)3 Proceedings

170Ak2536 Affidavits

170Ak2539 k. Sufficiency of showing. **Most Cited Cases**

Expert witness affidavit with information given to affiant by third party, which failed to provide either third party's methodology for providing information about computer hacking or information identifying the third party, was inadmissible for purposes of establishing an issue of material fact precluding summary judgment on claim brought under the Texas harmful access by computer statute. [Fed.Rules Evid.Rule 702, 28 U.S.C.A.](#)

[5] Evidence 157 ⚡318(7)

157 Evidence

157IX Hearsay

157k315 Statements by Persons Other Than Parties or Witnesses

157k318 Writings

157k318(7) k. Certificates and affidavits. **Most Cited Cases**

Federal Civil Procedure 170A ⚡2537

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)3 Proceedings

170Ak2536 Affidavits

170Ak2537 k. Matters which may be shown. **Most Cited Cases**

Statements of third party in summary judgment affidavit, which were offered to prove the truth of the matter asserted, constituted inadmissible hearsay. [Fed.Rules Evid.Rule 801\(c\), 28 U.S.C.A.](#)

[6] Evidence 157 ⚡318(7)

157 Evidence

157IX Hearsay

157k315 Statements by Persons Other Than Parties or Witnesses

157k318 Writings

157k318(7) k. Certificates and affidavits. **Most Cited Cases**

Federal Civil Procedure 170A ⚡2537

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)3 Proceedings

170Ak2536 Affidavits

170Ak2537 k. Matters which may be shown. **Most Cited Cases**

Statement in expert witness affidavit submitted in response to motion for summary judgment on corporation's claim against business competitor under the Texas harmful access by computer statute, that "it was learned" at mediation that competitor had acquired a password to corporation's servers, was inadmissible hearsay. [Fed.Rules Evid.Rule 801\(c\), 28 U.S.C.A.](#)

[7] Federal Civil Procedure 170A ⚡2539

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)3 Proceedings

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[170Ak2536](#) Affidavits

[170Ak2539](#) k. Sufficiency of showing. [Most Cited Cases](#)

Declarations in expert witness affidavit discussing research and inferences drawn from it were inadmissible for purposes of establishing an issue of material fact precluding summary judgment on claim brought under the Texas harmful access by computer statute, given absence of any explanation for the methodology underlying the research or any explanation of how relevant conclusions were drawn from it. [Fed.Rules Evid.Rule 702](#), 28 U.S.C.A.

[8] Federal Civil Procedure 170A  **2539**

170A Federal Civil Procedure

[170AXVII](#) Judgment

[170AXVII\(C\)](#) Summary Judgment

[170AXVII\(C\)3](#) Proceedings

[170Ak2536](#) Affidavits

[170Ak2539](#) k. Sufficiency of showing. [Most Cited Cases](#)

Expert witness affidavit that did not provide qualifications that demonstrated affiant's expertise or the methods by which he reached his conclusion was inadmissible for purposes of establishing an issue of material fact precluding summary judgment on claim brought under the Texas harmful access by computer statute. [Fed.Rules Evid.Rule 702](#), 28 U.S.C.A.

[9] Federal Civil Procedure 170A  **2539**

170A Federal Civil Procedure

[170AXVII](#) Judgment

[170AXVII\(C\)](#) Summary Judgment

[170AXVII\(C\)3](#) Proceedings

[170Ak2536](#) Affidavits

[170Ak2539](#) k. Sufficiency of showing. [Most Cited Cases](#)

Affiant's 12 years of experience developing software was insufficient to provide a basis for expert summary judgment affidavit regarding computer hacking. [Fed.Rules Evid.Rule 702](#), 28 U.S.C.A.

[10] Federal Civil Procedure 170A  **2554**

170A Federal Civil Procedure

[170AXVII](#) Judgment

[170AXVII\(C\)](#) Summary Judgment


[170AXVII\(C\)3](#) Proceedings

[170Ak2547](#) Hearing and Determination

[170Ak2554](#) k. Matters considered.

[Most Cited Cases](#)

Denial of motion for leave to supplement summary judgment evidence that did not offer an explanation for plaintiff's initial failure to comply, or indicate what new evidence would be added by amendment, was not an abuse of discretion.

[11] Evidence 157  **318(1)**


157 Evidence

[157IX](#) Hearsay

[157k315](#) Statements by Persons Other Than Parties or Witnesses

[157k318](#) Writings

[157k318\(1\)](#) k. In general. [Most Cited Cases](#)

Evidence 157  **370(1)**

157 Evidence

[157X](#) Documentary Evidence

[157X\(D\)](#) Production, Authentication, and Effect

[157k369](#) Preliminary Evidence for Authentication

[157k370](#) Necessity in General

[157k370\(1\)](#) k. In general. [Most Cited Cases](#)

Compact disks containing evidence indicating computer malfeasance constituted inadmissible hearsay for purposes of claim brought under the Texas harmful access by computer statute, given absence of testimony from a custodian or other qualified witness indicating the accuracy of the data and noncompliance with the self-authentication rule. [Fed.Rules Evid.Rules 801\(c\)](#), [803\(6\)](#), [902\(11\)](#), 28 U.S.C.A.

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[12] Telecommunications 372 ↪ 1342

372 Telecommunications

372VIII Computer Communications

372k1339 Civil Liabilities; Illegal or Improper Purposes

372k1342 k. Fraud; unauthorized access or transmission. [Most Cited Cases](#)

Neither email from business competitor's address expressing an interest in acquiring a website, nor email from a third party offering to allow competitor to scrape websites, established a violation of the Texas harmful access by computer statute.

*347 [Martin James Sweeney](#), Attorney, Cozen O'Connor, Dallas, TX, for Plaintiff–Appellant.

[Peyton Jameson Healey](#), Esq., Counsel, [Patrick William Powers](#), Powers Taylor, L.L.P., Dallas, TX, for Defendants–Appellees.

*348 Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:09–CV–661.

Before [WIENER](#), [PRADO](#), and [OWEN](#), Circuit Judges.

PER CURIAM: ^{FN*}

^{FN*} Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

**1 Snapt, Inc. filed suit against Ellipse Communications, Inc. and later joined Ellipse Communications I, L.P. (together, Ellipse). Snapt's amended complaint alleged that it suffered injury as a result of Ellipse's unfair competition. The United States District Court for the Northern District of Texas dismissed some of Snapt's causes of action and subsequently granted summary judgment on the remaining claim. We affirm.

I

Snapt filed suit against Ellipse, asserting the following causes of action in its amended complaint: “Texas Common Law Conversion, Texas Common Law Unfair Competition, Texas Competition and Trade Practices Common Law, Infringement of the Texas Harmful Access by Computer Statute, Federal Common Law Unfair Competition, Federal Lanham Act Violation, Federal Antitrust Violation, [and] Federal Copyright Violation.” The relevant facts in the amended complaint are contained in a single paragraph stating that Ellipse “converted the proprietary Snapt computer software” by the process known as “hacking” and that Snapt's metadata was then redirected to Ellipse by a process termed “scraping.” This was alleged to have occurred “beginning in 2005 and continuing through mid–2008.”

Ellipse moved for judgment on the pleadings pursuant to [Federal Rule of Civil Procedure 12\(c\)](#) and moved to dismiss the amended complaint under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). Snapt responded with a four-page brief in opposition, terming Ellipse's motion “generic” and arguing that it had met its requirement of “only plead[ing] a short plain statement of the claim.” It did not address the challenged causes of action individually. The court granted the motion in part, excluding only successor liability with respect to Ellipse Communications I, L.P. and the claim under the Texas Harmful Access by Computer Statute. In denying Ellipse's motion in part, the court observed that “the Amended Complaint is not clearly drafted, and Plaintiff's response to Defendants' motion is unhelpful.” With respect to the Texas Harmful Access by Computer Statute, the court read Ellipse's motion as having alleged a lack of evidence. Therefore, the court directed Ellipse to file a summary judgment motion on the point.

Accordingly, Ellipse moved for summary judgment on the remaining claim. Snapt filed a brief opposing summary judgment, attaching as evidence a district court opinion in another case, the declara-

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tion of Keith Caven, the declaration of Nate Jones, compact discs (CDs), which Snapt contends contain logs evincing “scraping” and “hacking,” and two emails. One email is purportedly from an Ellipse address, and Snapt asserts that the email demonstrates Ellipse’s earlier interest in acquiring Snapt. The other attached email is an invitation from a third company, never mentioning Snapt, for Ellipse to “scrape” information from the third company’s “associated website[s] to use for developing new websites.”

***349** Snapt had previously designated Caven and Jones as “mixed fact/expert witness[es].” At that time, Ellipse filed a motion to strike Snapt’s designation of Caven and Jones as experts, arguing that their qualifications had not been demonstrated. After Snapt filed its summary judgment response brief, Ellipse filed a motion to strike Snapt’s summary judgment evidence, again noting the lack of information to qualify Caven and Jones as experts. The Caven declaration offered no information regarding Caven’s expertise. It stated that Caven owned Snapt, and that Orin Olson—whose title and qualifications were not provided in the declaration—told him that Snapt’s servers “were compromised.” It then stated that Caven directed Nate Jones to research the issue. Caven stated that he learned at mediation in another case involving the parties that Ellipse had acquired Snapt’s server password. Caven also stated, “From our research, which was conducted by Nate Jones ... I have been able to determine from at least as early as June 12, 2008 that Ellipse converted the proprietary Snapt computer software.”

****2** The Jones declaration identified Jones as a Snapt independent contractor with “over 12 years experience developing software at all levels.” Jones declared that “[d]uring the research I conducted for Snapt since June of 2008, I discovered that Ellipse Communications I, L.P. formerly known as Ellipse Communications, Inc. (‘Ellipse’) accessed Snapt’s secured servers and extracted and transferred over 7,000 pieces of proprietary and protected intellectu-

al property.” Jones did not indicate the methodology involved in his research. Ellipse argued, in its motion to strike Snapt’s summary judgment evidence, that the evidence was inadmissible as unqualified expert testimony and hearsay.

As a result, Snapt filed a motion for leave to supplement its response to summary judgment and its summary judgment evidence. It declared that it sought to clarify issues raised by Ellipse’s “hyper technical motion to strike.” Snapt also opposed the motion to strike, arguing that it was “Ellipse’s plan to ignore the plain meaning of these declarations, and focus[] on irrelevant hyper technical issues.” The court determined that the relevant information in the Caven declaration constituted inadmissible hearsay and that the Jones declaration was inadmissible as the expert testimony of one without demonstrated expertise in hacking. The court denied the motion for leave, observing that Snapt had notice of Ellipse’s objections to its witnesses given the earlier filed motions. Moreover, the court noted that the motion did not indicate the manner in which Snapt would cure these defects if provided additional time. Therefore, as it concluded that Snapt lacked admissible evidence with which to oppose summary judgment, the court granted summary judgment to Ellipse. Alternatively, the district court concluded that Snapt failed to provide proof of allegations falling within the time period covered in the amended complaint, and thus Ellipse was entitled to summary judgment on that ground as well.

II

We have jurisdiction over a properly filed appeal of a final decision of the district court.^{FN1}

That said, Snapt contends on appeal that the district court lost subject matter jurisdiction over the case after it granted Ellipse’s motion to dismiss with respect to the included federal causes of action. We review the decision to retain jurisdiction over independent state claims for ***350** abuse of discretion.^{FN2}

FN1. 28 U.S.C. § 1291.

FN2. *Parker & Parsley Petroleum Co. v.*

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Dresser Indus., 972 F.2d 580, 585 (5th Cir.1992).

[1] Under 28 U.S.C. § 1367(c)(3), the district court “may” decline to exercise supplemental jurisdiction when all the claims over which it had original jurisdiction have been dismissed. We look to statutory factors—whether the claim raises a novel or complex issue of state law, whether the state law claim predominates, whether the district court has dismissed all of the claims over which it had original jurisdiction, and, in exceptional circumstances, whether there are other compelling reasons for declining jurisdiction—as well as common law considerations—judicial economy, convenience, fairness, and comity—in reviewing a district court’s decision.^{FN3} In *Mendoza v. Murphy*, we said that “no single factor is dispositive” in this supplemental jurisdiction inquiry.^{FN4} Indeed, in that case we held that, though no claims of original jurisdiction remained, the district court did not abuse its discretion in exercising jurisdiction. This was so because the claims in the case “were neither novel nor complex,” and, as relevant to the “common-law factors of judicial economy, convenience, fairness, and comity,” the claims were well-known to the district court and were ripe for disposition on summary judgment.^{FN5} In the instant case the district court noted the potential ripeness of a summary judgment motion on the remaining state law claim in its dismissal order, and the common-law factors similarly provided support for retaining jurisdiction given, for instance, the familiarity of the district court with the ambiguous pleadings. Therefore, the district court did not abuse its discretion in exercising jurisdiction over the remaining state law claim.

FN3. *Mendoza v. Murphy*, 532 F.3d 342, 346 (5th Cir.2008) (citing *McClelland v. Gronwaldt*, 155 F.3d 507, 519 (5th Cir.1998), *overruled on other grounds by Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir.2003)).

FN4. *Id.* (citing *Parker & Parsley Petroleum Co.*, 972 F.2d at 587).

FN5. *Id.* at 346–47.

III

**3 Snapt next contends that the district court improperly dismissed its Texas common law unfair competition cause of action for failure to state a claim. The district court held that unfair competition under the Texas common law requires an independent tort that interfered with Snapt’s ability to conduct its business, citing *Taylor Publishing Co. v. Jostens, Inc.*^{FN6} In fact, Ellipse had relied on *Taylor Publishing Co.* in its motion to the district court. In its short brief in opposition to the motion to dismiss, Snapt did not address this case, neither attempting to distinguish it nor indicating the independent tort it believed it had pled. Instead, it argued only that “[p]ursuant to the controlling case law and the standard for FRCP Rule 12(b)6 [sic], Plaintiff need only plead a short plain statement of the claim showing that the Plaintiff is entitled to relief under Rule 8.”

FN6. 216 F.3d 465, 486 (5th Cir.2000).

[2] On appeal, Snapt does not renew its earlier argument regarding pleading standards. Instead, it argues, for the first time, that unfair competition includes an independent tort under Texas law and, alternatively, that its cause of action under the Texas Harmful Access by Computer Statute—which was addressed after the motion to dismiss on summary judgment—served as an underlying tort. Snapt appears to contend that the result of *351 *United States Sporting Products, Inc. v. Johnny Stewart Game Calls, Inc.*^{FN7} alters our rule enunciated in *Taylor Publishing Co.* The proper time to advance such an argument was before the district court. As we have said, “In the absence of exceptional circumstances which would result in a miscarriage of justice ... questions not presented to the trial court will not be considered on appeal.”^{FN8} No such exceptional circumstances are present here.

FN7. 865 S.W.2d 214 (Tex.App.–Waco 1993, writ denied).

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FN8. *C.F. Dahlberg & Co. v. Chevron U.S.A., Inc.*, 836 F.2d 915, 920 (5th Cir.1988).

Alternatively, we observe that *Taylor Publishing Co.* not only postdates, but also included a citation to, *United States Sporting Products, Inc.* FN9 As a result, Snapt's contention that *United States Sporting Products, Inc.* alters our holding in *Taylor Publishing Co.* that a Texas unfair competition claim requires an independent tort is unavailing. FN10 Moreover, we note that Snapt's alternative argument relies upon the viability of its claim dismissed on summary judgment, the grant of which we affirm in the following section. FN11

FN9. *Taylor Publ'g Co.*, 216 F.3d at 486 (citing *U.S. Sporting Prods., Inc.*, 865 S.W.2d at 217).

FN10. *Teague v. City of Flower Mound, Tex.*, 179 F.3d 377, 383 (5th Cir.1999) (“the rule of orderliness forbids one of our panels from overruling a prior panel”).

FN11. *See infra* Part IV.

IV

Snapt also challenges the district court's grant of summary judgment to Ellipse and the court's related evidentiary rulings. Snapt argues that the Caven and Jones declarations are admissible evidence, and that these support Snapt's claim under the Texas Harmful Access by Computer Statute. Snapt asserts that the declarations provide an explanation of the data it seeks to admit—“logs from Rackspace that evidence this ‘scraping’ and ‘hacking’ by Ellipse.”

[3] First, we observe that the district court held that Snapt failed to allege computer malfeasance within the time period provided in the complaint. As a result, the court held that there was an alternative ground on which its summary judgment rested. Snapt has not contested this on appeal, and this constitutes waiver. FN12 Thus, we could affirm the

grant of summary judgment on this ground alone.

FN12. *United States v. Thibodeaux*, 211 F.3d 910, 912 (5th Cir.2000).

**4 Alternatively, Snapt has failed to point to evidence indicating an issue of material fact necessitating a reversal of the grant of summary judgment. FN13 To support its claim under the Texas Harmful Access by Computer Statute, Snapt relies on its repeated statement that the Caven and Jones declarations constitute the personal knowledge of Caven and the “mixed fact/expert” testimony of Jones, respectively. That said, *Federal Rule of Evidence 702* permits expert testimony only by:

FN13. *Hinojosa v. Butler*, 547 F.3d 285, 297 (5th Cir.2008).

a witness qualified as an expert by knowledge, skill, experience, training, or education ... if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[4][5][6][7] We review an order striking expert witness affidavits for an abuse of discretion, and have noted the “broad discretion*352 afforded to district courts in ruling on the admissibility of expert testimony in the summary judgment context.” FN14 The district court struck the Caven affidavit's statements regarding the information given to him by Orin Olson, as the affidavit failed to provide either Olson's methodology for providing information about hacking or information identifying Olson. Given the lack of information to qualify Caven or Olson as an expert, the affidavit's exclusion was not an abuse of discretion. FN15 Alternatively, the court also correctly noted that to the extent the Olson statements were offered to prove the truth of the matter asserted, they constitute hearsay. FN16 As we have said, “Neither the district court nor this court may properly consider hearsay evidence in affidavits...” FN17 Similarly, the district

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court struck as hearsay Caven's statement alleging, without providing a source, that "it was learned" at mediation that Ellipse had acquired a password to Snapt's servers. Again, the district court cannot consider hearsay in affidavits.^{FN18} The district court also struck the Caven declaration's discussion of Jones's research and Caven's inferences drawn from it. It observed that no explanation was provided for the methodology underlying the research or Caven's inferences. Indeed, the affidavit is devoid of any explanation of how Caven or Jones came to the relevant conclusions. Thus, the district court did not abuse its discretion in striking those elements of the Caven declaration.^{FN19}

FN14. *Mayfield v. Tex. Dep't of Criminal Justice*, 529 F.3d 599, 606 (5th Cir.2008) (citing *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 331 (5th Cir.1998)).

FN15. *Id.*

FN16. FED.R.EVID. 801(c).

FN17. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir.1987) (per curiam).

FN18. *Id.*

FN19. *Mayfield*, 529 F.3d at 606.

[8][9] The district court struck the Jones declaration for failure to provide qualifications that demonstrate Jones's expertise or the methods by which he reached his conclusion. Jones offered conclusory statements accusing Snapt of computer malfeasance, but offered no explanation of the methods he used to discover this malfeasance. Instead, he stated only that these bad acts were uncovered "[d]uring the research" he conducted. Striking these statements was not an abuse of discretion.^{FN20} Similarly unavailing is Snapt's contention on appeal that the district court abused its discretion by concluding that Jones's twelve years of "experience developing software" was insufficient to provide a basis for testimony regarding

hacking. The district court possesses "broad discretion" in such matters,^{FN21} and it is not apparent that an individual with expertise in general software development *ipso facto* possesses expertise in hacking and scraping.

FN20. *Id.*

FN21. *Id.*

**5 [10] We consider the denial of Snapt's motion for leave to supplement its summary judgment evidence for an abuse of discretion.^{FN22} This short motion contended that Ellipse had raised "hyper technical" issues in its motion to strike, and sought leave to "clear up any misunderstandings." It did not offer an explanation for its failure to comply, nor did it include any indication of what new evidence would be added by amendment. The district court denied the motion for leave, observing *353 that the rules violated were not novel, that Snapt had failed to explain how it would remedy these defects if leave was granted, and that Snapt was on notice of these challenges, as Ellipse had raised them earlier in the proceedings. Indeed, the court had previously chided Snapt for a lack of diligence in presenting its pleadings. The district court did not abuse its discretion in denying Snapt leave to amend.

FN22. *Farina v. Mission Inv. Trust*, 615 F.2d 1068, 1076 (5th Cir.1980).

[11] Insofar as Snapt contends on appeal that the CDs provide evidence to defeat summary judgment, that argument is unavailing. Even assuming, *arguendo*, that these CDs contain evidence indicating computer malfeasance, the CDs constitute inadmissible hearsay.^{FN23} Indeed, Ellipse objected on this ground during the proceedings below. While a data compilation produced in the "course of a regularly conducted business activity" can fall under an exception to the hearsay rule, this requires testimony of a custodian or other qualified witness, or certification.^{FN24} Here no supporting testimony was provided from Rackspace indicating the accur-

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acy of the data.^{FN25} The CDs also fail to comply
with the self-authentication rule.^{FN26}

FN23. FED.R.EVID. 801(c).

FN24. FED.R.EVID. 803(6).

FN25. See *Capital Marine Supply, Inc. v. M/V Roland Thomas, II*, 719 F.2d 104, 105-06 (5th Cir.1983).

FN26. FED.R.EVID. 902(11).

[12] The remaining evidence attached to Snapt's brief in response to the summary judgment motion is insufficient to defeat summary judgment. The email from an Ellipse address expressing an interest in acquiring "WebRentPro" does not, standing alone, indicate that Ellipse violated the Texas Harmful Access by Computer Statute. The remaining email from a third party offering to allow Ellipse to scrape the websites of seemingly unconnected companies similarly does not indicate a violation of the instant statute. Thus, the motion for summary judgment was properly granted.

* * *

We AFFIRM.

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