UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

TERRY PETTEWAY, et al. Plaintiffs, v. GALVESTON COUNTY, TEXAS, et al. Defendants.	§ § § § § § § §	Civil Action No. 3:22-CV-00057 (consolidated)
UNITED STATES OF AMERICA, Plaintiffs, v. GALVESTON COUNTY, TEXAS, et al. Defendants.	§ § § § § § § §	Civil Action No. 3:22-CV-00093
DICKINSON BAY AREA BRANCH NAACP, et al. Plaintiffs, v. GALVESTON COUNTY, TEXAS, et al. Defendants.	§ § § § § § § §	Civil Action No. 3:22-CV-00117

DEFFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION TO ADMIT EXPERT REPORTS

Defendants respectfully file this Response to Plaintiffs' Motion to Admit Expert Reports (Dkt. 213) and ask the Court to exclude expert reports as exhibits at trial.

ARGUMENT

I. Pre-admission of over 880 pages of Plaintiffs' expert reports effectively places the burden of proof on Defendants to disprove the reliability and helpfulness of the content and inhibits a proper defense of the case—as reports cannot be cross-examined.

Plaintiffs admit that "[t]he expert reports in this case span hundreds of pages," and they argue that "[i]t serves no purpose to multiply the trial proceedings by requiring the parties to elicit testimony and introduce individual exhibits for each particular fact and figure . . . ." Dkt. 213 at 4.

An expert report cannot be cross-examined. With the pre-admission of all expert reports, Plaintiffs effectively ask the Court to place the burden of proof on Defendants to show on cross-examination of a presumably live expert why, for each of the Plaintiffs' 10 experts, each and every statement within a pre-admitted report is unreliable, unsupported or unhelpful even when Plaintiffs never address it during direct examination. Defendants would have to cover whether an adequate basis exists for each opinion, whether it is based on sufficient facts or data (or reliable data), whether it is the product of reliable principles and methods, whether the principles and methods have been reliably applied to the facts, and whether the statements have any bearing at all on an issue in the case. *See* Fed. R. Evid. 701. Pre-admission of the 10 experts' reports will permit Plaintiffs to discuss any of the statements made within them, even if they did not touch upon those statements during their presentation of evidence.

Defendants agree that the Court is more than capable of understanding any limited reasons for admitting inadmissible information; however, what Plaintiffs propose in

admitting opinion evidence is much more injurious than just deciding whether a particular exhibit is relevant. While a Court might limit reliance on irrelevant information, opinion evidence is subject to opposition through counter evidence or opinion. Thus, admitting the reports forces Defendants to either challenge every possible opinion to be offered at trial and attack each error or unsupported statement on which an opinion may be based, or risk waiver.

Defendants therefore ask that the Court exclude the expert reports as hearsay, and require the presentation of expert evidence through testimony at trial.

II. The parties have already agreed to admit the experts' figures, tables and maps from the reports, with opinion statements redacted, so that it is not necessary to include the reports in their entirety to streamline trial.

Plaintiffs argue that, "under Rule 703, because this is a bench trial rather than a jury trial, Plaintiffs' experts are permitted to testify at trial about otherwise inadmissible underlying facts or data supporting their opinions." Dkt. 213 at 4. They cite to the plurality opinion in *Williams v. Illinois*, 567 U.S. 50, 78 (2012), which is not controlling. *See U.S v. Duron-Caldera*, 737 F.3d 988, 994 (5th Cir. 2013).

While experts may testify regarding inadmissible underlying facts and data supporting their opinions, an entire expert report includes much more information than merely those underlying facts and data. The parties have already agreed to the use of various table, figures and data from numerous expert reports. These excerpts redact the "excess" and leave those "inadmissible underlying facts and data supporting their opinions." The "excess," which Plaintiffs seek to admit are the entire opinions of each expert witness, which the Court can readily hear in the proper format—on the witness

stand. Therefore, all the concerns that are rightly associated with the use of hearsay evidence (including trustworthiness and probative force) may be negated with the use of these agreed-upon excerpts.

Essentially, the parties' agreement allows disclosure of the underlying inadmissible information and halts the need to invoke the rarely used and exceptional Rule 807. Plaintiffs argue that admission of expert reports will save the Court's and parties' time. However, the addition of what should be repetitive material to the experts' live testimony would certainly place a pressure on the Court's time and resources to review entire reports, in addition to listening to live testimony.

III. Federal Rule of Evidence 807's conditions must be met, and is a rare exception to the admissibility of hearsay.

As Plaintiffs implicitly admit, expert reports are hearsay. Fed. R. Evid. 801, 802; *Bryan v. John Bean Div. of FMC Corp.*, 566 F.2d 541 (5th Cir. 1978); *Polythane Sys. v. Marina Ventures Int'l.*, 993 F.2d 1201, 1207-08 (5th Cir. 1993). Additionally, experts may rely on materials that are hearsay to form the basis of his opinion, but only the expert's opinion, not the hearsay evidence or report, is admitted into evidence. *Aldridge v. United States*, No. MO:08-CR-00254-RAJ, 2014 WL 12819625, at *10-11 (W.D. Tex. May 1, 2014); *see* Fed. R. Evid. 702, 703. Plaintiffs do not deny that expert reports are hearsay. Instead, Plaintiffs attempt to rely on the residual hearsay exception, codified in Federal Rule of Evidence 807, to seek the admission of expert reports.

FRE 807, as a residual exception to the hearsay rule, provides limited conditions in which a court can admit hearsay statements. Fed. R. 807(a). Those conditions are that the

hearsay statement is (1) "supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement" and (2) if the hearsay statement "is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." *Id*. Before a hearsay statement can be admitted under Rule 807, the offering party must provide notice of their "intent to offer the statement—including its substance and the declarant's name—so that the party has a fair opportunity to meet it." Fed. R. 807(b).

Defendants do not dispute that the Plaintiffs gave notice that they sought to enter the *entirety* of their experts' reports into evidence. However, by offering over 800 pages of potential opinions into evidence without actually addressing all of the facts, bases and statements within them at trial, Plaintiffs do not provide a basis or fair notice of *which* hearsay statements within these reports meet the criteria of Rule 807, or how.

The residual hearsay exception may only be used rarely, in truly exceptional cases. *U.S. v. Phillips*, 219 F.3d 404, 419 n. 23 (5th Cir. 2000). The proponent bears a heavy burden to demonstrate both trustworthiness and probative force of the statement. *U.S. v. Washington*, 106 F.3d 983, 1001-02 (D.C. Cir. 1997).

> [E]vidence possessing 'particularized guarantees of trustworthiness' must be at least as reliable as evidence admitted under a firmly rooted hearsay exception . . . [and] must similarly be so trustworthy that adversarial testing would add little to its reliability.

U.S. v. El-Mezain, 664 F.3d 467, 497–98 (5th Cir. 2011), as revised (Dec. 27, 2011) (quoting *Idaho v. Wright*, 497 U.S. 805, 821 (1990)).

But expert reports are not as reliable as evidence that would be admitted under a firmly rooted hearsay exception. For example, courts have held that a report is hearsay and cannot constitute a business record without the testimony of the custodian or other qualified witness.[1] A report written in response to a request from a party, their attorney, or their insurance representative, however, cannot constitute a business record.[2] Courts have held, therefore, that expert reports do not muster the reliability associated with at least one firmly rooted hearsay exception:

> There is no compelling reason to chart a new course here. Rule 807 provides a residual exception for hearsay statements not covered by any of the enumerated exceptions that have "equivalent circumstantial guarantees of trustworthiness." It can rarely be said that a report prepared by a paid, retained expert witness for a party or its counsel bears "equivalent circumstantial guarantees of trustworthiness" to justify application of the residual hearsay exception. Plaintiffs have failed to establish that the Stewart Report is sufficiently reliable and trustworthy to permit it to come in under the residual exception. Admitting it under these circumstances would not best serve the purposes of the Federal Rules of Evidence or the interests of justice. It is inadmissible hearsay.

Diamond Resorts Int'l, Inc. v. Aaronson, 378 F. Supp. 3d 1143, 1145 (M.D. Fla. 2019) (internal citations omitted).

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[1] *See Creighton v. Aldi (Tex.) L.L.C.*, No. 6:19-CV-268-JDK-KNM, 2021 WL 2792350, at *2 (E.D. Tex. Feb. 9, 2021) (citing, inter alia, *Elgabri v. Lekas*, 964 F.2d 1255, 1261 (1st Cir. 1992); *Rossen v. Rossen*, 792 S.W.2d 277, 278 Tex. App.—Houston [1st Dist.] 1990, no writ); and *Northwestern Nat. Ins. Co. v. Garcia*, 729 S.W.2d 321, 325 (Tex. App.—El Paso 1987, writ ref'd, n.r.e.)).

[2] *See Creighton*, 2021 WL 2792350, at *2 (citing *Freeman v. Am. Motorists Ins. Co.*, 53 S.W.3d 710, 715 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Hirdler v. Boyd*, 702 S.W.2d 727, 731 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); *Associated Indem. Corp. v. Dixon*, 632 S.W.2d 833, 835 (Tex. App.—Dallas 1982, writ ref'd n.r.e.); *Texas Employer's Ins. Ass'n. v. Sauceda*, 636 S.W.2d 494, 499 (Tex. App.—San Antonio 1982, no writ); *see Certain Underwriters at Lloyd's London v. Sinkovich*, 232 F.3d 200, 205 (4th Cir. 2000); *Weaver v. Phoenix Home Life Mut. Ins. Co.*, 990 F.2d 154, 159 (4th Cir. 1993)).

Live testimony of the expert witnesses in this case will be more probative and trustworthy than the out-of-court, unsworn, written statements Plaintiffs seek to admit. Plaintiffs have stated their intention to call each expert witness live at trial. Therefore, each expert witness will have the opportunity to explain his or her opinions to the Court on the witness stand. Additionally, as discussed above, the parties have agreed to the use of numerous tables and figures, which appear within the various expert reports, at trial. Thus, each expert will have all necessary resources to explain his or her opinions to the Court, erasing the need to invoke the exceptional and rarely used Rule 807.

Plaintiffs cite to an order issued in *Perez v. Texas*. Dkt. 213. In *Perez v. Texas*, and in the cited order specifically, the Court held that "expert reports will not be pre-admitted or admitted in lieu of live expert testimony" and, instead, the reports would be allowed "subject to any further objections in open court if the expert testifies live or by trial deposition and adopts the statements in the report while under oath and subject to cross examination." Order at 1-2, *Perez v. Texas*, Case No. 11-CA-360-OLG-JES-XR (W.D. Tex. July 3, 2017), Dkt. 1447. The *Perez* court therefore saw the need to implement parameters due to expert reports inherent elements of hearsay, which can gravely affect the trustworthiness and probative value of trial evidence.

CONCLUSION AND PRAYER

For the foregoing reasons, Defendants ask that the Court exclude expert reports from evidence. In the alternative, should the Court permit such exhibits, Defendants ask that the Court permit entry of Defense expert reports.

Respectfully Submitted,

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**pending pro hac vice application*

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served to all counsel of record via the ECF e-filing system on August 1, 2023.

/s/ Joseph Russo