IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
	)	
Defendants.	)	

INTERIOR DEFENDANTS' MOTION TO RECONSIDER THE ADMISSIBILITY OF DEFENSE EXHIBITS 105-111

Interior Defendants move for reconsideration of the Court's decision denying the admissibility of Defense Exhibits 105-111 (for identification) ("DE 105-111").[1] DE 105-111 are the Morgan Angel draft reports referenced in Mr. Angel's expert report, Defense Exhibit 60. Despite Plaintiffs' objection that these draft reports are not sufficiently reliable to be admitted, precedent exists to support their admissibility. Moreover, Federal Rule of Evidence 703 also supports their admissibility.

I. PRECEDENT EXISTS TO SUPPORT THE ADMISSIBILITY OF DRAFT EXPERT REPORTS.

Although no reported cases appear to address at length the admissibility of draft expert reports, some courts have admitted such draft reports into evidence. In Powe v. Chrysler Fin. Corp., 278 B.R. 539, 552 (Bankr. S.D. Ala. 2002), the court overruled objections to the admissibility of two draft reports:

[1] Counsel for Interior Defendants have consulted with counsel for Plaintiffs, who oppose this motion.

> Two evidentiary objections were taken under advisement by the Court in conjunction with the trial of this case. Chrysler objected to admission of plaintiffs' Exhibits 110 and 111. Exhibit 110 was a draft of the expert witness report of Jan Johnson, the Chapter 13 trustee . . . . Exhibit 111 was a draft of the report of Alex Gray, an attorney that represented Chrysler in Mobile in the Powe case. The Court concludes the documents are relevant and they are admitted.

In the context of a summary judgment motion, the Tenth Circuit considered a draft expert report: "Even appellant's own experts . . . indicate in their draft expert report that the airline industry generally considers lifting and moving baggage to be an essential function of the CSR position." E.E.O.C. v. United Airlines, Inc., 185 F.3d 874, No. 98-2076, 1999 WL 397390, at *5 (10th Cir. June 17, 1999) (unpublished op.) Finally, the District Court for the District of Rhode Island accepted a draft report into evidence in Rhode Island Committee on Energy v. G.S.A., 397 F. Supp. 41, 46 n.8 (D.R.I. 1975):

> The draft report (Exhibit 97) . . . was admitted into evidence over defendants' objection, not for the truth of the findings made therein, but as relevant to a determination of the quantity and quality of environmental data available to GSA at the time of its disposal action . . . .

Just as the Rhode Island Committee court accepted a draft report into evidence as relevant to the quantity and quality of data available to the GSA, so too should this Court accept DE 105-111 into evidence as relevant to the quantity and quality of data available to Interior.

Even those reported cases rejecting the admissibility of a draft expert report nonetheless support the admissibility of DE 105-111 in this case. In Tuff 'N' Rumble Management, Inc. v. Profile Records, Inc., No. 95 Civ. 0246, 1997 WL 158364, at *4 n.4 (S.D.N.Y. Apr. 2, 1997), the court rejected plaintiffs attempt to "avoid summary judgment by proffering - as an expert's report - an unsigned, apparently draft letter without any letterhead from an entity identified simply as

'Sound Associates.'" Unlike in Tuff 'N' Rumble, in the present case DE 105-111 are clearly identified as reports generated by Morgan Angel. Further, Mr. Angel testified about each of the Defense Exhibits in question and explained his reliance on each one. This is not a situation, as in Tuff 'N' Rumble, in which the reliability of the underlying draft is in issue.

In Bennett v. PRC Public Sector. Inc., 931 F. Supp. 484, *503* (S.D. Tex. 1996), plaintiffs offered into evidence a list of articles compiled by their expert and attached to his preliminary report. The court refused to admit this list into evidence, ruling that

> Unless [the expert] is genuinely familiar with the contents of an article, the article is in fact relevant to an issue before the Court, and [the expert] is prepared to be cross-examined on the article, it may not be offered into evidence.

Bennett, 931 F. Supp. at *503*. Unlike Bennett, in the present case Mr. Angel testified as to his familiarity with DE 105-111, those exhibits are relevant to the Court's understanding of Interior's ability to conduct a historical accounting, and Plaintiffs have already cross-examined Mr. Angel about the exhibits. Under the Bennett standards, therefore, the Court should admit the exhibits into evidence.

In Grove Fresh Distributors, Inc. v. Everfresh Juice Co., No. 89 C 1113, 1992 WL 38998, at *1 (N.D. Ill. Feb. 24, 1992), plaintiff offered "an unfinished report by Coopers & Lybrand as expert evidence to support its claim for lost profits." The "expert refused to complete the report because the plaintiff had fallen behind in payment." Id. The unfinished report contained "fairly cryptic footnotes," never mentioned defendant or tied any data to it, and provided no summary or "explanation of the analysis used." Id. "The result [was] an unsubstantiated and inadmissible document." Id. The court also noted that plaintiff would "not be able to bolster the report with expert testimony at trial." Id.

Unlike the report in Grove Fresh, DE 105-111 are works in progress, rather than reports unfinished because of lack of payment. More importantly, unlike the report in Grove Fresh, DE 105-111 are not cryptic but rather clearly tie the extant historic data to a historical accounting. In addition, unlike in Grove Fresh, Interior Defendants have "bolstered" these exhibits with the trial testimony of Mr. Angel. As the Grove Fresh court noted that the Coopers & Lybrand report "might be helpful" in another case between the parties, id. at *2, so too should this Court recognize the helpfulness of Interior's proffered exhibits and admit them into evidence.[2]

II. FED. R. EVID. 703 SUPPORTS ADMISSIBILITY OF THE MORGAN ANGEL DRAFT REPORTS.

Among other things, Fed. R. Evid. 703 permits an expert to base an opinion on underlying facts and data, even if those facts and data are not themselves admissible. The Rule specifies that

> Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Fed. R. Evid. 703. Because the present case involves a bench trial, the Court supplants the jury as the finder of fact. As the finder of fact, the Court should consider DE 105-111 because their probative value in assisting the Court in evaluating Mr. Angel's expert testimony outweighs any prejudicial effect of their admission. There is little, if any, prejudicial effect in admitting these

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[2] Along with these cited cases, one court has also held that, in the discovery context, "draft reports of . . . experts are evidence." Trigon Ins. Co. v. United States, 204 F.R.D. 277, 288 (E.D. Va. 2001). On the other hand, one court has held more generally that "the Federal Rules of Evidence do not allow for introduction of expert reports into the record in the face of an objection by an opposing party." Cotia Steel v. M/V JAG VIDYA, No. Civ. A. 92-1802, 1996 WL 194927, at *2 n.2 (E.D. La. Apr. 19, 1996).

exhibits because the Court (perhaps unlike a jury) is savvy enough to understand their role in the development of the historians' opinions. More importantly, the exhibits have great probative value in that they provide support for Mr. Angel's opinions.[3]

DE 105-111 are also admissible under Rule 703 as a rebuttal to Plaintiffs' attack on Mr Angel's expert opinions. Inasmuch as Plaintiff cross-examination of Mr. Angel, both during voir dire and during their main cross, attacked his reliance on "draft" Morgan Angel reports, Interior Defendants should be permitted to rebut those attacks by introducing those underlying reports that Mr. Angel relied upon. The Rule itself contemplates such a use of underlying information:

> Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test. . . .

Fed. R. Evid. 703 advisory committee's note, 2000 amendments. The Court should therefore permit Interior Defendants to rebut Plaintiffs' attacks on Mr. Angel's opinions by accepting into evidence those reports that Mr. Angel relied upon in reaching those opinions.

Conclusion

Precedent exists to admit DE 105-111 into evidence. Rule 703 supports the admissibility of the draft reports as well. Therefore, the Court should accept DE 105-111 into evidence.

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[3] Interior Defendants recognize that, if admitted solely under Fed. R. Evid. 703, the Court may use the exhibits to evaluate the historians' testimony, but may not use the exhibits for any substantive purpose. See Fed. R. Evid. 703 advisory committee's note, 2000 amendments ("If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes.")

Dated: June 23,2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on June 23, 2003 I served the foregoing *Interior Defendants' Motion to Reconsider the Admissibility of Defense Exhibits 105-111* by hand upon:

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