IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, ROGER ANCLAM, EMILY BUNTING, MARY LYNNE DONOHUE, HELEN HARRIS, WAYNE JENSEN, WENDY SUE JOHNSON, JANET MITCHELL, ALLISON SEATON, JAMES SEATON, JEROME WALLACE, and DONALD WINTER, Plaintiffs, v. GERALD C. NICHOL, THOMAS BARLAND, JOHN FRANKE, HAROLD V. FROEHLICH, KEVIN J. KENNEDY, ELSA LAMELAS, and TIMOTHY VOCKE, Defendants.	)	No. 15-cv-421-bbc

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PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO ADMIT CERTAIN TRIAL EXHIBITS AND STATEMENTS FROM LEARNED TREATISES INTO EVIDENCE

INTRODUCTION

Defendants object, in part,[1] to plaintiffs' motion to admit certain trial exhibits and statements from learned treatises into evidence on the basis of a misinterpretation and misapplication of the learned treatise rule, Federal Rule of Evidence 803(18). Defendants' argument, at bottom, is nothing more than that the highlighted statements in learned treatises, which plaintiffs brought to the attention of their expert witnesses during their trial testimony and

[1] Defendants do not substantively challenge plaintiffs' motion to admit certain trial exhibits and statements from learned treatises into evidence except insofar as they challenge the statements from learned treatises or maintain objections that have already been overruled by the Court. Therefore, this motion focuses solely on the admissibility of the statements from learned treatises.

tendered to the Court, are inadmissible under Rule 803(18) because plaintiffs did not choose to have each statement read in its entirety into the record during trial. Defendants' interpretation and proposed application here of Rule 803(18) is directly contradicted by the text of the Rule itself, defies common sense, and would displace the Court's discretion over the admission of evidence and how best to achieve the "just, speedy, and inexpensive determination" of this action. Fed. R. Civ. P. 1; Western District of Wisconsin Bar Association, http://www.wdbar.org/ ("Rule 1"). The highlighted statements from learned treatises that the plaintiffs tendered to the Court, brought to the attention of their experts, and on which their experts relied, meet the requirements of Rule 803(18) and should be admitted.

I. The statements relied upon by plaintiffs' experts satisfy the requirements of Rule 803(18) and defendants' objections are without merit.

Federal Rule of Evidence 803 provides, in relevant part, that:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
> …
>
> **(18) Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:
> **(A)** the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
> **(B)** the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.
>
> If admitted, the statement may be read into evidence but not received as an exhibit.

The rule thus establishes just two requirements for admissibility of statements in a learned treatise:[2] (1) the statement must be relied on by an expert during direct examination or called to an expert's attention during cross-examination at trial; and (2) the treatise in which the statement appears must be established as reliable. As plaintiffs established in their motion, each and every highlighted statement in a learned treatise that the plaintiffs' counsel tendered to the Court, brought to the attention of their experts during trial, and on which their experts relied, satisfies both of these express requirements, and is therefore admissible. Defendants' arguments to the contrary are meritless.

All of the tendered statements were specifically identified with highlighting and called to the attention of plaintiffs' experts Kenneth Mayer and Simon Jackman during their testimony at trial; all of the statements were relied upon by one or both of plaintiffs' experts; and all were identified as reliable authority by one or both expert's testimony. Plaintiffs' counsel asked plaintiffs' experts on the witness stand to review the specific highlighted statements in the witness binders—which were also provided to defendants' counsel and the Court—and identify whether they relied on each of those highlighted statements in their expert analysis. Tr. Vol. II at 141 ("Q: Dr. Mayer, if you open the binder in front of you, it says "Kenneth Mayer Reliance Material" on the front. Do you see that? A: I do. Q: And do you see that there's an index [sic] the articles; correct? A: Correct. Q: Are each of these articles scholarly publications on which you've relied for your opinions? A: They are. Q: And if you go through each of the articles, you'll see that there is *highlighting on each of the articles,* correct? A: That's Correct. *Q: And are those statements in those articles on which you have relied for your opinions? A: They are*.")

[2] Although Fed. R. Evid. 803(18) expressly sweeps within its reach statements in a "treatise, periodical, or pamphlet," for the purpose of brevity, this Reply will refer to all qualifying publications as "learned treatises."

(emphasis added); Tr. Vol. III at 175 (after identifying several highlighted articles and establishing that they were relied upon by Professor Jackman, Mr. Hebert asked: "So those are – are those articles than in part you – statements in those articles, did you rely on those in forming your opinions in this case," and Professor Jackman answered "Yes." Mr. Hebert further asked: "And those are reliable authorities by experts in your field," to which Professor Jackman also answered "Yes.").

Defendants mount only a tepid opposition to plaintiffs' arguments that these requirements of Rule 803(18) were met, asserting that some of the highlighted statements were not called to the experts' attention. Defs.' Opp. Br. (Dkt. 159) at 2 (arguing that "testimony where the specific highlighted 'statement' in question is called to the attention of the expert" is "[l]acking"); Defs.' Opp. Br. (Dkt. 159) at 3-6. But as is demonstrated by the testimony identified in the paragraph above, contrary to defendants' assertions, the statements in learned treatises that plaintiffs moved into evidence ***were***, in fact, brought to the attention of the plaintiffs' experts, those experts testified that they relied on those statements, and they further testified that the treatises in which those statements appear are reliable.

If defendants had doubts about the reliability of any of these statements or concerns about whether plaintiffs' experts actually relied on any particular statement, defendants' counsel had the opportunity to cross-examine them on each of these statements. Defendants did not cross-examine plaintiffs' experts on these specific, highlighted statements during trial, and raised no concerns about their admissibility under the substantive criteria of Rule 803(18) in their opposition. Moreover, defendants do not argue that the highlighted portions do not fall within a learned treatise or other scholarly journal. Nor do defendants claim that the highlighted portions of the articles fail to qualify as reliable authority. Defendants' only objection is that plaintiffs

chose to use the time-saving device of highlighting the specific statements in learned treatises to quickly and efficiently call numerous relevant statements to the experts' attention. Given that each of the plaintiffs' tendered highlighted statements meet the requirements of Rule 803(18) and given the defendants lack of substantive objections, the highlighted statements should be admitted into evidence.

II. The Court should reject defendants' attempt to graft an additional requirement for the admissibility of statements in learned treatises that Rule 803(18) does not contain.

Defendants further argue that the highlighted statements in plaintiffs' experts' reliance materials are not admissible and cannot be admitted because they were not read individually into the record. Defs.' Opp. Br. (Dkt. 159) at 2 (arguing that "plaintiffs did not read 'the statement' into evidence, ***as required by the federal rules***" (emphasis added)). But defendants cite no authority for the proposition that reading the proffered statements into evidence is a ***prerequisite*** for the admission of those statements into evidence. Indeed, the proposition that defendants advance is contradicted by the plain text of Rule 803(18), which states: "***If admitted***, the statement ***may*** be read into evidence but not received as an exhibit" (emphasis added). Therefore, under the plain and common-sense reading of Rule 803(18), the Court ***first*** decides whether to admit the statement into evidence, and then, if the evidence is admitted, the party sponsoring that evidence "***may***" have that statement read into the record.

In other words, if the statement is ***first*** admitted in evidence on the basis of Rule 803(18)'s enumerated criteria, the party proffering the statement is given the ***option*** of reading it into the record. Under the express language of Rule 803(18), whether the party proffering the statement chooses to have it read into the record once it has been admitted simply has no bearing on whether it is admitted into evidence. Grafting a new prerequisite for admissibility onto the enumerated requirements of Rule 803(18), as defendants suggest, would stand the language of

Rule 803(18) on its head.[3] Furthermore, trial courts have wide latitude in designing procedures for trial that streamline the presentation of evidence and maximize the efficient use of resources for the Court and trial counsel. The Court should reject the defendants' effort to recraft this exception to the hearsay rule. Plaintiffs' proffered statements satisfy the required criteria under Rule 803(18) for admissibility, and therefore the statements should be admitted regardless of whether they were actually read into the record. *DaGraca v. Laing*, 672 A.2d 247, 252 (App. Div. 1996) (analyzing the New Jersey version of the learned treatise rule) (holding that "the trial court erred in precluding plaintiffs from cross-examining Dr. Kiev on portions of that report, even though those portions were not read into evidence by plaintiffs' expert").

III. Defendants' objection to the admissibility of statements in Dr. Chen's recent article on the ground that it is not "published" is meritless.

With respect to the highlighted statements in Exhibit 156, Dr. Jowei Chen's recent article on Wisconsin's political geography, defendants further argue, without support, that the statements are not admissible under Rule 803(18) because "the 'publication' seems to be the mere posting of this article on a personal webpage." Defs.' Opp. Br. (Dkt. 159) at 3. But there is simply no requirement that a statement must be published in a peer-reviewed journal to fall within the sweep of Rule 803(18) or that a statement in an article published on a scholar's academic website is inadmissible.[4] Defendants cite no authority for this proposition. Indeed, Rule 803(18) specifically allows for the admission of statements in various sorts of publications including, *inter alia*, publications as informal as "pamphlets." The highlighted statements in

[3] To the extent defendants argue that plaintiffs are seeking to have these articles admitted as exhibits, Defs.' Opp. Br. (Dkt. 159) at 2, they simply misstate plaintiffs' position. Plaintiffs have always acknowledged that these articles should not be admitted in their entirety as exhibits but only that the proffered statements, highlighted in each learned treatise, should be admitted into evidence.

[4] Furthermore, Dr. Chen's article is forthcoming in the Election Law Journal, a peer-reviewed, scholarly journal.

Exhibit 156 are certainly not rendered inadmissible simply because they are publicly available on the website maintained by Dr. Chen, a scholar in the field – especially given that Dr. Chen is an academic that the defendants' ***own experts*** acknowledge as an expert in the field, and on whose writings they rely for their ***own*** opinions. *Metcalf v. Blue Cross Blue Shield of Mich.*, No. 3:11-CV-1305-ST, 2013 WL 4012726, at *10 (D. Or. Aug. 5, 2013) ("Metcalf Exhibits 7 and 8 are materials made publicly available by the National Uniform Claim Committee ('NUCC') on its website. . . . [They] qualify as learned treatises under FRE 803(18). Moreover, Metcalf, as a licensed chiropractor, relied upon the ChiroCode DeskBook and followed NUCC guidelines when filling out claim forms. Metcalf Decl., ¶ 10. Metcalf's testimony alone, if offered at trial, would be sufficient to admit the NUCC and ChiroCode materials as learned treatises."); *United States v. Walia*, No. 14-CR-213 MKB, 2014 WL 3734522, at *5, n.6 (E.D.N.Y. July 25, 2014) ("Although the Court is not aware of any application of the learned treatise exception to statements made before the United States Senate and subsequently distributed online, this exception has been applied to a variety of materials suggesting it has a liberal scope.").

The question is not where the publication in which the proffered statements can be found, but rather whether that publication is a "reliable authority." Contrary to defendants' assertion that plaintiffs "failed to produce testimony showing the reliability of 'the publication,'" Defs.' Opp. Br. (Dkt. 159) at 3, plaintiffs established at trial that Dr. Jowei Chen's recent publication is a "reliable authority" pursuant to Rule 803(18). Dr. Mayer testified that: (1) as a qualified expert he relied on this article in forming his opinions, Tr. Vol. II at 141; (2) this article is forthcoming in a peer-reviewed journal, Tr. Vol. II at 261; and (3) he has known Dr. Chen "for a number of years," "seen him give presentations on [his] method," and "had a number of conversations with him over the years" about his methods, Tr. Vol. II at 257. Moreover, Dr. Mayer testified at

length about the methodology used in Dr. Chen's forthcoming article and the valid conclusions he draws from that reliable methodology. Tr. Vol. II at 262-266. The highlighted statements in Dr. Chen's forthcoming article, Exhibit 156, are also admissible for the reasons outlined in plaintiffs' post-trial briefing. Pls.' Post-Tr. Br. (Dkt. 155) at 26-30; Pls.' Post-Tr. Rpl. Br. (Dkt. 157) at 9, n.3.

Finally, it is particularly ironic that the defendants argue against admitting the statements in Dr. Chen's recent article – apparently contesting their reliability since they appear only on Dr. Chen's University of Michigan website and not in a publication – when Dr. Chen's other, related work was sufficiently reliable for defendants' own experts to rely upon for their opinions. Stripping away the thin veneer of this argument, it is clear that defendants' real objection is that Dr. Chen's recent work exposes the defendants' experts' misuse of his earlier work in attempting to buttress their opinions. The Court should reject the defendants' attempt to cherry-pick only those statements in Dr. Chen's work that they and their experts contend support the defense theories, especially where doing so would – according to Dr. Chen himself – mislead the Court. The Court should admit all of the proffered statements of Dr. Chen and give those statements the weight that the Court deems appropriate.

CONCLUSION

For the reasons set forth above and in plaintiffs' motion (Dkt. 151), plaintiffs respectfully request that the Court grant their motion and admit the identified exhibits and statements from learned treatises into evidence.

Dated this 30th day of June, 2016.

Respectfully submitted,

/s/ Danielle M. Lang

Danielle M. Lang
CAMPAIGN LEGAL CENTER
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200
dlang@campaignlegalcenter.org

One of the Attorneys for the Plaintiffs, William Whitford, et al.

/s/ Douglas. M. Poland

Douglas M. Poland
State Bar No. 1055189
RATHJE WOODWARD, LLC
10 East Doty Street, Suite 507
Madison, WI 53703
Phone: (608) 960-7430
Fax: (608) 960-7460
dpoland@rathjewoodward.com

One of the Attorneys for the Plaintiffs, William Whitford, et al.