

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS  
BOSTON DIVISION**

STUDENTS FOR FAIR ADMISSIONS, INC.,  
Plaintiff,  
v.  
PRESIDENT AND FELLOWS OF HARVARD  
COLLEGE,  
Defendant.

Civil Action No. 1:14-cv-14176-ADB

**MOTION TO ADMIT EXHIBIT P9**

To streamline this trial, SFFA moves to admit Exhibit P9. “There is no magic to foundation or authenticity. It simply means that the witness must be able to identify the exhibit.” Foundation, 4 Bus. & Com. Litig. Fed. Cts. § 44:12 (4th ed.). A witness has foundation to testify about a matter “if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony.” Fed. R. Evid. 602; *Folio Impressions, Inc. v. Byer Ca.*, 937 F.2d 759, 763–64 (2d Cir. 1991) (explaining that a witness laid foundation where she supervised the designers who created a document and “believed” the document was one in her studio’s possession).

Exhibit P9 is a PowerPoint document created by Harvard’s Office of Institutional Research, entitled “Admissions Part II.” Harvard designated Erin Driver-Linn as its corporate representative to discuss the “creation, use, and discussion of reports prepared by the Office of Institutional Research . . . .” (Ex. 1 at 1, 12.) During her deposition, Harvard did not object to Ms. Driver-Linn testifying about P9 in her corporate representative capacity.

At that deposition, Ms. Driver-Linn laid the foundation for this document (identified as Deposition Exhibit 5) on behalf of Harvard:

Q. I’m handing you a document that’s been marked as Exhibit 5. Take a minute and familiarize yourself with the document. Let me know if you’ve seen it before.

A. (Witness reviews document.) Yes, I have seen this document or one very much like it.

Q. Did you, in fact, review this document in preparation for your deposition today?

A. I believe so.

Q. So what is this document?

A. Draft admissions, Part 2, subtitle.

...

Q. ... But I'm asking for your description of what this document is.

...

A. I believe it to be an internal work product.

...

Q. Okay. What do you know about who prepared this document?

A. I think it likely involved Erica Bever and/or Mark Hansen.

(Ex. 2 at 98:8–99:22.) SFFA may use that corporate representative testimony for any purpose, including to admit Exhibit P9. *See* Fed. R. Civ. P. 32(a)(3) (“An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party’s officer, director, managing agent, or designee under Rule 30(b)(6) . . .”). If the Court prefers for this testimony to be read on the record, SFFA can do so when convenient during trial.

Harvard has explained multiple times during trial that this document’s author, Mark Hansen, will be testifying later and can lay the foundation for this document to be admitted. (*See* Ex. 3 at 57:21–24 (Oct. 17, 2018); Ex. 4 at 90:9–11 (Oct. 19, 2018).) But a witness need not be the author of a document to have foundation. *See Folio Impressions*, 937 F.2d at 763–64. Under Rule 602, the witness only needs to have personal knowledge about the document. Given Ms. Driver-Linn’s 30(b)(6) testimony establishing the foundation for and the admissibility of this document as an admission by a party opponent, SFFA does not need Mr. Hansen’s testimony to admit Exhibit P9.

Therefore, if the Court grants this motion SFFA anticipates no longer calling Mr. Hansen if Harvard also confirms that it will not call him to testify.

For these reasons, SFFA respectfully requests that the Court admit Exhibit P9.

October 21, 2018

Respectfully submitted,

*/s/ Adam K. Mortara*

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**CERTIFICATE OF CONFERENCE**

Pursuant to Local Rule 7.1(a), the undersigned conferred with counsel for Defendant on October 21, 2018, and Defendant opposes this motion.

*/s/ Katherine L.I. Hacker*

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## **CERTIFICATE OF SERVICE**

I hereby certify that this document, filed through the ECF system will be sent electronically to the registered participants as identified in the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this 21st day of October, 2018.

*/s/ Adam K. Mortara*

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