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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LANELL MONIQUE JONES,
Plaintiff,
vs.
CITY OF OAKLAND, et al.,
Defendants.

Case No.: **11-cv-4725 YGR**
ORDER #6 RE: TRIAL EXHIBITS AND
MOTIONS IN LIMINE

This Order follows a series of pre-trial conferences held by the Court on February 22, 25, and March 5, 11, and 15, 2013, as well as orders regarding the pretrial filings issued on February 25 (Dkt. 62), March 7 (Dkt. 77 [Order #2]), March 8 (Dkt. 93 [Order #3] and Dkt. 94 [Order #4]); March 11 (Dkt. No. 97 [Order #5]). The Court has carefully considered the briefing and arguments of the parties, and rules as follows on Defendants’ Motions in Limine Nos. 1 and 3, and on the parties’ objections to proposed exhibits:

I. Motion In Limine No. 3 and Exhibits 13 and 16:

Defendants’ Motion In Limine Number 3 seeks to exclude any evidence or argument concerning the “Nightrider” officers, those officers’ criminal prosecution, and the civil lawsuit of Delphine Allen, et al. v. City of Oakland, et al., Case No. 00-cv-4599 TEH (also known as “the Riders Case”), including settlement of that case or subsequent monitoring reports required as part of those proceedings.¹ Such documents would include the documents identified as Plaintiff’s Exhibits 13 and 16.

¹ The parties agree that neither of the Defendant officers here was one of the “Nightrider” officers involved in those prior criminal and civil cases.

1 As indicated in Order #4, Plaintiff listed “Hon. Henderson’s Order re: City of Oakland
2 Compliance Director” as her Exhibit 13. Thereafter, she presented several hundreds of pages of court
3 documents from multiple docket entries consisting of six (6) separate and distinct documents,
4 Exhibits 13(A) - 13(F). The Court ordered Plaintiff to mark the separate exhibits and explain the
5 basis on which she sought to admit them. The Court, in its Order #5, excluded Exhibits 13(A) and
6 13(D) for the reasons stated therein. As to the other documents, the Court allowed Plaintiff
7 additional time to identify the specific pages, the specific purpose for which they were offered, and
8 the nexus to liability in this action. Defendants were then permitted to offer their response brief, and
9 the parties permitted to argue the matters at the (Fifth) Pre-Trial Conference hearing on March 15,
10 2013.

11 **A. Exhibit 13**

12 Exhibits 13(B), (C), (E) and (F), documents offered by Plaintiff from the Riders Case may not
13 be used in this action. Exhibit 13(B), the Negotiated Settlement Agreement (“NSA”), on its face
14 states that it cannot be used as evidence of liability against the City. As Plaintiff has pointed out, the
15 NSA was made an order of the Court in the Riders Case. The NSA provides that “[n]othing in this
16 Agreement ... shall be construed as an admission of liability or evidence of liability under any federal,
17 state or local law, including 42 U.S.C. § 1983” (NSA at page 1, line 26-page 2, line 2). The NSA
18 further states that:

19 This Agreement is enforceable only by the parties, as described elsewhere in this
20 document. No person or entity is intended to be a third-party beneficiary of the
21 provisions of this Agreement for the purposes of any civil, criminal, or
22 administrative action, and accordingly, no person or entity may assert any claim or
23 right as a beneficiary or protected class under this Agreement.

23 (NSA at page 2, lines 22-26.) Plaintiff argues that these provisions only prevent another party from
24 enforcing the NSA, which she is not seeking to do. Further, Plaintiff argues that the NSA is not
25 offered as evidence of the City’s liability, but as evidence of notice to the City that there were
26 “problems and issues” with the Oakland Police Department. Following from the notice in the NSA,
27 she argues, Exhibits 13(C) [AMOU], 13(E) [Audit], and 13(F) [Hon. Henderson's Order Re
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1 Compliance Director] show that the City failed to comply with the NSA and created an atmosphere in
2 which the alleged constitutional violations by the Defendant Officers occurred.

3 First, Plaintiff's notice versus liability argument is a distinction without a difference. She is
4 plainly seeking to offer the NSA and documents related to its compliance to establish the City's
5 liability in this action, a use that is prohibited by the terms of the NSA, and thereby the court's order
6 in the Riders Case. Likewise, offering evidence to show that the City failed to comply with the
7 agreement is prohibited, since the probative value of the lack of NSA compliance presumes that the
8 NSA's terms can be used to establish liability. And, to be clear, Plaintiff has not offered any portion
9 of the NSA, or the documents following therefrom, that would have put the City on notice with
10 respect to any conduct of the Defendant Officers here.

11 In addition to the fundamental problems with offering the NSA and other documents for a
12 purpose prohibited by the agreement, the Court finds that the documents are otherwise inadmissible.
13 Plaintiff contends that the Court can take judicial notice of Exhibits 13(B), (C), (E), and (F), but
14 judicial notice can only be taken for the limited purpose of establishing the existence of those
15 documents, not for the truth of any facts stated therein. *Lee v. City of Los Angeles*, 250 F.3d 668,
16 689-90 (9th Cir. 2001). The purposes for which Plaintiff offers the Riders Case documents far
17 exceed the limited scope of judicial notice.

18 Plaintiff also contends that these are self-authenticating documents and fall under Rule
19 803(8)'s hearsay exception for public records. Plaintiff concedes that no witness can authenticate
20 these documents.² As to self-authentication, Plaintiff has not shown how these exhibits are self-

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22 ² Plaintiff has argued repeatedly that the Court "excluded" two witnesses, Captain Erise
23 Joyner and Sergeant Charles Abdullah. In addition, Plaintiff's argues in her brief filed March 13,
24 2013, that she is being prejudiced by the exclusion of Coroner Robert Zedelis and Officer Daniel
25 Higgins. (Dkt No. 100 [Plaintiffs Pre-Trial Conference Brief # 3] at p. 8) Plaintiff's argument that
26 these individuals were excluded as witnesses overlooks the fact that she never included these
27 witnesses on any proposed witness list. (See Docket Nos. 41 [filed February 15, 2013] and 45 [filed
28 February 21, 2013].) Plaintiff argues that she mentioned their names in a brief she filed and that
Defendants were aware that these individuals had information about the case. These arguments do
not relieve Plaintiff of the obligation to disclose them as witnesses and list them on her witness list in
a timely manner. The Court is not required to comb the record to determine who Plaintiff might be
intending to call as a witness, and opposing parties are entitled to know the names of the witnesses
Plaintiff intends to call in her case-in-chief in advance.

1 authenticating under Rule 902, since they are not sealed or certified copies of any records, official
2 publications or documents fitting under any other category stated therein.

3 Moreover, the hearsay exception cited by Plaintiff is unavailing. Rule 803(8) provides an
4 exception from the hearsay exclusion for a “record or statement of a public office if. . . (A) it sets out
5 the office’s activities or . . . factual findings from a legally authorized investigation; and (B) neither
6 the source of the information nor other circumstances indicate a lack of trustworthiness.” FRE
7 803(8). Exhibits 13(B), 13(C), and 13(F) do not meet the first part of the test as they are not
8 statements of a public office’s activities or a legally authorized investigation.

9 While Exhibit 13(E), the Audit Report, might qualify as a public record of “activities” or an
10 “investigation” by the Oakland Police Department under FRE 803(8), it suffers from the same
11 authentication problems as the other documents, as well as raising particular relevance concerns.
12 Exhibit 13(E), an audit report, is dated August 14, 2012, and purports to be an audit of “use of force
13 incidents that occurred April 2011 through June 2011,” post-dating the November 8, 2010 incident at
14 issue here. Plaintiff has not offered a nexus or explanation of how a report concerning a different,
15 later time period might support her proffered theory that these exhibits establish the City’s
16 knowledge, deliberate indifference, and failure to correct or train, such as would establish the City’s
17 liability for the November 8, 2010 incident.

18 Finally, beyond the problems already identified, the Court finds that admission of the Riders
19 case documents would be more prejudicial than probative under FRE 403. Admitting the documents
20 alone, without any context or explanation of their meaning by any witness, has the strong potential to
21 confuse and mislead the jury, as would Plaintiff counsel’s unsupported “argument” regarding the
22 meaning of the same.

23 **B. Exhibit 16**

24 With respect to Exhibit 16, the Independent Monitor’s Fifth Quarter Report in the Riders
25 Case, Plaintiff offers this document to establish “that the Oakland Police Department was not in
26 compliance with the NSA agreement during the Reporting Period of October 1, through December
27 31, 2010,” which lack of compliance “substantially contributed to the events leading to the death of
28 the decedent Derrick Jones.” (Dkt. 100 [Plaintiffs Pre-Trial Conference Brief # 3] at 8.) Like the

1 documents in Exhibit 13, use of the document to establish the City’s liability here is prohibited by the
2 terms of the NSA, since any statements of compliance or non-compliance necessarily rely on the
3 terms of the NSA itself.

4 As with the documents in Exhibit 13, Plaintiff has not shown how the document can be self-
5 authenticating under any provision of FRE 902, and does not offer a testifying witness to establish
6 authenticity under FRE 901.

7 In addition to these authentication problems, admission of a report produced in the Riders
8 case pursuant to the NSA, in a context where those documents themselves are not admissible, would
9 be more prejudicial than probative under FRE 403. Admitting the report without any witness to
10 provide context or explanation would very likely confuse and mislead the jury. The Independent
11 Monitor offers opinions about the City’s compliance with the NSA overall, with specific tasks
12 therein, and in comparison to earlier reports. Standing alone, it would give jurors an incomplete
13 understanding of the meaning of the tasks, status, and progress reported therein.³

14 Based upon the foregoing, Defendants’ Motion in Limine No. 3 is **GRANTED**. Exhibits 13(B),
15 13(C), 13(E), 13(F) and 16 are **EXCLUDED** from evidence. In addition, **PLAINTIFF IS PROHIBITED**
16 from pursuing any lines of questioning, offering evidence or making argument concerning the Riders
17 Case, its settlement or subsequent orders concerning that settlement, as well as the “Nightrider”
18 officers and their criminal prosecution.

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23 ³ In light of other fundamental issues with the admissibility of Exhibit 16, the Court declines
24 to reach the issue of whether it satisfies the hearsay exception in FRE 803(8)(A). The Ninth Circuit’s
25 decision in *Montiel v. City of Los Angeles*, 2 F.3d 335 (9th Cir. 1993) is distinguishable, since the
26 court there assumed the document at issue, the report of the Christopher Commission, met Rule
27 803(8)(A)’s requirement that the offering party establish that the document was a public record. The
28 *Montiel* court held that the district court erred because it should have presumed that the public report
was trustworthy and put the burden of establishing otherwise on the opponent of the evidence. *Id.* at
341. Here, defendants have raised some issues with respect to its trustworthiness, but the issue has
not been fully litigated. The Court need not decide this issue since Exhibit 16 is not admissible for
other sufficient and independent reasons.

1 **II. Motion in Limine No. 1, Exhibit 14 (now Exh. 200-273 et seq.)**
2 **and Exhibit 15 (now Exh. 300-336 et seq.)**

3 Defendants' Motion in Limine No. 1 seeks to prohibit any statement, suggestion, or argument
4 by plaintiff, plaintiff's counsel, and plaintiff's witnesses concerning the Internal Affairs (IA), Citizen
5 Police Review Board (CPRB) and/or personnel histories of the police officers who responded to the
6 scene of the incident in this case including but not limited to Defendants Daza-Quiroz and Perez-
7 Angeles and any and all of the Oakland Police Department Officers who may testify at trial. The
8 motion is made on the grounds that such evidence, testimony, or argument is irrelevant, or
9 alternatively, is more prejudicial than probative, and should not be admitted under Federal Rule of
10 Evidence ("FRE") 401 and 403. The motion is made on the additional grounds that such evidence,
11 testimony, or argument is inadmissible "prior acts" evidence under FRE 404.

12 In its Order #4, the Court noted the Plaintiff had identified, under the heading of Exhibits 14
13 and 15, numerous discrete documents, totaling several hundred pages, from the officers' internal
14 affairs history. In doing so, she had not indicated which documents she intended to use, or the basis
15 upon which those documents could be authenticated, relevant, and admissible for purposes other than
16 character evidence prohibited under FRE 404. Plaintiff was ordered to separate the individual
17 documents she wished to admit from Exhibits 14 and 15, renumbering them as exhibit numbers 200
18 et seq. and 300 et seq., respectively (collectively, "the IA file evidence"). Plaintiff was also ordered
19 to identify, no later than March 11, 2013: (1) the specific information she wished to introduce; (2) its
20 connection to the action here; and (3) an offer of proof that its admission with the Federal Rules of
21 Evidence, and to file that information. At the Fourth Pretrial Conference on March 11, Plaintiff
22 sought and was granted an extension to March 13, 2013, to comply with Order #4.

23 Plaintiff's March 13 filing (Dkt. 101) contends the documents comprising these exhibits are
24 admissible for purposes of impeachment under FRE 607 and 608, are admissible to prove character
25 under FRE 405, and that certain documents are admissible under FRE 407 (subsequent remedial
26 measures).⁴ At the March 13 hearing, and in her additional filing on March 13 (Dkt No. 102),

27 _____
28 ⁴ In oral argument and in her previous filings, Plaintiff also contended the documents are
admissible under FRE 406 as evidence of a habit or routine practice. Plaintiff appears to have
abandoned that argument in her March 13 filing (Dkt. 101), and has modified her argument that she

1 Plaintiff explained the areas of inquiry on which she proposed to introduce and/or rely on the
2 documents in Exhibits 14 and 15. The Defendant Officers filed their response on March 14, and the
3 Court heard the parties' additional arguments on March 15.

4 Under FRE 404(a)(1), "[e]vidence of a person's character or character trait is not admissible
5 to prove that on a particular occasion the person acted in accordance with the character or trait."
6 Likewise, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character
7 in order to show that on a particular occasion the person acted in accordance with the character." FRE
8 404(b)(1). FRE 404 and 405 provide for specific qualifications and exceptions to this general rule.
9 So, for example, prior acts may be admissible when offered to prove something other than character,
10 such as knowledge, plan, notice, or intent. FRE 404(b)(2). And, when character or a character trait is
11 an essential element of a claim or defense, FRE 405(b) permits evidence of specific instances of
12 conduct to prove that character or character trait. FRE 407, also cited by Plaintiff here, provides that,
13 evidence of measures that were later taken that would have made an earlier injury or harm less likely
14 to occur, that evidence is not admissible to prove negligence or culpable conduct, but may be
15 admitted for other purposes such proof of ownership, control, or the feasibility of precautionary
16 measures where those matters are excluded, or as impeachment.

17 Plaintiff identified seven areas of inquiry related to Exhibits 200-273 and 300-336:

- 18 1. Task 41 Non-compliance during the 5th Quarterly Reporting Period.
- 19 2. (A) Total Number of Complaints: (B) Proportionality of Use of Force,
20 (C) In Compliance/Not In Compliance [with the NSA].
- 21 3. Leslie Allen Deadly Force Shooting July 31, 2008
- 22 4. Johnson use of force incident that occurred on November 6, 2010, two
23 days before lethal shooting of the decedent Derrick Jones.
- 24 5. Summary of Tasks Oakland Police Department not in compliance with
25 during the NSA agreement
- 26 6. Number of Investigations and the reported findings i.e. Exonerated,
27 sustained, unfounded, no recommendations; the fact that the
28 department was not in compliance with those Tasks represented by
the NSA and quarterly report.

27 does not seek to have all the documents admitted as much as she would like to pursue lines of
28 questioning on the topics stemming from the documents. The Court finds that Plaintiff has not
established that the documents at issue would be probative of any habit or routine practice of the
Defendant Officers relevant to this litigation.

1 7. Evidence of demeanor/conduct toward others/intimidation of
2 complaining witnesses: Specific instances of use of force, unlawful
3 arrests and complaints by African Americans of specific instances
4 of the described conduct.

(Dkt. No. 102, Plaintiff's Pretrial Conference Itemization of Proposed Areas of Inquiry, etc..)

5 As an overarching matter, the Court finds that Plaintiff is seeking to admit the IA file
6 evidence against the Defendant Officers for purposes prohibited by FRE 404(a)(1) and 404(b)(1).

7 The character or character trait of the Officer Defendants is not an element of the § 1983 claims here,
8 and therefore is not a permitted use of character evidence under FRE 405(b). Moreover, the Court
9 sees no connection between FRE 407 and the documents here, as Plaintiff points to nothing in these
10 documents relating to any subsequent remedial measures by any defendant, much less any exception
11 to the rule that such evidence is generally excluded.

12 The Court turns to the specific purposes for which Plaintiff offers the evidence of other acts in
13 the IA file evidence. Certain of these areas of inquiry are improper because they rely on the terms of
14 the NSA and reports of compliance with those terms. As set forth above, evidence regarding the
15 NSA is excluded. Moreover, Plaintiff has not offered any witness who could testify as to the
16 connection between facts or conclusions set forth in these documents and any portion of the NSA or
17 compliance reports concerning the NSA. Therefore, to the extent the documents in these exhibits are
18 offered to show that the City was not in compliance with the NSA or that the NSA's requirements
19 applied to the matters set forth in the documents, under Areas of Inquiry Nos. 1, 2(C), 5, and the
20 compliance portion of 6, they are likewise excluded.

21 As to Areas of Inquiry Nos. 2(A) and (B), use of the documents to establish the number of
22 complaints or reports concerning the Defendant Officers is excluded under FRE 401 and 403.
23 Without any context to establish the number of complaints relative to the officers' duties, numbers of
24 persons with whom they have come in contact in carrying out those duties, and numbers of
25 complaints against other officers or a reasonable officer, the documents are likely to mislead and
26 confuse a jury, and therefore more substantially more prejudicial than probative on the matters at
27 issue in this litigation. Likewise, admitting the documents to show whether or not the use of force
28 was proportional to the circumstances of a particular incident would require additional contextual and
comparative evidence regarding each incident, and would essentially require mini-trials of other

1 unrelated incidents, as to which Plaintiff has not identified any testifying witnesses. Aside from the
2 tremendous expenditure of time that would be involved to undertake numerous trials within a trial,
3 attempting to do so relying solely on the documents in the IA file evidence would be incomplete,
4 confusing, and misleading for a jury. Moreover, use of these documents for the purpose of
5 establishing that the officers previously used force that was excessive in proportion to the
6 circumstances of the incidents, in the absence of contextual or expert opinion evidence, would be
7 substantially more prejudicial than probative.

8 Plaintiff's Areas of Inquiry Nos. 3 and 4 concern two specific prior uses of deadly force by
9 the Defendant Officers. To the extent Plaintiff seeks to admit the documents to show that the
10 Defendant Officers' actions in the incident at issue in this litigation were consistent with those prior
11 acts, this would, again, be a prohibited use under FRE 404(a) and 404(b)(1). To the extent offered
12 against the officers for any other purpose, under FRE 404(b)(2), Plaintiff has not articulated what
13 those purposes might be, nor has she established that the circumstances in those incidents bore
14 material similarities to the incident at issue in this litigation. Finally, to the extent the documents are
15 offered to establish that the City was aware of the incidents and did not take proper action, there are
16 no witnesses or other evidence proffered to establish either that the City was on notice of improper
17 conduct or that the City failed to respond appropriately. In the absence of evidence establishing a
18 nexus to the City's Monell liability, admission of documents concerning these two specific prior
19 incidents would be substantially more prejudicial than probative.

20 Under Area of Inquiry No. 6, in addition to the NSA compliance basis (addressed above),
21 Plaintiff, also seeks to admit the documents for purposes of showing the "[n]umber of Investigations
22 and the reported findings i.e. Exonerated, sustained, unfounded, no recommendations." (Dkt. 102.)
23 Without an identified witness to explain any of the documents stating the findings and summaries of
24 findings, the numbers of investigations and various findings of those investigations standing alone
25 does not provide evidence material to any matter relevant to the claims. And, like Areas of Inquiry
26 Nos. 2(A) and 2(B), in the absence of any context to understand the nature of the underlying
27 incidents, how those findings were reached, and the meaning of the findings, the documents are likely
28 to be confusing and misleading. Plaintiff's purpose in offering the evidence against the officers again

1 falls squarely within the uses prohibited by FRE 404(a) and 404(b)(1). To the extent the documents
2 are offered to establish that the City is liable for not taking properly investigating or taking action on
3 account of the investigations, there are no witnesses or other evidence establish such a connection. In
4 light of the foregoing, admission of these documents for purposes of showing the number of
5 investigations and their findings would be substantially more prejudicial than probative.

6 Plaintiff's final Area of Inquiry, No. 7, is to establish "[e]vidence of demeanor/conduct
7 toward others/intimidation of complaining witnesses," more specifically "use of force, unlawful
8 arrests and complaints by African Americans." Offering this evidence for the purpose of establishing
9 prior conduct and "demeanor" of the Officer Defendants falls directly within the prohibitions on
10 character evidence under FRE 404(a) and 404(b)(1). Plaintiff has not identified any witnesses who
11 can speak to any incidents or complaints stated within any of the documents, nor has she identified
12 any witnesses or evidence to establish the City's notice of or failure to take action such conduct or
13 complaints. Indeed, Plaintiff has not identified which of the 111 documents from the IA files would
14 be relevant to this Area of Inquiry. Thus, the Court finds that admission of the documents for this
15 purpose, to the extent they might be at all probative of any matter at issue, would be substantially
16 more prejudicial than such probative value.

17 The Court further notes that, with very few exceptions, the IA file documents at issue cannot
18 be authenticated by any testifying witness. Of the documents identified on Plaintiff's Docket No.
19 101, only 17 of the 111 documents appear to have been authored by any witness expected to testify.
20 In addition, all the documents are hearsay, most hearsay within hearsay. Plaintiff has argued that the
21 documents all fall under the hearsay exception for business records, FRE 803(6), and that they can all
22 be authenticated under FRE 901(b)(4), as documents with "distinctive characteristics." However,
23 Plaintiff has not identified any witnesses or evidence that would establish admissibility under either
24 of these rules.

25 Accordingly, Defendant's Motion in Limine No. 1 is **GRANTED**. Plaintiff is prohibited from
26 making any inquiry, statement, or argument concerning the IA, CPRB and/or personnel histories of
27 the Defendant Officers. The defendant officers are expected to testify about the November 8, 2010
28 incident as well as their training. Should questioning in these areas open the door to use of

1 documents for purposes of impeachment, Plaintiff may make an offer of proof as to the specific
2 documents she seeks to admit. To the extent offered for any reason other than impeachment, the
3 documents in Exhibits 200-273 and 300-336 are **EXCLUDED**.

4 **III. Other Exhibits**

5 **A. Rulings on Plaintiff's Exhibits**

- 6 1. Plaintiff withdrew Exhibit 1;
- 7 2. Defendants stipulated to admissibility of Exhibits 4(A), 4(B), 4(C), 6(B), 6(F),
8 7(A), and 7(B);
- 9 3. Plaintiff's renewed argument for admission of Pages 2 and 3 of Exhibit 5,
10 previously excluded by the Court, is **DENIED**. Those pages are excluded in the absence of testimony
11 to lay a sufficient foundation for their admissibility.
- 12 4. Defendants' objections to Exhibits 4(J), 6(C), 6(D), and 6(E) under Rule 403
13 are **OVERRULED**.
- 14 5. Defendants' objections to Exhibits 8(A)(1) and 8(B)(1) are **SUSTAINED** and
15 those exhibits are excluded.
- 16 6. Defendants' objections to Exhibit 9(A), the entirety of the Coroner's Report
17 are sustained with the exception that ruling is reserved as to photographs showing the location of
18 bullet wounds after an offer of proof by Plaintiff.
- 19 7. Defendants' objections to Exhibit 9(B), the certified copy of a portion of the
20 Coroner's Report are **OVERRULED**. The exhibit is admissible as a self-authenticating document under
21 Rule 902(2).
- 22 8. The Court previously ruled that Plaintiff's Exhibit 10(A), the text message
23 portion of Exhibit 10, was offered in its entirety by Plaintiff and that, upon the City's withdrawal of
24 its objection to the exhibit if offered in its entirety under FRE 106, Plaintiff subsequently requested to
25 limit or redact that exhibit. The Court stated that it declined to allow Plaintiff to redact the exhibit at
26 that time, and that the exhibit could come in its unredacted form for use by any party, but a proper
27 foundation for admissibility must still be offered. Plaintiff now argues that she can establish a basis
28 for admitting the portions of the exhibit under an exception to the hearsay rule, FRE 804(b)(4)(A) and

1 (B), but only those portions should be admitted. Rule 804 generally concerns exceptions to the rule
2 against hearsay when a declarant is unavailable as a witness. The subsection cited by Plaintiff, FRE
3 804(b)(4), permits statements about:

4 (A) the declarant’s own birth, adoption, legitimacy, ancestry, marriage,
5 divorce, relationship by blood, adoption, or marriage, or similar facts of personal
6 or family history, even though the declarant had no way of acquiring personal
7 knowledge about that fact; or

8 (B) another person concerning any of these facts, as well as death, if the
9 declarant was related to the person by blood, adoption, or marriage or was so
10 intimately associated with the person's family that the declarant's information is
11 likely to be accurate

12 Plaintiff argues that the text messages between herself and decedent qualify under FRE 804(b)(4)(A)
13 and (B) because they are offered to show the decedent’s marriage to her, and because she is a person
14 related to decedent/declarant by marriage. First, Plaintiff’s reasoning is circular: she argues that
15 because she is a person related to declarant by marriage, she can testify to his out-of-court statements
16 that he was married to her. This does not appear to be a hearsay exception contemplated by the rule.
17 Indeed, the purposes for which the text messages are offered appear to exceed a mere statement of
18 personal or family history. Moreover, excluding the other portions of the document would be
19 contrary to the principle stated in FRE 106, that is, “[i]f a party introduces all or part of a writing or
20 recorded statement, an adverse party may require the introduction, at that time, of any other part--or
21 any other writing or recorded statement--that in fairness ought to be considered at the same time.” In
22 fairness, if Plaintiff seeks to admit Exhibit 10(A) to establish the decedent’s personal history, i.e. that
23 she and decedent were married, Defendants should, in fairness, be permitted to introduce any other
24 parts of that writing that might contradict or qualify that evidence. To the extent that Plaintiff seeks
25 to offer any part of Exhibit 10(A) into evidence, Defendants may thereafter introduce the entire
26 document. A “redacted version” (which the Court notes has never been provided) will not be
27 allowed.

28 9. Defendants’ objections to Exhibit 10(B), a photograph, are **OVERRULED** with
the caveat that Plaintiff must lay a foundation for its admission. Likewise, and as stated in the

1 Court's March 8, 2013 Order #4 Re: Trial Exhibits and Motions in Limine, Exhibits 10(C)-10(F) are
2 admissible so long as Plaintiff lays an adequate foundation.

3 10. The Court reserves ruling on Exhibits 4(D), 4(E), 4(F), 4(G), 4(H), 4(I),
4 11(A)(1) and (2), 11(B)(1) and (2).

5 **B. Rulings on Defendants' Exhibits**

6 1. Previously the Court ruled that Defendants' attempt to withdraw Exhibit 104,
7 which Defendants identified as two "Photos of Barbershop," would not be permitted because Plaintiff
8 had stipulated to their admission, and had relied on that stipulation. At the March 15 hearing, the
9 parties clarified that they had not identified particular photographs in their discussions regarding
10 Exhibit 104. In light of this information, the Court has permitted Plaintiff to identify two
11 photographs of the barbershop by the time of continued Pretrial Conference set for March 18, 2013,
12 at 10:00 a.m. The Court will consider allowing this additional exhibit at that time.

13 2. Plaintiff's objection to Exhibits 106 and 107 (divorce filings) on the grounds
14 that Defendants' failed to disclose these documents in their FRCP 26(f) disclosures is overruled. The
15 Court notes that the exhibits are not certified copies and are not self-authenticating. The Court
16 reserves further ruling as to the admissibility of the exhibits. The line of questioning regarding those
17 divorce filings is allowed.

18 3. The parties previously stipulated to Exhibit 102(D).

19 4. Plaintiff's objections to Exhibit 108 (photographs) are **OVERRULED**.

20 5. The Court reserves ruling on all other exhibits.

21 **IV. Additional Orders**

22 1. Visuals for Plaintiff's Opening Statement

23 Defendants' objection to use of the autopsy photograph as part of Plaintiff's opening
24 statement is sustained. Plaintiff may use one of the photographs from the scene in Exhibit 6 that the
25 Court has ruled will be admitted. Defendants' objection to the use of the funeral program is
26 overruled.

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2. Conduct of Trial

Parties are again reminded that each side has a limit of 12 hours for all aspects of trial, including opening and closing statements. Parties are cautioned that failure to manage one's hours may result in the denial of examination of witnesses.

As previously ordered, all parties must be ready to proceed at 8:30 a.m. every day of trial. Time will be assessed against any party who is not prepared. A party may be deemed to have rested their case if their witnesses are not prepared to testify at the conclusion of the preceding witness's examination.

In light of the parties' acrimonious relationship during this litigation, parties shall file with the Court the list of witnesses to be called 24 hours prior to their testimony.

Jury selection shall begin on Tuesday, March 19, 2012. Plaintiff shall be prepared to call her first witnesses at 8:30 a.m. on Wednesday, March 20, 2012.

IT IS SO ORDERED.

Dated: March 17, 2013


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE