In the United States Court of Federal Claims

No. 01-56 C
(Filed: April 19, 2005)

JOHN W. BULL, ET AL.,	)
Plaintiffs,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

ORDER

Before the court is Defendant's Objections to Plaintiffs' Exhibits (Def.'s Obj). Although afforded an opportunity to reply to these objections, see Order dated November 16, 2004, plaintiffs have not replied. The court addresses defendant's objections in turn.

1. Litigation Documents

Defendant objects to the inclusion of "numerous documents, such as deposition notices and protective orders, that were either created by the attorneys or the Court." Def.'s Obj. at 1. Defendant asserts that the documents are not relevant. Id. The court SUSTAINS defendant's objection with respect to the deposition notices, specifically, exhibits 1, 8-9, 18-20, 23, 25, 30, 39, 42, 44-46, 50, 53, 64, 68, 71, 76, 83, 84 (list of documents and information requested in connection with the Notice of RCFC 30(b)(5) and RCFC 30(b)(6) Deposition), 92, 101, 105, 111, 118 and 120. Federal Rule of Evidence (FRE) 402. The court SUSTAINS the objection with respect to the protective order, specifically, exhibit 2. Id. The court declines to render a ruling on defendant's objections to exhibits that have not been more particularly described.

2. Material Concerning Non-Sample Plaintiffs

With respect to plaintiffs other than the sample plaintiffs designated for trial, defendant objects to the inclusion of "discovery responses," "damage spreadsheets," "time and attendance reports," "SF50 and/or PERHIS ('personal history') reports." Defendant argues that the documents are not relevant to the claims of the sample plaintiffs. Def.'s Obj. at 2. Defendant also argues that the discovery responses and damage spreadsheets are hearsay. The court SUSTAINS the objection with respect to exhibits 3-4, 31-33, 47-48, 51-52, 66, 69, 72-74, 77-81, 91, 102-104, 106-108, 116, 135, 137-156, 158, 160-164, 165-174, 176-183, 185-190, 192, 194-213, 215-221, 223-231, 233-240, 242-248, 250-269, 271, 273-277, 279-287, 289-296, 298-304, 306-325, 327, 329-333, 335-343, 345-352 and 354–359. FRE 402 (with respect to all of the excluded exhibits), 802 (with respect to the discovery responses and damage spreadsheets only).

3. Material Relating to Sample Plaintiffs

Although conceding that the discovery responses of the sample plaintiffs "may have some relevance," defendant contends that they are not admissible by plaintiffs because they are hearsay. Def.'s Obj. at 3. The court SUSTAINS the objection with respect to exhibits 6-7, 22, 40-41, 305, 326, 328, 334, 344 and 353. FRE 802.

4. Spreadsheets

Defendant objects to the "damage spreadsheets" listed for each plaintiff. Def.'s Obj. at 3. Defendant also objects to the spreadsheets that "appear as part of other exhibits," particularly, exhibits 326 and 929. Id. at 3 & n.3. Defendant argues that the spreadsheets for the non-sample plaintiffs are irrelevant. Id. at 4.

For the sample plaintiffs, defendant contends that "the spreadsheets are admissible for a limited purpose only." Id. Defendant asserts that, because the spreadsheets were created "expressly for litigation" by "[m]embers of the law firm's staff," id. at 4, the spreadsheets are not business records under the rules of evidence and "do not qualify as exhibits that can be the basis for factual finding by the Court," id. (citing Potamkin Cadillac Corp. v. BRI Coverage Corp., 38 F.3d 627, 632 (2d Cir. 1994) ("Data prepared or compiled for use in litigation are not admissible as business records."); United States v. Blackburn, 992 F.2d 666, 670 (7th Cir. 1993) (finding that trial court improperly admitted as a business record a "report . . . not kept in the course of a regularly conducted business activity, but rather . . . specially prepared at the behest of the F[ederal] B[ureau] [of] I[nvestifation] and with the knowledge that any information . . . supplied would be used in an ongoing criminal investigation); Paddack v. Dave Christenson, Inc., 745 F.2d 1254, 1259 (9th Cir. 1984) (excluding audit reports prepared for litigation purposes due to lack

of trustworthiness and quoting McCormick on Evidence §308, at 877 n.26 (E. Cleary 3d ed. 1984) ("where the only function that the report serves is to assist in litigation or its preparation, many of the normal checks upon the accuracy of business records are not operative.")).

Defendant also argues that the spreadsheets do not qualify as "'summary documents'" under FRE 1006 because, as required by FRE 1006,[1] the spreadsheets do not summarize only underlying documents that are admissible. Id. at 5. Instead, defendant asserts, the spreadsheets "capture information . . . presented in plaintiffs' declarations" about the time allegedly spent performing various work-related tasks, and the content of plaintiffs' declarations constitutes hearsay. Id.

While arguing that the spreadsheets are not admissible as independent evidence with respect to the sample plaintiffs, defendant acknowledges that the spreadsheets may be used as demonstrative exhibits. To the extent plaintiffs intend to use the spreadsheets as demonstrative exhibits (which, defendant observes, are only as accurate as the accompanying testimony), defendant does not object. Id. at 6.

The court SUSTAINS defendant's objection regarding the use of the spreadsheets with respect to the non-sample plaintiffs. FRE 402. The court also SUSTAINS defendant's objection regarding the use of the spreadsheets with respect to the sample plaintiffs to the extent that plaintiffs intend to offer the spreadsheets as independent evidence. See FRE 803(6), 1006. Otherwise, defendant's objection is MOOT.

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[1]FRE 1006 provides that "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." This court has stated that "[f]or a summary to be admissible under FRE 1006, the proponent must lay a proper foundation by establishing four requirements:"

> First, the summarized writings must be so voluminous so as to be unable to be conveniently examined in court. Second, the underlying evidence must itself be admissible. Third, the original or copies of the summarized writings must be made available to the opposing party. And, fourth, the proposed summary (or chart or calculation) must accurately summarize (or reflect) the underlying document(s) and only the underlying document(s).

Bannum, Inc. v. United States, 59 Fed. Cl. 241, 244 (2003) (citing Bath Iron Works Corp. v. United States, 34 Fed. Cl. 218, 232-33 (1995) (emphasis and internal citations omitted), aff'd, 98 F.3d 1357 (Fed. Cir. 1996)).

5. Exhibit 35, 36, 37

Defendant objects to exhibits 35 (a one page handwritten schematic diagram) and 37 (a document captioned "Glock: Instructions for Use") on the grounds of authenticity and hearsay. Def.'s Obj. at 7. Defendant contends that, because "[t]he existing record does not indicate what these documents are," the documents are inadmissible. Id. (citing FRE 901). The court reserves its ruling on this objection to hear further argument at the pretrial conference regarding the authenticity of the documents and identification of what the documents are.

Defendant also objects to a document contained within exhibit 36 ("a series of documents that collectively were produced by plaintiffs during the deposition process and labeled as one document") on the grounds of authenticity and hearsay. Def.'s Obj. at 7. The particular document to which defendant objects is a small document that begins with the caption "Introduction." In the absence of any testimony about what this document is, defendant argues that the document is inadmissible. Id. at 8 (citing FRE 801(d)(2) (denying that document is not a statement by a party opponent), 803 (no hearsay exception established), and 901 (lack of identification or showing of authenticity of document). The court reserves its ruling on this objection to hear further argument at the pretrial conference regarding the authenticity of the documents and identification of what the documents are.

6. Documents Generated By An Expert

Defendant objects to the use of documents created by plaintiffs' expert, Mr. Oran Clemons, specifically, exhibits 112-115 and 139-140. Def.'s Obj. at 8. Defendant argues that these documents, which included Mr. Clemons's resume and expert report, are hearsay and therefore, inadmissible. Id. (citing Granite Partners, L.P. v. Merrill Lynch, Pierce, Fenner & Smith Inc., 200[2] WL 826956 at *7 (S.D.N.Y. 2002) (unreported decision excluding, as inadmissible hearsay, the expert report of an expert expected to testify) and (Ake v. Gen. Motors Corp., 942 F. Supp. 869, 877-78 (W.D.N.Y. 1996) (when the report at issue constitutes the expert's opinion, court permitted expert to testify about contents of report but found report itself inadmissible)).

Rule 703 of the federal rules governing evidence, as amended in 2000, states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the

> subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. 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.

FRE 703. The Advisory Committee Notes observe that "[c]ourts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion." FRE 703 advisory committee's note. Because otherwise inadmissible facts or data may be disclosed to a factfinder upon a determination that probative value of the information disclosed substantially outweighs the prejudicial effect of the disclosure to the factfinder evaluating the expert's opinion, the court OVERRULES defendant's objection to exhibits 112-115 and 139-140 to the extent that the objection is inconsistent with the discretion afforded to the court under FRE 703. Moreover, to the extent that defendant reasserts argument that were addressed in its motion in limine to exclude the expert testimony of Mr. Clemons and by the court's Order dated April 14, 2005, defendant's motion is MOOT.

7. Video Clips

Defendant objects to the portions of the depositions of Mr. Newcombe and Mr. Titus that plaintiffs intend to present at trial by video clip because defendant has not received copies of the video clips. Def.'s Obj. at 7. Because by Order dated April 19, 2005, the court disallowed the use of deposition testimony at trial for Messrs. Newcombe and Titus, defendant's objection is MOOT.

IT IS SO ORDERED.

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EMILY C. HEWITT
Judge