APPENDIX
UNPUBLISHED CASES

Only the Westlaw citation is currently available.

United States District Court,
W.D. Texas,
San Antonio Division.
B.J. TIDWELL INDUSTRIES, INC. d/b/a Cardell Kitchen & Bath Cabinetry, Plaintiff/Counter-Defendant,
v.
DIVERSIFIED HOME PRODUCTS, INC., Jim Hindman and Irene Cuellar, Defendants/Counter-Plaintiffs.
Civil Action No. SA-06-CA-0264 FB (NN).

Oct. 19, 2007.

Melodee L. Gruber, Stephen R. Fogle, Jackson Walker LLP, San Antonio, TX, for Plaintiff/Counter-Defendant.

Gary Blackburn, Mathew R. Zenner, Blackburn & McCune, PLLC, Nashville, TN, David M. Adkisson, Law Offices of David M. Adkisson, San Antonio, TX, for Defendants/Counter-Plaintiffs.

ORDER DENYING MOTIONS TO EXCLUDE

NANCY STEIN NOWAK, United States Magistrate Judge.

***1** This order addresses the pending motions to exclude experts.[FN1] I have authority to consider the motions under the district court's order of referral.[FN2] After considering the motions and the pleadings on file, I deny the motions.

FN1. Docket entry # s 72 & 75.

FN2. Docket entry # 50.

Background of the Case

This lawsuit arose from a dispute between a cabinet manufacturer and its customer/distributor. Plaintiff B.J. Tidwell Industries, Inc., d/b/a as Cardell Kitchen and Bath Cabinetry (Cardell), manufactures cabinets. Diversified Home Products, Inc. (Diversified), supplies kitchen and bath cabinets to homebuilders and contracted with Cardell to purchase cabinets. Cardell sued Diversified in state court as an action on a sworn account. Diversified and defendants Jim Hindman and Irene Cuellar removed the lawsuit to this court as a diversity case. The defendants subsequently filed counter-claims against Cardell for breach of contract, misrepresentation and violation of the Tennessee Consumer Protection Act.[FN3] After receiving a copy of Dr. Gregory Faulk's report from Diversified, Cardell moved to exclude Dr. Faulk's testimony. Cardell designated Gerald Hill as a rebuttal expert. Diversified then moved to exclude Hill's testimony.

FN3. Docket entry # 7.

Whether Dr. Faulk Is Qualified to Provide Valuation Opinions

Diversified alleges that Cardell failed to deliver conforming products in a timely manner, causing a number of homebuilders to end their relationship with Diversified and resulting in economic loss to Diversified.[FN4] Diversified designated Dr. Faulk as its expert to testify about the valuation of the economic loss.[FN5] Cardell first challenges Dr. Faulk's qualifications to provide valuation opinions. Cardell complains that Diversified has not shown that Dr. Faulk is uniquely qualified to testify about the valuation of a cabinet distribution business like Diversified. Cardell further complains that the majority of Dr. Faulk's opinions have been about the valuation of personal injury economic losses.

FN4. Docket entry # 7, p. 8.

FN5. Docket entry # 80.

Rule 702 of the Federal Rules of Evidence provides for the admissibility of expert testimony if it will "assist the trier of fact to understand the evidence or to determine a fact in issue," and "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." The rule further provides that a witness may be qualified as an expert "by knowledge, skill, experience, training, or education...." FN6 Under this rule, "an expert may be qualified on any of the five bases listed. A witness therefore can qualify as an expert even though he lacks practical experience, provided that he has received suitable training or education or has otherwise gained the requisite knowledge or skill." FN7 The absence of hands-on experience with the particular industry is relevant to the determination whether to accept a witness as an expert, but it is not determinative.FN8 The party offering the expert must prove by a preponderance of the evidence that the proffered testimony satisfies the requirements for expert testimony.FN9

FN6.FED.R.EVID. 702.

FN7.*Lavespere v. Niagara Mach. & Tool Works*, 910 F.2d 167, 176-7 (5h Cir.1990).

FN8.*Lavespere*, 910 F.2d at 177.

FN9.*See* *Mathis v. Exxon*, 302 F.3d 448, 459-60 (5th Cir.2002).

***2** Diversified has shown that Dr. Faulk is qualified by knowledge, skill, experience, training, or education. Dr. Faulk has a bachelor's degree in mathematics, a master's degree in business administration, and a doctorate degree in finance.FN10 Dr. Faulk's master's program included courses relevant to corporate valuation-specifically, managerial accounting, accounting for financial decision-making and financial management.FN11 Likewise, Dr. Faulk's doctorate program included courses in advanced financial management, the theory of finance, and a seminar in corporate finance. FN12 Dr. Faulk has taught finance and corporate valuation at Belmont University.FN13 Before teaching, Dr. Faulk was a senior vice president at Southeast National Bank, where he served on the bank's loan committee and assessed the capacities of businesses and individuals to repay loans.FN14 Even though Dr. Faulk has not previously done a valuation of a cabinet distribution business, he has the knowledge, skill, experience, training, or education to enable him to conduct such a valuation.

FN10. Docket entry # 73, exh. 2, exh. A (Dr. Faulk's resume attached to Dr. Faulk's affidavit).

FN11. Docket entry # 73, exh. 2 (Dr. Faulk's affidavit).

FN12.*Id.*

FN13. Docket entry # 73, exh. 2, exh. A (Dr. Faulk's resume attached to Dr. Faulk's affidavit).

FN14. Docket entry # 73, exh. 2 (Dr. Faulk's affidavit).

Whether Dr. Faulk's Testimony Is Reliable

Cardell next challenges the reliability of Dr. Faulk's testimony. Cardell complains that Dr. Faulk relied on summary spreadsheets-prepared by Diversified's employees-that include builders that Diversified alleges stopped doing business with Diversified because of Cardell's actions. Cardell maintains that Dr. Faulk's opinions are unreliable because Dr. Faulk did not verify the authenticity of the data before determining his valuation of Diversified's economic loss. Cardell challenges the assumptions that Dr. Faulk used in valuating Diversified's economic loss-that the builders on Diversified's spreadsheets would have continued doing the same level of business with Diversified for the next three to five years and that Diversified's marginal revenue on sales was 20%. Cardell maintains the assumptions are erroneous.

Rule 703 of the Federal Rules of Evidence provides that an expert's opinion is generally admissible so long as the facts and data underlying that opinion are of a type reasonably relied on by experts in the field.FN15 Dr. Faulk has attested that he relied on summary spreadsheets prepared by Diversified's employees containing information on Diversified's customers, invoices, billing and finance charges over the relevant time period. He further attested that he reviewed Diversified's financial records for 2004 through 2006 and interviewed Diversified's employees. Dr. Faulk also attested that the information is the type of information that experts in his field normally and reasonably rely upon when performing a valuation. Although Dr. Faulk did not attest that he verified the accuracy of the information he received from Diversified, it seems unreasonable to expect valuation experts to ascertain the accuracy of the financial information provided by their clients. It seems reasonable for a business valuation expert to rely on information the client provides about its customers, invoices, billing, finance charges, and financial records in valuating a business's economic loss. In essence, Cardell's motion seeks to challenge the truthfulness of Diversified's allegations that the builders on the spreadsheets stopped doing business with Diversified because of Cardell's actions. The truthfulness of those allegations is relevant to the causation element of Diversified's breach of contract claim, not Diversified's damages. Dr. Faulk is designated to testify about damages. If Diversified is unable to prove that all of the builders on the list stopped doing business with Diversified because of Cardell's actions, it would be appropriate for Dr. Faulk to adjust his valuation. Until that time, Dr. Faulk's valuation is not unreliable on grounds that he did not verify the accuracy of information provided by Diversified.

FN15.*See*FED.R.EVID. 703.

Whether Hill's Testimony Should Be Excluded

***3** After receiving Dr. Faulk's report, Cardell asked certified public accountant Gerald Hill to comment on Dr. Faulk's report. In his expert report, Hill criticizes two aspects of Dr. Faulk's valuation. First, Hill faults Dr. Faulk for not verifying the accuracy of the information he received from Diversified.[FN16] Hill explained that although the customer population in many damage cases is too extensive to personally contact customers, the customer population for Diversified's claim is small enough that Dr. Faulk should have contacted the customers that Diversified alleges stopped doing business with Diversified because of Cardell's actions-twelve builders on Diversified spreadsheets-before conducting his valuation.[FN17] Second, Hill criticized Dr. Faulk for not considering Diversified's financial position. [FN18] Hill opines that Diversified was grossly under-capitalized in 2004 when it began and that Diversified's financial position dramatically deteriorated.[FN19]

FN16. Docket entry # 79, exh. 1.

FN17.*Id.*

FN18.*Id.*

FN19.*Id.*

Diversified maintains that portions of Hill's testimony describing his conversations with Diversified's former customers should be excluded as inadmissible hearsay.[FN20] Diversified maintains that Cardell cannot overcome the general rule against hearsay because the probative value of the hearsay is not substantially out-weighed by the prejudicial effect of the information and that the information does not constitute scientific, technical, or other specialized knowledge.

FN20.*See* docket entry # 75.

Rule 702 permits the admissibility of “scientific, technical, or other specialized knowledge” if it will “assist the trier of fact to understand the evidence.” [FN21] Hill's description of his process in evaluating Dr. Faulk's valuation is specialized knowledge because the subject matter is closely related to valuating businesses and is not within the common knowledge of the average layman.[FN22] Hill's description of his discussions with former Diversified customers will assist the trier of fact in considering Dr. Faulk's opinion about the valuation of Diversified's economic loss because the evidence addresses the accuracy of Dr. Faulk's valuation. The description demonstrates why the contacts are important in Hill's assessment of Dr. Faulk's valuation because the description undermines Diversified's position that the former customers on the spreadsheets stopped doing business with Diversified because of Cardell's actions. If the builders on Diversified's spreadsheets stopped doing business with Diversified for reasons unrelated to Cardell's actions, Dr. Faulk's valuation is over-stated because the valuation is based on all of the builders on the spreadsheets. Although Hill's description of his conversations with Diversified's former customers may constitute hearsay, “[e]xpert witness testimony is a widely-recognized exception to the rule against hearsay testimony. It has long been the rule of evidence in the federal courts that an expert witness can express an opinion as to value even though his opinion is based in part or solely upon hearsay sources.” [FN23] The best way for Cardell to defend against Diversified's counterclaim is producing Diversified's former customers at trial, but Cardell has discussed why that is unlikely.[FN24] No basis exists for excluding Hill's testimony at this point.

FN21.FED.R.EVID. 702.

FN22.*See* *Faircloth v. Lamb-Grays Harbor Co.*, 467 F.2d 685, 694 (5th Cir.1972) (explaining when expert testimony is admissible).

FN23.*United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir.1971). *See* *LaCombe v. A-T-O*, 679 F.2d 431, 436 n. 5 (5th Cir .1982) (relying on the same rule in a civil case).

FN24.*See* docket entry # 79, pp. 9-10.

Conclusion and Order

***4** Because Diversified has shown that Dr. Faulk has the knowledge, skill, experience, training, or education to conduct a valuation of a cabinet distribution business and that Dr. Faulk's testimony is reliable, I DENY Cardell's motion to exclude (docket entry # 72). Because Cardell has shown that Hill's testimony about his contacts with the former customers on the spreadsheets formed the methodology of an opinion that will assist the jury in considering Dr. Faulk's valuation of Diversified's economic loss, I DENY Diversified's motion to exclude (docket entry # 79).

W.D.Tex.,2007.
B.J. Tidwell Industries, Inc. v. Diversified Home Products, Inc.
Not Reported in F.Supp.2d, 2007 WL 3118300 (W.D.Tex.)

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LEXSEE 2005 U.S. DIST. LEXIS 46851

CONSOLIDATED CREDIT AGENCY, a California general partnership v. EQUIFAX, INC., a Georgia corporation; EQUIFAX CREDIT INFORMATION SERVICES, INC., a Georgia Corporation; EQUIFAX INFORMATION SERVICES, LLC, a Georgia limited liability company; and DOES 1 through 15, inclusive

Case No.: CV-03-1229 CAS (CWx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2005 U.S. Dist. LEXIS 46851

January 26, 2005, Decided
January 26, 2005, Filed

PRIOR HISTORY: *Consol. Credit Agency v. Equifax, Inc., 2004 U.S. Dist. LEXIS 31061 (C.D. Cal., Aug. 5, 2004)*

COUNSEL: [*1] For Consolidated Credit Agency, a California general partnership, Plaintiff: James R Noblin, LEAD ATTORNEY, Blecher & Collins, Los Angeles, CA; Jana S Johnston, John Gregory Derrick, LEAD ATTORNEYS, Mullen and Henzell, Santa Barbara, CA; Jeffrey T Briggs, LEAD ATTORNEY, Briggs & Briggs, Los Angeles , CA.

For Equifax Inc, a Georgia corporation, Defendant: Christopher B McDavid, Frank D Rorie , Jr, William A Molinski, LEAD ATTORNEYS, Orrick Herrington and Sutcliffe, Los Angeles , CA; Garret G Rasmussen, LEAD ATTORNEY, Orrick Herrington and Sutcliffe, Washington, DC; Jesse W Markham, Jr, LEAD ATTORNEY, Morrison and Foerster, San Francisco, CA; Juthymas Harntha, LEAD ATTORNEY, Orrick Herrington & Sutcliffe, San Francisco, CA.

For Equifax Credit Information Services Inc, a Georgia corporation, Equifax Information Services LLC, a Georgia limited liability company, Defendants: Christopher B McDavid, Frank D Rorie , Jr, William A Molinski, LEAD ATTORNEYS, Orrick Herrington and Sutcliffe, Los Angeles , CA; Jesse W Markham, Jr, LEAD ATTORNEY, Morrison and Foerster, San Francisco, CA; Juthymas Harntha, LEAD ATTORNEY, Orrick Herrington & Sutcliffe, San Francisco, CA.

JUDGES: HONORABLE CHRISTINA A. SNYDER, [*2] U.S. DISTRICT JUDGE.

OPINION BY: CHRISTINA A. SNYDER

OPINION

MINUTE ORDER

PROCEEDINGS: **(1) PLAINTIFF'S MOTION *IN LIMINE* REGARDING ADMISSION OF CUSTOMER AND SUPPLIER STATEMENTS** (filed December 13, 2004)

(2) DEFENDANTS' MOTION *IN LIMINE* NO. 1 TO EXCLUDE EVIDENCE OF, REFERENCE TO OR OTHERWISE CLAIM THAT EQUIFAX'S ADJUSTMENTS TO ITS WHOLESALE PRICES CAUSED PLAINTIFF'S ANTITRUST INJURY (filed December 13, 2004)

(3) DEFENDANTS' MOTION *IN LIMINE* NO. 2 TO LIMIT PLAINTIFF'S CONTRACT CLAIMS TO WHETHER CCA WAS TERMINATED FOR REFUSING TO PARTICIPATE IN A PRICE-FIXING AGREEMENT (filed December 13, 2004)

(4) DEFENDANTS' MOTION *IN LIMINE* NO. 3 LIMITING PLAINTIFF'S CLAIM FOR INTERFERENCE WITH CONTRACTUAL RELATIONS TO ONE CONTRACT WITH MIKE DAVIDSON FORD (filed December 13, 2004)

(5) DEFENDANTS' MOTION *IN LIMINE* NO. 4 TO EXCLUDE LAY OPINION TESTIMONY OF CURTIS KNIEVEL AND RELATED DOCUMENTS (filed December 13, 2004)

(6) DEFENDANTS' MOTION *IN LIMINE* NO. 5 TO STRIKE EXPERT OPINION TESTIMONY OF WILLIAM COMANOR (filed December 13, 2004)

(7) DEFENDANTS' MOTION *IN LIMINE* NO. 6 TO STRIKE EXPERT OPINION TESTIMONY OF JON M. RIDDLE (filed December 13, 2004)

I. INTRODUCTION

The facts of this case are set forth in the Court's August 5, 2004 [*3] Order Granting Summary Judgment in Part, Denying Summary Judgment in Part, and Denying Leave to Amend Scheduling Order and to Amend Complaint ("August 5, 2004 Order"). The trial in this case is set for March 9, 2005. The parties' have filed various motions in limine which are presently before the Court.

II. DISCUSSION

A. Plaintiff's Motion *in Limine* Regarding Admission of Customer and Supplier Statements

Plaintiff seeks to offer testimony "from resellers about direct communications they had with customers and suppliers about reasons why such customers and suppliers stopped dealing with the reseller." Mot. at 1. Plaintiff contends that this evidence has a proper foundation and is competent. Id. Plaintiff further argues that: (1) this testimony is not inadmissible hearsay because it falls within a hearsay exception recognized by the Supreme Court in *Lawlor v. Loewe, 235 U.S. 522, 536, 35 S. Ct. 170, 59 L. Ed. 341 (1915)* and *Buckeye Powder Co. v. E. I. DuPont de Nemours Powder Co., 248 U.S. 55, 65, 39 S. Ct. 38, 63 L. Ed. 123 (1918)*, to prove the motives of the speaker; and (2) similar evidence has been held by several courts to be consistent with the Federal Rules of Evidence. Id. at 2.

Defendants respond that plaintiff has no admissible evidence [*4] that lenders require Equifax reports. Thus defendants argue that plaintiff cannot refute defendants' argument that an agreement to fix prices would have been imprudent because it would have invited defendants' other competitors to compete with Equifax's allegedly high fixed prices. Opp'n at 1. Defendants contend that plaintiff is improperly attempting to admit evidence that lenders accepted only Equifax reports. Id. Defendants argue that plaintiff cannot rely on the hearsay exception articulated by the Supreme Court in Lawlor v. Lowe for evidence of motive because the state of mind of customer-lenders or suppliers is not at issue in this case and statements regarding motive cannot be admitted for the truth of the matter asserted therein, i.e. to show that the reason that customers refused to purchase credit reports from plaintiff after termination of the agreement with Equifax was because lenders require Equifax reports. Id. at 2-3.

Further, defendants argue that plaintiff's evidence is flawed for the following reasons: without evidence about the circumstances under which the customer statements were made, the Court cannot determine whether the statements satisfy the requirement that [*5] the customers' statements be made contemporaneously with the mental state to be proven; and the Court cannot determine whether the customers' statements are reliable, particularly because they incorporate statements made by lenders to customers, and thus contain an additional level of uncorroborated hearsay. [1] Id. at 4-6.

1 In its reply, plaintiff contends that it does not need to identify specific customers who communicated with its sales representatives or call witnesses to corroborate customers' out-of-court statements. Reply at 5-6. Plaintiff also argues that a limiting instruction is not necessary. Id. at 7. However, assuming plaintiff meets the requirements of *Rule 803(3)*, the Court believes that some limiting instruction to be determined at a subsequent date may be appropriate.

Defendants contend that the cases plaintiff cites in support of admitting customer statements are distinguishable in that they involved plaintiffs who sold only defendants' products. Id. at 6. Because plaintiff sells reports from both defendants and other credit bureaus, "the reason customers ceased buying Equifax reports from plaintiff and the reason customers refused to buy TransUnion or Experian reports [*6] are two separate issues." Id. Accordingly, defendants request that if the Court does permit plaintiff to proffer evidence about why its customers ceased buying Equifax reports from plaintiff, the Court should prevent plaintiff from proffering testimony "that the reason customers did not buy TransUnion or Experian reports was due to a lender requirement for Equifax reports." Id. at 7. Finally, defendants contend that the prejudice to plaintiff outweighs the probative value of the evidence. Id.

Federal Rule of Evidence 803(3) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Federal Rule of Evidence 803(3). The state of mind exception to the hearsay rule requires that: (1) the statement was made contemporaneously with the mental state to be proven; (2) [*7] circumstances do not suggest a motive for the declarant to fabricate or misrepresent his or her thoughts; and (3) the declarant's state of mind is relevant to an issue in the case. 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence § 803.05[2] [a]* (Joseph M. McLaughlin, ed., 2d ed. 2004)(citations omitted). "Statements revealing a person's state of mind may be relevant evidence to show matters such as... [a] customer's reason for refusing to deal with a supplier or dealer." Id. (citations omitted). Courts have held that statements from customers regarding their reasons for not dealing with a supplier are admissible for the limited purpose of proving customer motive, but not as evidence of facts recited as furnishing the motives in antitrust cases. See *J.F. Feeser, Inc. v. Serv-a-Portion, Inc., 909 F.2d 1524, 1535 n.ll (3d Cir. 1990)*; *Hydrolevel Corp. v. American Soc'y of Mechanical Engineers, Inc., 635 F.2d 118, 128 (2d Cir. 1981)*, aff'd *456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982)*; *Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906 (2d Cir. 1962)*. Cf. *Buckeye Powder Co. v. E.I. Dupont de Nemours Powder Co., 248 U.S. 55, 65, 39 S. Ct. 38, 63 L. Ed. 123* (upholding exclusion of statements of reasons for refusing [*8] to do business with plaintiff because statements were proffered for the truth of the matter).

It appears that plaintiff has failed to identify the exact, statements it intends to present. [2] While the Court agrees that plaintiff's evidence is conceivably admissible, the Court cannot make this determination without knowing the precise statements plaintiff seeks to have admitted into evidence. As stated at oral argument, the Court will consider the admissibility of particular testimony at a date closer to trial. Accordingly, the Court GRANTS plaintiff's motion in part and DENIES plaintiff's motion in part, subject to its being renewed before trial. [3]

2 In its reply, plaintiff states: "At trial, CCA intends to call witnesses - including its own personnel - who will testify that customers and suppliers stated that they ceased doing business with CCA after CCA lost the ability to sell Equifax credit reports." Reply at 1.

3 At oral argument, the Court also granted defendants leave to re-open discovery to conduct limited depositions of customers whose statements will be proffered by plaintiff.

B. Defendants' Motion *in Limine* No. 1 to Exclude Evidence of, Reference to or Otherwise Claim That Equifax's [*9] **Adjustments to Its Wholesale Prices Caused Plaintiff's Antitrust Injury**

Defendants contend that plaintiff is attempting to change its theory of antitrust injury from one premised upon defendants' termination of CCA to one premised upon changes in wholesale prices by Equifax. Mot. at 1-2. Defendants seek to exclude evidence of antitrust injury under this "new" theory, articulated in a supplemental declaration by plaintiff's expert William Comanor ("Dr. Comanor"), submitted on September 23, 2004. Mot. at 2, 9. Defendants contend that it is appropriate to exclude this evidence for the following reasons: (1) plaintiff's complaint does not allege that Equifax's wholesale price changes harmed plaintiff, were part of an illegal price-fixing agreement or constituted exclusionary conduct under the Cartwright Act; (2) plaintiff's written discovery responses similarly assert a theory of damages based only on defendants' termination of plaintiff; (3) plaintiff's experts, Jon Riddle ("Dr. Riddle") and Dr. Comanor, in the past have confirmed that plaintiff's theory of harm is based only on defendants' termination of plaintiff, and not on Equifax's wholesale prices; (4) plaintiff's opposition to defendants' [*10] motion for summary judgment also asserted that defendants' termination of plaintiff caused plaintiff's damages; (5) the Court's August 5, 2004 Order confirmed that plaintiff's antitrust injury was premised on the termination; and (6) plaintiff has never alleged that Equifax's price changes were connected to the alleged price-fixing agreement. Id. at 2-9.

Defendants argue that plaintiff's introduction of a new theory at this stage of the litigation is unfair and will cause them undue prejudice. Id. at 10-14. Defendants contend that exclusion of evidence related to this new theory is an appropriate sanction for plaintiff's failure to supplement its discovery responses and expert analysis in light of its new theory and that plaintiff's new theory is not properly before the Court because plaintiff has not added it to its complaint. Id. at 12.

Plaintiff confirms that its claimed antitrust injury is premised on its termination by Equifax, not on Equifax's price increase which occurred after CCA's termination. Opp'n at 1-2. Nevertheless, plaintiff contends that Equifax's price increase is relevant as circumstantial evidence of conspiracy. Plaintiff asserts that it has referred to Equifax's [*11] price increases in documents throughout this case and that Equifax has known that its price increase was part of the evidence supporting plaintiff's antitrust claim. Id. at 4-6. Plaintiff contends that Equifax is attempting to exclude evidence of its price increase in an attempt to support a new argument that if "the price change was not the result of exclusionary conduct, CCA would have suffered little or no damage from being terminated because the increase in price to CCA would have eliminated any profits CCA could have expected." Id. at 7 (citing Defendants' Motion in limine number 1 at n.8).

It appears to the Court that the parties agree that plaintiff's antitrust injury is premised upon its termination by Equifax, rather than on Equifax's price increase. However, evidence of Equifax's price increase is nevertheless relevant to plaintiff's allegations of conspiracy. Accordingly, the Court DENIES defendants' motion in limine number 1.

C. Defendants' Motion *in Limine* No. 2 to Limit Plaintiff's Contract Claims to Whether CCA Was Terminated for Refusing to Participate in a Price-Fixing Agreement

As a preliminary matter, defendants set forth their interpretation of the Court's August 5, [*12] 2004 Order in which the Court stated that "[i]n light of the Court's conclusion regarding the Cartwright Act claim, summary judgment on the breach of contract claim is inappropriate." Mot. at 1 (citing August 5, 2004 Order at 36). Defendants contend that in so holding, the Court recognized that a factual dispute exists as to whether an illegal price-fixing 'agreement was the reason defendants terminated CCA's contract and that the Court "properly rejected CCA's efforts to circumvent the parties' contract by claiming the existence of various oral representations by Equifax that varied or contradicted the written agreement as to the price Equifax could charge CCA." Id. at 1. Defendants seek to "limit CCA's breach of contract claims to the narrow issue on which the Court found there to be a jury issue," i.e. whether CCA was terminated for refusing to enter a price-fixing agreement. [4] Id. While defendants acknowledge that the Court's August 5, 2004 Order permits plaintiff to argue that defendants required good cause to terminate their agreement with plaintiff, defendants contend that the parol evidence rule prohibits plaintiff from submitting evidence of oral promises to demonstrate that [*13] defendants did not honor pricing commitments. Id. at 3-5. Alternatively, defendants request the Court to limit "CCA's contract claim to whether Equifax had the right to terminate CCA's broker agreement" and to find, pursuant to *Fed. R. Civ. P. 56(d)*, that the contract "did not obligate Equifax to maintain forever the same price for its reports." Id. at 5-7.

4 Defendants contend that the Court implicitly rejected the theory that Equifax terminated plaintiff's contract in bad faith by not honoring certain alleged pricing commitments. Mot. at 3.

Plaintiff responds that defendants' attempt to "imply" exclusion of various oral communications from the Court's August 5, 2004 Order is unfounded and that the Court's August 5, 2004 Order did not exclude this evidence. Opp'n at 1. Plaintiff argues that the March 22, 2000 Weismann e-mail [5] confirming Equifax's prices is admissible because the contract's use of the term "rate schedule" without including one therein, presumes the existence of an extrinsic agreement. Id. at 3. Further, "rate schedule," as used in the Weismann e-mail is a contemporaneous writing admissible under *Georgia Code § 24-6-3*. Id. at 3-4. Defendants also argue that the Weismann [*14] e-mail is admissible to explain the contract's ambiguity regarding the applicable "rate schedule." Id. at 4. Plaintiff contends that it would be unrealistic to believe that price was not a concern for CCA and that Equifax's interpretation of the contract's phrase "prices now or subsequently established" to mean that Equifax could raise its prices at any time is incorrect. Id. at 5. In sum, plaintiff argues that the Weismann e-mail is not inconsistent with the terms of the contract and is not barred by the parol evidence rule.

5 Plaintiff refers to the e-mail from Kathy Weismann of Equifax to CCA quoted by the Court in its August 5, 2004 Order which states:

> I received your letter. The rates on Beacon and Safescan for the different levels were a little off.
>
> 20-000-100,000 report [sic] cost $ 1,90, Beacon .50, Safescan .15 100,000-250,000 report cost $ 1.80, Beacon .40, Safescan .10 250,000-500,000 report cost $ 1.70, Beacon .25, Safescan .08
>
> I will clarify your question on the cities in owned vs. affiliate sales points and about the cities that aren't included at all.

August 5, 2004 Order at 11; Opp'n at 3.

Plaintiff contends that Georgia's public policy against fraud and perjury underlying [*15] the parol evidence rule is not a concern in this case. Id. at 6-7. Plaintiff also claims that this evidence is admissible with respect to the issue of the alleged price-fixing conspiracy. Id. at 8. Finally, plaintiff argues that Equifax's request that the Court make findings of fact about the language of the contract is contrary to Georgia law which reserves findings of fact related to contract construction for the jury. Id. at 8. In addition, any ambiguity in the contract should be resolved against the drafter, in this case Equifax. Id. at 9.

Defendants reply that the Court should determine whether the contract is ambiguous with respect to whether Equifax can amend its rate schedules before admitting plaintiff's parol evidence. Reply at 1. Further, defendants argue that the contract is not ambiguous and that it permits Equifax to change its prices. Id. at 2-3. Defendants concede that the Weismann e-mail and Equifax's rate tables are admissible but argue that the e-mail does not establish that rates will not change and that the rate table states that prices may change. Id. at 4. However, defendants argue that the Court should exclude *"the oral parol* evidence that CCA attempts to offer [*16] to add agreements found neither in the contract, in the rate schedules, nor in Ms. Weismann's email summary of the rate schedule." [6] Id. (emphasis in original). Defendants urge the Court to consider CCA's customer agreements which state that CCA may pass on price increases to customers, as well as the fact that the terms in CCA's February 10, 2000 request to maintain prices were not incorporated into the contract. Id. at 5-6, 8-10. Defendants contend that its reservation of the right to change prices is consistent with the realities of commerce. Id. at 9.

6 Defendants identify this evidence as follows:

> (1) CCA's claim that Equifax orally agreed that the prices set forth on the rate schedule (as summarized by Ms. Weismann) would either never change; and
>
> (2) CCA's claim that Equifax orally agreed that the prices charged to CCA would be uniform with what Equifax charged all other resellers.

Reply at 7.

As the Court recognized in its August 5, 2004 Order:

> CCA contends that the Agreement entered into on April 1, 2000, incorporated the separate schedule of prices confirmed by the March 22, 2000 e-mail from Kathy Weismann. Opp. at 18. In particular, CCA argues that the clause of the Agreement stating, [*17] "Broker will pay...according to the rate schedule of cash prices now or subsequently established by Equifax" references the prices quoted by Kathy Weismann on March 22, 2000.

August 5, 2004 Order at 12. Nevertheless, the Court concludes that the parol evidence rule bars the receipt of extrinsic evidence in this case. The Court finds that the contract between CCA and Equifax was integrated. Given this conclusion, extrinsic evidence is not admissible to vary the terms of the contract unless there is an ambiguity in the contract. In order to make this determination, it is necessary for the Court to look at the contract itself and the language plaintiff offers to determine whether there is an ambiguity. Here, the Court finds that there is no ambiguity. This conclusion is supported by CCA's own contracts with its customers which state the following:

> Pricing set forth in paragraph 1 is based on the pricing agreement for credit reports and/or ancillary products presently in place between [CCA] and the credit repositories...[CCA's] providing credit services to client may be terminated immediately if the Repositories terminate [CCA's] ability to provide credit reporting services. In the event that [*18] the Repositories increase the price of credit reporting services to [CCA], [CCA] at its option, may pass on the price increase to the client, or terminate the credit reporting services to Client.

Reply at 5-6; Declaration of Frank D. Rorie In Support of Defendants' Motions in Limine Nos. 1-6, Ex. AA (Sample Agreement for Credit Reporting Services) P 12. Accordingly, the Court will not consider parol evidence in support of plaintiff's claims and therefore GRANTS defendants' motion. [7]

7 Insofar as plaintiff suggests that parol evidence may be received under Georgia law, Opp'n at 3-4, 6, defendants argue that Georgia law requires the Court, rather than the jury, to construe

the contract and exclude parol evidence. Mot at 4 (citing *First Data POS, Inc. v. Willis, 273 Ga. 792, 794-95, 546 S.E.2d 781 (2001))*; Reply at 6 (citing same). The Court concludes that its analysis above is consistent with Georgia law.

D. Defendants' Motion *in Limine* No. 3 Limiting Plaintiff's Claim for Interference with Contractual Relations to One Contract with Mike Davidson Ford

Defendants seek to exclude eight out of nine contracts between CCA and automobile dealers which purportedly form the basis of plaintiff's claim for interference [*19] with contractual relationship by Equifax. [8] Mot. at 1. Defendants argue that the Court should limit plaintiff's tortious interference claim to one contract between CCA and Mike Davidson Ford (the "Ford contract") because plaintiff timely produced only the Ford contract when Magistrate Judge Woehrle ordered plaintiff to produce all contracts on which it bases its interference with contractual relationship claim. Id.

8 In its reply, defendants request the Court to decide, as a matter of law, that CCA's theory that Equifax's termination was wrongful because it was done to effectuate an illegal price-fixing agreement is "legally invalid." Reply at 1.

Defendants also seek to prevent plaintiff from arguing that Equifax's actions induced plaintiff, rather than plaintiff's customers, to terminate contracts. [9] Id. at 1-2. Defendants argue that they relied on plaintiff's original theory of interference based on customer breaches when they conducted their discovery and that they will suffer unfair prejudice if the Court permits plaintiff to argue that its tortious interference claim is based on plaintiff's termination of the contracts. Id. at 4. Defendants contend that the Court's October 5, 2004 [*20] Order confirms that plaintiff's interference with contractual relationship claim is premised on customers' breaches. Id. at 6. Defendants further argue that even if the Court were to allow plaintiff to pursue a tortious interference claim, this claim must fail as a matter of law for the following reasons: (1) plaintiff is not a "stranger" to the breached contracts, as required by California law, (2) Equifax cannot be liable in tort for exercising its contractual right to terminate its agreement with CCA; and (3) CCA's contract with its end users explicitly permitted termination of the contract if CCA's relationship with Equifax was terminated. Id. at 7-8.

9 This distinction is significant because there appear to be only nine contracts which plaintiff claims Equifax actively interfered with by improperly switching out the codes of end-user automobile users, thus causing them to deal with Equifax directly and inducing customer breach. Opp'n at 3. Conversely, if Equifax induced plaintiff to terminate its contracts by rendering plaintiff unable to sell Equifax reports to end-users, the claim involves hundreds of contracts. Id.

Plaintiff responds that at the March 10, 2004 hearing on defendants' [*21] contempt motion before Magistrate Judge Woehrle, CCA confirmed that its contractual interference claim is not limited to the contracts that CCA claims Equifax actively interfered with but rather includes hundreds of contracts which CCA lost upon Equifax's termination of CCA. [10] Opp'n at 1. Further, plaintiff contends that it has fully complied with Magistrate Judge Woehrle's order to produce these contracts and has in fact produced hundreds of these contracts. Id. at 2. Moreover, plaintiff asserts that it had already provided Equifax with hundreds of these end-user contracts at the time CCA's account was first set up. Id. at 3. Plaintiff also argues that it has not changed its theory of interference, i.e. it now claims and in the past has claimed that Equifax interfered with every contract CCA had with customers to supply Equifax credit reports, including the nine known contracts with which Equifax actively interfered. [11] Id. at 3.

10 Plaintiff also contends that Judge Woehrle denied Equifax's request to restrict plaintiff's contractual interference claims. Opp'n at 2.

11 Plaintiff asserts that with respect to these few contract, nine of which have been identified, Equifax "switch[ed] [*22] out the codes of end-user automobile users who were CCA customers, causing them to deal with Equifax directly." Opp'n at 3.

With respect to Equifax's argument that plaintiff's contractual interference claims fail as a matter of law, plaintiff argues the following: (1) while Equifax was a stranger to the contracts at issue, the California Court of Appeal has approved a factor test to determine whether interference is privileged and the relationship of defendants to the contract does not, by itself, confer immunity from liability, id. at 5; and (2) Equifax's argument that an action for intentional interference with a contractual relationship cannot lie in connection with a terminable-at-will contract is contrary to California law. Id. at 7-8.

The Court concludes that plaintiff's theory of contractual interference based on interference with all of its end-user contracts, as opposed to only the contracts with which Equifax actively interfered, has been raised throughout this case and is therefore not untimely. See Supplemental Declaration of Jeffrey T. Briggs in Support of Plaintiff's Opposition to Defendants' Motion in Limine No. 3, Ex. B (January 13, 2004 Deposition of Jeffrey T. Briggs) [*23] at 181:18 - 182:5.

With respect to defendants' argument that plaintiff's claim for interference fails as a matter of law for several reasons, defendants appear to be asserting an argument that should have been raised in its earlier motion for summary judgment. However, based on cases cited by defendants, including *Nat'l Rural Telecommunications Coop. v. DirecTV, Inc., 319 F. Supp. 2d 1059 (C.D. Cal. 2003)* and *Marin Tug & Barge, Inc. v. Westport Petroleum, Inc., 271 F.3d 825 (9th Cir. 2001)*, it appears that defendants' relationship to CCA may preclude recovery for interference with contractual relationship unless CCA can demonstrate that defendants engaged in wrongful conduct of the kind necessary to establish a tort claim. See also *JRS Prods., Inc. v. Matsushita Elec. Corp. of Am., 115 Cal. App. 4th 168, 8 Cal. Rptr. 3d 840* (3d dist. 2004). Because the question of whether plaintiff is entitled to proceed with its interference claim appears close, the Court orders the parties to submit a letter citing additional cases addressing this issue. [12] The parties shall present these cases in letter form on or before February 7, 2005. In addition, with regard to the eight contracts that defendants claim were not [*24] produced in compliance with Magistrate Judge Woehrle's March 10, 2004 order, the Court orders plaintiff to submit to defendants' counsel with a copy to the Court a list of the contracts that plaintiff claims were produced. Plaintiff shall identify the contracts by date, Bates number and date of production. Defendants shall respond to this submission no later than February 14, 2005, and provide a copy of their response to the Court. The Court will thereafter determine whether further oral argument is necessary.

12 Defendants' arguments that plaintiff's claim must fail as a matter of law because defendants are not "strangers" and because Equifax cannot be liable in tort for exercising a contractual right are intertwined and therefore the Court addresses them together. However, while it may be true that CCA had the right to terminate its contracts with end-users, that fact does not in any way defeat CCA's contentions that it was wrongfully terminated by Equifax.

E. Defendants' Motion *in Limine* No. 4 to Exclude Lay Opinion Testimony of Curtis Knievel and Related Documents

Defendants request that the Court reconsider its August 5, 2004 Order in which it ruled that plaintiff could proffer lay [*25] opinion testimony regarding Equifax's regional market share and average report pricing. Mot. at 1. In particular, defendants seek to exclude the testimony of Curtis Knievel ("Knievel") and documents connected to Knievel's testimony. Id. at 2.

Defendants contend that Knievel was not properly identified during discovery and that "CCA put Mr. Knievel up to submit his declaration in opposition to summary judgment for the sole reason that he had not yet been deposed and, thus, the basis for his 'estimates' had not yet been tested." Id. at 4. Having now taken Knievel's deposition, defendants question the basis of Knievel's testimony, noting that Knievel lacks the education, experience, training and first-hand knowledge to testify about the matters in his declaration. Id. at 4-5.

Defendants argue that Knievel's opinions are inadmissible lay opinion testimony under *Federal Rule of Evidence 701*. First, defendants argue that Knievel's opinions regarding market share information, average report pricing, and report distribution percentages are not properly based on Knievel's common human experience, sensory perception or personal knowledge. Id. at 6-7. Second, defendants argue that Knievel's opinions [*26] will not be helpful to a clear understanding of his testimony or to the determination of a fact at issue because Knievel lacks the experience or specialized knowledge that would make his opinion reliable. [13] Id. at 9-12.

13 Defendants assert that the particular problems with Knievel's testimony include the following:

. Knievel has not been CCA's Director of Sales for four years but rather was a commissioned sales representative during the relevant period. Mot. at 4.

. Knievel lacks a degree in business or economics. Id.

. Knievel lacks prior experience selling credit reports. Id.

. Prior to joining CCA, Knievel had never been to seven of the nine states at issue in this litigation. Id.

. Knievel has not formal training regarding market shares, average report pricing, or report distribution percentages in the credit report industry. Id.

. Knievel has never testified before about market shares, average report pricing, or report distribution percentages. Id.

. Knievel received his job training primarily from Matthew Briggs and Bobby Edwards. Id. at 5.

. In his deposition, Knievel "clarified that he did not have first hand knowledge of market share information for every state, but instead acquired [*27] certain market share information from conversations he had with other CCA sales representatives." Id.

. Knievel's "knowledge of pricing is based primarily on his recollection of: (a) telephonic conversations with auto-end users, (b) periodic meetings with auto-end users, and (c) documents (primarily Equifax invoices) shown to [him] during meetings with end users." Id.

. Knievel admits that "he does not know such crucial facts as: (a) the number of auto-end [sic] users from whom he actually obtained information to formulate his opinions, (b) the number of auto end-users located in each state, (c) the percentage of the auto end-users in these states that he visited; (d) the number of Equifax, Experian, and TransUnion credit reports purchased by auto end-users in each state, (e) the amount each auto end-user pays for credit reports in each stae, or (f) the manner in which each auto end-users [sic] obtains credit reports in each state." Id. at 9.

. Knievel's opinions regarding average report pricing are inconsistent with documents produced by CCA, including CCA's QuickBooks and records of sales to auto dealers. Id. at 12.

Defendants contend that Knievel's testimony is more properly characterized [*28] as expert opinion testimony and that as such, it does not meet the requirements of *Federal Rule of Evidence 702* or Daubert. [14] Defendants argue that Knievel's opinions concerning market share information, report pricing, and report distribution percentages should be treated as expert testimony because this type of information is usually introduced through expert testimony in antitrust cases. Id. at 13. Defendants argue that Knievel's testimony is not based on sufficient facts or data and is not the product of reliable methods. Id. at 15.

14 In addition to several of the problems discussed in footnote 7, defendants point to the following additional purported deficiencies in Knievel's testimony:

. Knievel relies on his recollection of telephone conversations, in-person meetings, and information from other CCA sales representatives from over three years ago. Id. at 15.

. Knievel does not know how many dealerships he spoke with or the size of his dealership sample. Id. at 15.

. Knievel assumes that Equifax's market shares are the same today as they were four years ago. Id. at 15.

Finally, defendants argue that the Court should exclude the market share chart and Equifax invoices attached to Knievel's [*29] declaration in opposition to summary judgment. In particular, defendants contend that the chart is inadmissible hearsay, contains irrelevant information about states outside the scope of this litigation, has a tendency to confuse and mislead the jury, and has little probative value. Id. at 16-17. Similarly, defendants contend that the Equifax invoices are minimally probative and have the tendency to confuse and mislead the jury as to Equifax's average price because they reflect only individually negotiated prices. Id. at 17.

Plaintiff responds that Equifax has mischaracterized Knievel's testimony for a variety of reasons and that Knievel's testimony is admissible lay opinion. Opp'n at 1-13.

In its August 5, 2004 Order, the Court already considered Knievel's testimony and concluded that Knievel's declaration is admissible lay opinion. August 5, 2004 Order at 7 n.3. At oral argument, plaintiffs argued that they intend to proffer Knievel's testimony only as evidence of motive to conspire. Plaintiff argued that Knievel's testimony is relevant to the issue of conspiracy because it demonstrates Equifax's dominance in the market. Plaintiff contended that a greater degree of dominance indicates [*30] a stronger motive to conspire. Plaintiff further argued that Knievel's testimony forms a basis for Dr. Comanor's opinions, and consequently helps the jury understand Dr. Comanor's testimony. Accordingly, based on plaintiff's indication that Knievel's testimony will be limited to demonstrate motive to conspire, the motion is DENIED. However, the Court continues to question the relevancy of Knievel's testimony, even if limited to motive, and will consider that issue further at the pretrial conference.

F. Defendants' Motion *in Limine* No. 5 to Strike Expert Opinion Testimony of William Comanor

Defendants seek to strike Dr. Comanor's testimony, in particular opinions stated in Dr. Comanor's September 23, 2004 expert report and his December 4, 2004 Second Rebuttal Declaration. Mot. at 3. In these documents, defendants assert that Dr. Comanor opines the following: (1) "Equifax had an economic incentive to engage in a resale price maintenance conspiracy and to terminate CCA pursuant to that conspiracy because Equifax was a dual distributor"; (2) "such a conspiracy is the most economically logical interpretation of the facts"; and (3) "Equifax had 'market power'". Id. at 3-4. Defendants argue [*31] that Dr. Comanor's opinion regarding Equifax's alleged economic incentive to engage in a conspiracy and terminate CCA pursuant to that conspiracy is unreliable because, rather than conducting an economic analysis to determine whether Equifax was "pursuing its own vision of efficient distribution" or "merely deciding that it cannot afford to retain the plaintiff dealer a the expense of losing the complainer's patronage," "Dr. Comanor merely assumes that the existence of dual distribution provides an economic motive for a conspiracy to terminate CCA." Id. at 5. Defendants further argue that Dr. Comanor's first declaration is inconsistent with his more recent rebuttal declaration in that Dr. Comanor first opined that Equifax had unilaterally terminated CCA to enhance its market power but then opined that a conspiracy with ADP and CREDCO was the motive behind the termination of CCA. Id. at 6-7. Accordingly, defendants argue that Dr. Comanor's opinion is unreliable and will not assist the jury. Id. at 7.

Defendants also point to Dr. Comanor's opinions: (1) that "[t]he lesson to be learned from recent theoretical advances is that cooperation among rival firms does not just happen," id. at 8 [*32] (citing September 23, 2004 Comanor Decl. at 9); and (2) that "the generally non-competitive conduct exhibited by both ADP and CREDCO is more indicative of the presence of a conspiracy than its absence," id. at 8 (citing December 4, 2004 Comanor Rebuttal Decl.). Defendants argue that these opinions demonstrate that Dr. Comanor has failed to consider the possibility of cooperation through interdependent conduct and therefore has confused interdependent conduct with conspiratorial conduct. Id. at 8.

Defendants also argue that Dr. Comanor has failed to analyze the factors necessary to prove market power, a prerequisite for a conspiracy. Id. at 9. Defendants argue that some of the most important aspects of Dr. Comanor's opinions, including those related to market definitions, calculation of market shares, and characterization of Equifax's credit reports as "essential facilities" [15] are based entirely on lay opinion and anecdotal information provided by Knievel and Matthew Briggs, CCA employees, rather than on independent analysis. Id. at 10. Finally, defendants note that other courts have excluded the expert testimony of Dr. Comanor in the past for reasons similar to those asserted in the [*33] present motion. Id. at 17.

15 Defendants also seek to exclude Dr. Comanor's characterization of Equifax's credit reports as an "essential facility" on the basis that this testimony would confuse a jury given that such characterization is "relevant only to CCA's unsuccessful attempt to add Sherman Act § 2 claim." Mot. at 16.

Plaintiff argues that defendants have not met the high burden for excluding expert economic testimony in a motion in limine. Opp'n. at 1-2. Plaintiff contends that defendants' concerns about Dr. Comanor's methodology and credibility are properly the subject of cross-examination and argument. Id. at 3-4. Plaintiff contends that all of Dr. Comanor's declarations employ the "intellectual rigor that characterizes the practice of an expert." Id. at 5 (citing *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)).* Plaintiff argues that defendants have mischaracterized the nature of Dr. Comanor's testimony in that the testimony is not an opinion about the likelihood of a conspiracy or an opinion excluding the possibility that Equifax acted independently. Rather, Dr. Comanor's testimony "provides an economic framework for the jury's use in determining, from other evidence [*34] such as that cited by the Court in its summary judgment order, whether or not Equifax took part in the conspiracy." Id. at 6. [16] Plaintiff further argues that Dr. Comanor's testimony is well-founded in applicable scholarship [17] and that his theory has not changed since his first declaration, in which he described performing a very particular type of analysis, different from the analysis performed later in the litigation. [18] Id. at 8-9. Plaintiff also disputes defendants' argument that "the fact that Equifax's, ADP's and Credco's prices were not identical undercuts the existence of a price-fixing conspiracy among them" and argues that any type of price-fixing, even if it results in lower prices or allows for some level of competition, is contrary to law. Id. at 12-13.

16 Plaintiff also argues that in its August 5, 2004 Order, the Court already found that there was sufficient evidence excluding the possibility

of independent action to reserve the question of whether there was a conspiracy for the jury. Opp'n at 7. Plaintiff asserts that "[t]here is no legal requirement that Dr. Comanor himself be the one proffering that evidence to be allowed into the courtroom to testify at all." Id.

17 Plaintiff [*35] later elaborates on this argument, contending that defendants' reliance on theories articulated in the Areeda & Hovenkamp treatise alone is misleading given the criticism of these theories in Judge Richard Posner's treatise, Antitrust Law. Opp'n at 11.

18 Plaintiff argues that there is nevertheless "no inconsistency between Equifax having a unilateral incentive to terminate CCA and an incentive to do so pursuant to an agreement with ADP and CREDCO." Id. at 9.

Plaintiff further argues that Equifax's discussion of market definition and market power is misplaced in that these concepts do not provide a defense to a per se price-fixing conspiracy, as alleged in this case. Id. at 13-14. Nevertheless, plaintiff contends that Dr. Comanor's analysis of the market background in this case was appropriate, proper and relevant. Id. at 14-15. In particular, plaintiff argues that Dr. Comanor's reliance on the admissible testimony of Knievel was proper and that any success in discrediting Knievel to the jury will also discredit Dr. Comanor. Id. at 15-16. Also, plaintiff contends that other admissible evidence, including the deposition of Grayson Sackett and Equifax's expert Dr. Teece, supports Dr. Comanor's [*36] analysis of market power. Id. at 17. Plaintiff argues that the Court should not exclude Dr. Comanor's testimony given Equifax's delays in providing financial and pricing data. Id. at 20.

Plaintiff argues that Dr. Comanor's opinion about whether Equifax reports are "essential facilities" is still relevant to this case in the absence of a monopolization claim because it pertains to CCA's claim under *Cal. Bus. & Prof. Code § 17200* and may be relevant when considering Equifax's market power and whether other credit reports could be substituted for Equifax's reports. Id. at 20. Finally, plaintiff points to Dr. Comanor's extensive experience testifying in antitrust cases and argues that defendants' reliance on cases rejecting Dr. Comanor's testimony is inappropriate because the cited cases are inapposite. Id. at 21-22.

The Court concludes that Dr. Comanor's testimony is admissible, and therefore DENIES defendants' motion. To the extent defendants have raised concerns about Dr. Comanor's testimony, these concerns speak to the weight, rather than the admissibility of Dr. Comanor's testimony. Accordingly, defendants may address these concerns during cross-examination and argument. [19]

19 On January [*37] 13, 2004, defendants filed a reply. On January 19, 2005, plaintiff filed a sur-reply to defendants' motion. In the sur-reply plaintiff argues that defendants' reply is misleading, particularly in the following ways: (1) Equifax's discussion quotes authorities discussing single distributor situations while this case involves a dual distributor situation; (2) the testimony by Dr. Teece cited by Equifax in its reply is inaccurate and has been mischaracterized; (3) Equifax has mischaracterized Dr. Comanor's testimony; (4) Equifax has selectively quoted scholarly works to support its points; and (5) defendants are incorrect in stating that Dr. Comanor's work has not been accepted by courts because Dr. Comanor's work has been accepted by courts in published and unpublished cases. Sur-reply at 1-7.

On January 21, 2005, defendants filed a motion to strike plaintiff's surreply on the grounds that it violates the local rules and CCA did not obtain leave of the Court to file the sur-reply. Motion to Strike at 1. Because the Court does not rely on plaintiff's sur-reply, the motion to strike is moot.

G. Defendants' Motion *in Limine* No. 6 to Strike Expert Opinion Testimony of Jon M. Riddle

Defendants [*38] seek to exclude expert testimony by Jon M. Riddle ("Dr. Riddle") regarding the difference between profits that CCA would have earned absent Equifax's allegedly improper conduct and CCA's actual profits. Mot. at 1. Defendants contend that Dr. Riddle's testimony is based on the following unsupported assumptions: (1) that "but for the termination, CCA's per unit acquisition cost for Equifax credit reports would remain constant for the entire 12-year period over which Dr. Riddle calculates damages," when, in fact, Equifax had actually changed its prices; (2) that "but for Equifax's termination of CCA, CCA would have successfully entered the business of selling 'merged file' credit reports to mortgage companies and would have sold reports at three times the price it was charging on average to auto dealers"; (3) that "CCA's growth rate in sales of Experian and TransUnion reports is comparable to the rate at which CCA's sales of Equifax reports would have grown, but for the termination"; (4) that the six firms used to value CCA's business are comparable to CCA, even though they are much larger and Dr. Riddle never compared other factors such as earnings patterns, position in the industry, [*39] capital structure and maturity of company; and (5) that CCA carries the same risk premium as the smallest ten percent of publicly traded firms despite failing to analyze whether these firms are comparable to CCA. [20] Id. at 2-4.

20 In their reply, defendants also argue that Dr. Riddle's testimony is flawed because he failed to consider that the conspiracy, if true, would have enhanced CCA's profits and because he failed to offset his calculations accordingly. Reply at 7.

Defendants further argue that Dr. Riddle's testimony is unreliable and should be excluded because it ignores undisputed facts and suggest a model that is "too far from factual reality." Id. at 6.

In addition, defendants argue that Dr. Riddle's damage calculations improperly use CCA's increased sales of Experian and TransUnion to increase, rather than mitigate damages. Id. at 7. Defendants contend that Dr. Riddle's opinions are inconsistent in that he uses CCA's sales of Experian and TransUnion reports as a measurement of CCA's projected "but for" sales but also contends that these sales were not an alternative, mitigating use of CCA's resources. Id. Defendants also argue that Dr. Riddle failed to consider other causes of [*40] CCA's damages. Id. at 7-8.

Defendants argue that the purported defects in Dr. Riddle's testimony do not merely address the weight of the testimony but rather render the entirety of Dr. Riddle's testimony inadmissible under the Kumho standard which requires experts to "employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Id. at 9. Finally, defendants argue that since the close of discovery, Dr. Riddle has asserted a new theory of damages based on CCA's inability to sell merged reports to the mortgage industry. Id. at 9-10. Accordingly, because defendants have not had the opportunity to question Dr. Riddle about this new theory, defendants argue that Dr. Riddle should not be permitted to testify to this matter. Id. at 10.

Plaintiff responds that because the standard of proof required for damages in an antitrust case is lenient and because there is a strong public policy supporting this relaxed standard, Dr. Riddle's testimony, which is based on traditional economic principles, should be received. Opp'n at 1-5. Plaintiff also contends that the issues raised by defendants address the weight, rather than the admissibility [*41] of Dr. Riddle's testimony. Id. at 6.

With respect to arguments regarding plaintiff's inability to enter the merged reports market, plaintiff asserts that on January 9, 2004, Matthew Briggs, a principal of CCA, testified in his deposition that CCA's damages were premised, in part, on CCA's loss of the ability to expand its business. However Equifax did not pursue this line of inquiry with additional questions or analysis of documents provided by CCA. Id. at 7-8. Plaintiff argues that defendants misconstrue the role of Dr. Riddle's testimony in that Dr. Riddle does not seek to determine whether CCA would have entered and succeeded in this particular endeavor but rather that Dr. Riddle seeks to "calculate a just and reasonable estimate of the profits that would have ensued" from plaintiff's plans to pursue this endeavor. [21] Id. at 9.

21 Plaintiff acknowledges that it must proffer evidence that it had such a plan and that such a plan would have been successful. Opp'n at 9.

In regard to defendants' arguments regarding use of evidence of mitigation, plaintiff contends that defendants mischaracterize Knievel's testimony about the growth of Experian and Transunion sales and the reallocation of [*42] resources dedicated to these sales and that defendants provide no other evidence in support of their arguments. Id. at 11. Plaintiff argues that the evidence cited by defendants does not support the conclusion that sales of Experian and TransUnion reports increased and that Dr. Riddle did not ignore evidence of "mitigation." Id. at 12. Plaintiff also disputes defendants' logic that using the sales of other companies' reports as a yardstick is inconsistent with claiming that there was no increase in sales is flawed, i.e. the two theories can co-exist. Id. at 13.

In addition, plaintiff argues that defendants' criticism of Dr. Riddle for not considering Equifax's price increase in his calculations is unfounded because it is disputed whether or not the price increase would have actually taken place. Id. at 14. With respect to causation, plaintiff contends that in antitrust cases, economic experts like Dr. Riddle need not testify as to causation and that causation is a question for the jury. Id. at 15-17. Finally, plaintiff asserts that defendants' other criticisms about Dr. Riddle's selection of comparable firms, allocation of costs, and modification of his initial analyses address the [*43] weight, rather than admissibility of Dr. Riddle's testimony. Id. at 17.

Having considered these arguments, the Court concludes that Dr. Riddle's testimony is admissible and DENIES defendants' motion. [22] To the extent that defendants have raised concerns about Dr. Riddle's testimony, these concerns speak to the weight rather than admissibility of Dr. Riddle's testimony. Accordingly, defendants may address these concerns during cross- examination and argument. [23]

22 At oral argument, defendants urged the Court to consider a recent Seventh Circuit opinion, Zenith Elecs. Corp. v. WH-TV Broad. Corp., Nos. 04-1635 & 04-1790 (7th Cir. Jan. 20, 2005), The Court has reviewed this case and finds that the nature of the expert testimony therein, which includes numerical projections, is qualitatively different from that presented in this case such that Zenith appears to be inapposite. In any event, Zenith is not binding on this Court.

23 As stated at oral argument, the Court will permit defendants to take further depositions of Matthew Briggs and Jeffrey Briggs regarding plaintiff's theory that CCA was harmed by its inability to provide merged reports to the mortgage industry.

III. CONCLUSION

For the [*44] reasons stated herein, the Court GRANTS in part and DENIES in part plaintiff's motion in limine. The Court GRANTS defendants' motion in limine number 2 and DENIES defendants' motions in limine numbers 1, 4, 5, and 6. The Court declines to decide defendants' motion in limine number 3 at this time.

IT IS SO ORDERED.

Only the Westlaw citation is currently available.

United States District Court,
M.D. Pennsylvania.
FEESERS, INC., Plaintiff,
v.
MICHAEL FOODS, INC. and Sodexho, Inc., Defendants.
Civil No. 1:CV-04-0576.

Jan. 17, 2008.

Eamon O'Kelly, Elizabeth A. Haley, Jeffrey L. Kessler, John F. Collins, Lisa M. Card, Susannah P. Torpey, Dewey & Leboeuf LLP, New York, NY, Steven M. Williams, Cohen, Seglias, Pallas, Greenhall & Furman PC, Harrisburg, PA, for Plaintiff.

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MEMORANDUM and ORDER

SYLVIA H. RAMBO, District Judge.

***1** During trial on January 14, 2008, Defendants objected to Plaintiff's attempt to offer evidence relating to conversations between Feesers employees and employees of Feesers' institutional customers concerning the customers' reasons for purchasing food from Sodexho rather than Feesers. Defendants argued that this evidence was inadmissible for two reasons: (1) Plaintiff violated Fed.R.Civ.P. 26(a)(1)(A) by failing to disclose the identity of these customer witnesses during discovery, and (2) the conversations were hearsay statements not admissible under the state of mind exception because they were not offered to prove customer motive. Plaintiff responds that it has fulfilled its obligations under Rule 26 by disclosing the identity of the Feesers employees who will testify to the conversations relating to instances of competition as requested by Defendants in their interrogatory, and that the evidence is admissible under the state of mind hearsay exception because it is offered to prove customers' motive for switching from Feesers to Sodexho. The issues have been fully briefed by the parties. For the reasons that follow, the objections will be overruled.

1. *Rule 26*

Rule 26(a) (1)(A) obligates a party to disclose, "the name ... of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, ... identifying the subjects of the information." Fed.R.Civ.P. 26(a)(1)(A). Additionally, parties have an ongoing duty to supplement disclosures, *see*Fed.R.Civ.P. 26(e)(1), and responses to interrogatories, *see*Fed.R.Civ.P. 26(e)(2).

Here, in its response to Michael Foods' interrogatories, Plaintiff disclosed the identities of its employees with knowledge of instances of competition between Feesers and Sodexho. Plaintiff also disclosed a number of specific institutional customers for which Feesers and Sodexho competed. This was all that Rule 26 required. Having been informed of both the identity of these Feeser's employees and the subject matter of their knowledge, Defendants could infer that these individuals had communicated with employees of the institutions for which both Feesers and Sodexho compete, and through such conversations learned the factors motivating a customer's decision to switch. Armed with this knowledge, Defendants had the opportunity to depose those employees, who are now called as witnesses. Plaintiff was not required by Rule 26 to specifically disclose the names of the employees of its customers with whom Feesers employees had conversations concerning a switch from Feesers to Sodexho.[FN1] Accordingly, Defendants' Rule 26 objection to the testimony of Plaintiff's witnesses about conversations with employees of its customers is **OVERRULED.**

FN1. Significantly, here Feesers is offering the testimony of its *employee witnesses* who were specifically identified during discovery. This is in contrast to the individuals at issue in Plaintiff's motion *in limine* (Doc. 246), who were named as witnesses on the eve of trial even though they were not specifically identified during discovery. In that situation, Plaintiff had no opportunity to depose the challenged witnesses.

2. *Hearsay*

Under Rule 803(3) of the Federal Rules of Evidence, an out-of-court statement is not excluded as hearsay if offered to prove the declarant's then existing state of mind or motive. In *J .F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1535 n. 11 (3d Cir.1990), the Third Circuit observed that statements of a customer to an employee are admissible if the customer's motive is relevant to the action. *See also* Weinstein's Federal Evidence § 803.05 (2007). *J.F. Feeser* involved a claim of price discrimination under the Robinson-Patman Act, and the court held that the evidence should have been admitted because “the reason why a customer was not doing business with a particular seller is relevant in a lost profits/sales inquiry and its causal connection to the pricing practices of the alleged violator.” *Id.* at 1535 n. 11. By contrast, in *Stelwagon Manufacturing Co. v. Tarmac Roofing Sys., Inc.*, the Third Circuit held that customer statements to an employee should have been excluded as hearsay when they were considered as proof of actual damages, rather than proof of motive. 63 F.3d 1267, 1274-74 (3d Cir.1995).

***2** In this case, Plaintiff offers the out-of-court statements of their customers in order to prove the motive of those customers for switching from Feesers to Sodexho, rather than to prove the facts concerning the switch. This motive evidence is directly relevant to the issue of competitive injury in this case. Accordingly, it is admissible under the state of mind exception to the rule against hearsay. Defendants' objection is **OVERRULED.**

M.D.Pa.,2008.
Feesers, Inc. v. Michael Foods, Inc.
Not Reported in F.Supp.2d, 2008 WL 170663 (M.D.Pa.)

END OF DOCUMENT

Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
D. Minnesota.
GLOBAL TRAFFIC TECHNOLOGIES, LLC, Plaintiff,
v.
TOMAR ELECTRONICS, INC., Defendant.
Civil No. 05-756.

Oct. 1, 2008.

Named Expert: Donald A. Gorowsky, C.P.A., Dwight A. Duncan, C.P.A ., Scott T. Sikora, C.P.A.
David J.F. Gross, James W. Poradek, Chad Drown and Timothy E. Grimsrud, Faegre & Benson LLP, for and on behalf of Plaintiff.

Niall A. MacLeod, Nicholas S. Boebel and Aaron A. Myers, Myers, Boebel and MacLeod L.L.P., for and on behalf of Defendant.

MEMORANDUM OPINION AND ORDER

MICHAEL J. DAVIS, Chief Judge.

***1** This matter is before the Court on the parties' motions in limine.

1. Global Traffic's Motion # 1-Motion to Preclude Tomar from Presenting Evidence or Argument on Equitable Estoppel.

By Order of this Court dated December 27, 2007, default judgment was entered against Tomar, and Tomar's pleadings were stricken. Global Traffic asserts that the only issue left for determination is that of damages. However, Tomar has submitted a proposed jury instruction on the defense of equitable estoppel, and its proposed special verdict form asks whether Tomar has proved by a preponderance of the evidence that Global Traffic, through misleading conduct, inaction or silence, led Tomar to reasonably infer that Global Traffic did not intend to enforce the '113 patent. In response, Tomar has withdrawn its proposed jury instruction and its proposed factual findings on the special verdict form. This motion is therefore moot.

2. Global Traffic's Motion # 2-Motion to Exclude Tomar's 3080 and 3140 OSPs as Alleged Noninfringing Substitutes from the Trial on Damages.

At trial, Global Traffic intends to seek damages for the period April 13, 2005 through December 31, 2007. Global Traffic intends to seek damages for lost profits of approximately $7.3 million dollars. To be entitled to lost profits, Global Traffic must prove that “but for” infringement, Global Traffic would have made the additional profits enjoyed by Tomar, the infringer in this case. *Micro Chem., Inc. v. Lextron, Inc.*, 318 F.3d 1119, 1122 (Fed.Cir.2003). One method to prove lost profits is referred to as the *Panduit* test, which requires proof of (1) demand for the patented product, (2) absence of acceptable noninfringing substitutes, (3) the patent owner's manufacturing and marketing capability to exploit the demand, and (4) the amount of the profit the patent owner would have made. *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1156 (6th Cir.1978). In a two supplier market, causation may be inferred. *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 765 (Fed.Cir.1983).

In this case, Tomar intends to show that acceptable noninfringing substitutes exist-the 3080 and 3140 models-to defeat Global Traffic's lost profits claims. Tomar began to produce these models in January 2008-after the Court entered default judgment. Tomar asserts, however, that in a lost profits analysis, an accurate reconstruction of the hypothetical “but for” market may take into account any alternatives available to the infringer-that is evidence of what Tomar would have done in the absence of infringement. Even an available technology that was not on the market during infringement can constitute a noninfringing alternative. *Grain Processing Corp. v. American Maize-Prods.*, 185 F.3d 1341, 1350-51 (Fed.Cir.1999). However, when an alleged alternative is not on the market, the Court may reasonably infer that it was not available. *Id.* at 1353.

> The accused infringer then has the burden to overcome this inference by showing that the substitute was available during the accounting period.... Mere speculation or conclusory assertions will not suffice to overcome the inference. After all, the infringer chose to produce the infringing, rather than noninfringing product. Thus, the trial court must proceed with caution in assessing proof of the availability of substitutes not actually sold during the period of infringement. Acceptable substitutes that the infringer proves were available during the accounting period can preclude or limit lost profits; substitutes only theoretically possible will not.

2Id.* (citations omitted). Similarly, a "finding that an infringer had to design or invent around the patented technology to develop an alleged substitute weighs against a finding of availability." *Micro Chem.*, 318 F.3d at 1123 (citing *Grain Proc.*, 185 F.3d at 1346.)

In Tomar's Damages Expert Report dated November 8, 2006, Tomar disclosed its theory that the Tomar 2070 OSP with eLock is an acceptable noninfringing substitute. Global Traffic Ex. 4 (Duncan Report at p. 9). Global Traffic does not move to preclude this evidence.

However, after discovery was closed and after Tomar had submitted its expert report, Tomar tried to disclose and rely on a second alleged noninfringing alternative-referred to as the M2080. Global Traffic moved to exclude both Tomar's Supplemental Expert Report dated December 6, 2006 and any evidence or testimony regarding the M2080-which motion was granted in its entirety. On April 24, 2008, Tomar disclosed a third alleged noninfringing substitute-the 3080 and 3140 OSPs with eLock . Tomar moved the Court for permission to allow its expert, Mr. Duncan, to offer an expert opinion that the 3080 and 3140s are noninfringing alternatives that preclude lost profits. By Order dated June 10, 2008, Magistrate Boylan denied the motion. This Court affirmed the June 10, 2008 Order. In the June 10, 2008 Order, however, Magistrate Judge Boylan noted "this order does not preclude Tomar from attempting to utilize the opinions and the analysis from the proposed supplemental expert report during cross examination at trial. However, the District Judge presiding over the trial will ultimately determine the admissibility of said evidence."

Global Traffic now moves to exclude any and all evidence concerning the 3080 and 3140s based on the Court's previous findings that Tomar did not have a valid basis for the late disclosure of such evidence. As discussed in the June 10, 2008, it is Tomar's position that the 3080 and 3140s should be considered an available substitute, since these noninfringing models were created with minimal effort. Global Traffic asserts that by the same token, it would have taken minimal effort to disclose this allegedly available technology during discovery, but Tomar did not do so.

The Court agrees that based on prior rulings and Tomar's pretrial conduct in this case, Tomar is precluded from presenting evidence or argument concerning the 3080 or 3140 OSPs. This includes the use of said evidence on cross-examination. Accordingly, the motion will be granted in its entirety.

3. Global Traffic's Motion # 3-Motion to Hold a Separate Hearing on an Injunction.

Global Traffic asks that the jury decide the issue of damages, and while the jury is deliberating, the Court can conduct an evidentiary hearing on the appropriate permanent injunctive relief. The hearing would address evidence relevant only to Global Traffic's request for an injunction. Global Traffic is concerned that if during the damages trial, evidence relevant only to the requested injunctive relief is admitted-more specifically evidence as to the 3080/3140 OSPs-it will be prejudiced thereby. Global Traffic did not address this issue at the time the pretrial schedule was approved in February 2008 because Tomar had not yet disclosed evidence of the 3080/3140s.

***3** Tomar responds that Global Traffic knows its 3080/3140's do not infringe the patents at issue and that the market has accepted these new phase selectors as substitutes for the discontinued 2080 and 2140 phase selectors that are the subject of the Court's default order. This motion should be denied because Global Traffic has not demonstrated why a separate injunction hearing is needed. At Global Traffic's request, Tomar submitted a Certificate of Non-Infringement-certifying that Tomar has ceased to produce and sell the infringing 2080/2140 models, and that such models have been replaced with the

3080/3140 models-which do not have the CCD feature and which do not uniquely identify emitters. Because Global Traffic has not articulated a reason why the 3080/3140 models infringe, they should not be the subject of an injunction.

This motion will be granted. Evidence as to permanent injunctive relief has no relevance to issues related to damages, and Tomar has not demonstrated any prejudice if an evidentiary hearing is held.

4. Global Traffic's Motion # 4-Motion to Exclude Undisclosed Damages Evidence.

As discussed above, to be entitled to lost profits, Global Traffic must prove the following elements: (1) demand for the patented product, (2) absence of acceptable noninfringing substitutes, (3) Global Traffic's manufacturing and marketing capability to exploit the demand, and (4) the amount of the profit Global Traffic would have made. *Panduit Corp.*, 575 F.2d at 1156. Global Traffic argues that on November 14, 2005, it requested Tomar to state its damages position, including whether a royalty or lost profits applied and the basis for its position. Tomar never provided a substantive response to this request, however. In two prior orders in this case, this Court denied Tomar's motion to submit supplemental expert reports that addressed allegedly available noninfringing substitutes as Tomar had failed to disclose such evidence in a timely manner, or to show good cause as to why such evidence was disclosed after the deadline established in the pretrial order. Thus, pursuant to the Order dated February 6, 2007 [Doc. No. 145] Tomar's Supplemental Expert Report dated December 6, 2006 is excluded, and Tomar is not permitted to submit, offer or otherwise rely on said report or the opinions or information contained therein. Also, evidence or testimony from any witness, including Tomar's expert Dwight Duncan and Scott Sikora, relating to a modified 2080 is excluded.

Pursuant to the Order dated June 10, 2008 [Doc. No. 235], and as discussed above, Tomar is precluded from submitting a supplemental expert report addressing evidence of the 3080 and 3140 models as an available, non-infringing substitutes, and is precluded from using the opinions and analysis from said supplemental report during cross examination.

Global Traffic argues that, given that Tomar is precluded from submitting any evidence concerning a modified 2080 and the 3080/3140 models, together with the fact that Tomar has not provided any other basis for its position that lost profits are not appropriate as non-infringing alternatives were available, Tomar cannot present any evidence or argument rebutting: the fact that the parties competed in a two-supplier market; the fact that there was consumer demand for Tomar's infringing Strobecom II product and Global Traffic's patented system; and the fact that Global Traffic had the manufacturing and marketing capacity to make the sales that Tomar made of the Strobecom II.

***4** Global Traffic further argues that the only admissible expert report-the Duncan Report dated November 8, 2006-does not dispute that Global Traffic and Tomar competed in a two supplier market, and he offered no opinion as to capacity or demand. Accordingly, Global Traffic argues that Tomar's failure to disclose any evidence as to market, capacity or demand automatically triggers exclusion under Fed.R.Civ.P. 37(c)(1). *See* *ELCA Enters., Inc. v. Sisco Equip. Rental & Sales, Inc.* 53 F.3d 186, 190 (8th Cir.1995) (exclusion of damages evidence/theories affirmed where party failed to timely disclose such evidence/theory).

Tomar opposes this motion, arguing that the Court must allow it to substantially and fairly cross-examine witnesses, and that granting this motion would interfere with its right to cross-examination. Tomar further asserts that Global Traffic has overstated the Duncan Report regarding his statements concerning a two-supplier market. What Duncan stated was that even absent consideration of non-optical traffic preemption systems supplied by others, Tomar made available product lines that satisfied consumer demand for cost-effective traffic preemption systems without infringing. Tomar argues that if the Court were to grant this motion, Tomar would be stripped of its right to cross-examine Global Traffic's fact and expert witnesses-including the non-infringing products that Tomar actually sold during the relevant time period.

At this time, the Court will reserve ruling on this motion. Tomar is put on notice, however, that all previous Orders issued in this case are in full force and effect, and that no previously undisclosed evidence may be introduced at trial. Failure to follow the

Court's rulings could result in further sanctions.

5. Global Traffic's Motion # 5-Motion to Exclude Expert Testimony of Hearsay Conversations.

In his expert report, Duncan opines that Global Traffic cannot establish that absent infringement, it would have made the sales that Tomar made. Ex. 4, Duncan Report, p. 10. He bases this opinion, in part, on his conversations with Tomar customers, such as Mr. Ken Cox, the Deputy Commissioner of Traffic Engineering for the City of St. Louis. Mr. Cox purportedly told Duncan that Tomar's eLock based optical traffic system would have been acceptable for purchase by the City of St. Louis.

Global Traffic moves to exclude reference to any hearsay statements contained in Duncan's Report. Although Rule 703 of the Fed.R.Evid. provides that an expert may rely on evidence that is otherwise inadmissible if such evidence is of a type reasonably relied upon by experts in the field, the Rule also provides that "[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury." Global Traffic thus moves to exclude any reference to Mr. Cox's out-of-court statements to Duncan. An expert should not be allowed to summarize out-of-court statements of others as his testimony. *United States v. Smith,* 869 F.2d 348, 355 (7th Cir.1989). If Tomar wanted to use Mr. Cox's testimony, it should have deposed him.

***5** Tomar responds that this motion should be denied, as its expert reasonably relied on the statements from Mr. Cox-evidence which is typically relied upon by experts on damages in patent cases-to reach his opinion that Tomar had available noninfringing substitutes during the relevant time period. Tomar further asserts that typically, the factual basis of an expert's opinions usually goes to the credibility of the expert, not to the admissibility of the expert's testimony. Any concerns that Global Traffic may have as to Mr. Duncan's reliance on Mr. Cox's testimony can be addressed during cross-examination. *See* *Hose v. Chicago NW Trans. Co.,* 70 F.3d 968, 974 (8th Cir.1995). Tomar cites the Court to *United States v.. Rollins,* 862 F.2d 1282 (7th Cir.1988) in which the court allowed an expert to testify as to the definition of certain code words, based, in part, on information he received from an informant. The Seventh Circuit affirmed, finding that the defendants could extensively cross-examine the expert, and argue to the jury that the expert's opinion should be rejected as it was based on the informant's testimony. *Id.* 1292-1293.

Tomar further points out that Global Traffic's expert, Mr. Gorowsky, similarly relies on out-of-court statements of 3M employees, who were not deposed and whose names do not appear on Global Traffic's witness list.

Based on the above, the Court will deny this motion.

6. Global Traffic's Motion # 6-Motion to Exclude Expert Opinion of a Reasonable Royalty based on a Hypothetical Negotiation Date in 2005.

Global Traffic moves to exclude Tomar's Expert, Dwight Duncan, from offering an opinion as to a reasonable royalty rate based on a hypothetical negotiation date in 2005.

The parties agree that for purposes of determining a reasonable royalty rate, such determination is made using the date when the alleged infringement began. Global Traffic asserts that the proper date is 1997, the year that Tomar began to sell the infringing Strobecom II product. Global Traffic asserts that the Federal Circuit has clearly established that for reasonable royalty damages, the hypothetical negotiations are determined to have occurred when the infringement began, not when the infringer was first given notice of infringement. *Wang Labs., Inc. v. Toshiba Corp.,* 993 F.2d 858, 870 (Fed.Cir.1993).

Tomar responds that at this time, there has been no finding as to the date infringement began, because this Court granted Global Traffic's motion for default judgment as a sanction. The Court's Order does not include a date that infringement began. The Court finds, however, that because default judgment has been entered as to the Strobecom II, and because there is no dispute that the Strobecom II went on the market in 1997, the law provides that 1997 is the proper hypothetical negotiation date. Accordingly, the Court will grant this motion.

7. Global Traffic's Motion # 7-Motion to Present the Jury with the Spoliation Inference During Global Traffic's Case-In-Chief.

***6** In one of the first sanctions order issued in this case, this Court adopted the sanction suggested by Magistrate Judge Boylan that an adverse inference instruction be given to the jury because of Tomar's litigation misconduct, which included the destruction of relevant evidence. The requested instruction is:

As part of this case, Tomar destroyed and withheld relevant documents and emails. This was a violation of the Court's rules and it was improper. Because we do not know what these destroyed Tomar documents said, you may infer that Tomar destroyed documents that supported Global Traffic's damages claim and were unfavorable to Tomar's defense.

Although the Court did enter default judgment as to infringement and validity, Global Traffic argues this instruction is still warranted as it has the burden to prove damages in this case, and Tomar is vigorously fighting this claim. The sanction was originally imposed in order to punish Tomar for its destruction of evidence, and it serves to level the playing field in light of such destruction.

Tomar responds that Global Traffic has already received the bounty of sanctions in a patent case-default judgment on infringement and validity. Adding the proposed instruction would be “piling on.” This sanction was imposed a year and a half before the Court entered default judgment, and the default judgment trumps the earlier sanction order. It is cumulative and unnecessary. Tomar also argues that the instruction requested by this motion is cumulative to other proposed instructions submitted by Global Traffic. For example, Global Traffic has submitted its proposed Instruction 30 which states:

If the reason that Global Traffic has difficulty proving the amount of its lost profits is because Tomar did not keep records or destroyed records, such as records of its sales, then you should resolve doubts as to the amount of lost profits against Tomar.

Finally, Tomar argues there is no reason to give the adverse inference instruction during Global Traffic's case-in-chief. Tomar argues that to give the adverse inference instruction during the case-in-chief would simply prejudice Tomar, rather than remedy Global Traffic's prejudice suffered as a result of the destruction of documents.

The Court finds that Global Traffic is entitled to the requested adverse inference instruction during its case-in-chief. Tomar's conduct leading to the Court entering default judgment against it was uniquely egregious, and the fact that default judgment was entered does not negate the need for the adverse inference instruction at issue here. Global Traffic's burden in proving its damages is not lessened by the fact that default judgment was entered, and its ability to prove damages is clearly affected by the fact that Tomar did not retain relevant documents as required by the Rules.

8. Global Traffic's Motion # 8-Motion to Preclude Tomar from Presenting Evidence or Argument regarding Noninfringement or its 2008 Activities.

***7** Because this Court has already found that certain Tomar systems infringe, Global Traffic asserts there is no room or relevance as to any discussion of why Tomar thinks the Court's Order is wrong or why it thought it did not infringe. As the jury trial is just about damages, evidence as to infringement is irrelevant. Such evidence would also waste Court resources, confuse the jury and prejudice Global Traffic as the issue of infringement has been decided.

As Global Traffic is not seeking any damages with respect to any activities occurring in 2008, and because Global Traffic is not claiming willful infringement, evidence as to Tomar's activities during 2008 is also irrelevant.

Tomar responds that this motion is overly broad and vague. If there is a specific piece of evidence that Global Traffic would like to keep out, it should bring a proper motion. Tomar does not dispute that the default judgment order should be not admitted at trial. Also, Tomar has no intention of trying noninfringement issues. To the extent that Global Traffic's motion seeks to exclude testimony and evidence of the structure, operation, development and nature of the accused Tomar products, Tomar opposes the motion for such evidence is relevant for context and/or background for the jury, and is relevant to a reasonably royalty calculation.

Based on Tomar's assurances that it does not intent to submit evidence as to noninfringement issues or submit as evidence the Court's default judgment Order, the Court will reserve its ruling on this motion.

9. Tomar's Motion in Limine to Exclude Prior Sanctions Orders.

By this motion, Tomar seeks to exclude the Sanctions Orders dated July 21, 2006, September 18, 2006 and December 27, 2006. Global Traffic agrees that presenting the Orders to the jury is unnecessary. Whether the Orders may be introduced as rebuttal evidence will be reserved.

10. Tomar's Motion in Limine # 2-Motion to Exclude Global Traffic's Injunction Phase Exhibit List and to Enforce Pretrial Scheduling Order

This motion is related to Global Traffic's Motion in Limine # 3. Again, Tomar objects to the Court holding a separate hearing on Global Traffic's motion for injunctive relief. As the Court has determined that an evidentiary hearing is warranted, this motion will be denied.

IT IS HEREBY ORDERED that:

1. Global Traffic's Motion to Preclude Tomar from Presenting Evidence or Argument on Equitable Estoppel [Doc. No. 244] is MOOT.

2. Global Traffic's Motion to Exclude Tomar's 3080 and 3140 OSPs as Alleged Noninfringing Substitutes from the Trial on Damages [Doc. No. 245] is GRANTED. Tomar is precluded from presenting evidence, argument, or testimony, including from Dwight Duncan and Scott Sikora, or cross-examining witnesses regarding a 3080 or 3140 OSP at trial.

3. Global Traffic's Motion to Hold a Separate Hearing on an Injunction [Doc. No. 246] is GRANTED. The Court will conduct a separate evidentiary hearing on the appropriate injunction.

***8** 4. Global Traffic's Motion to Exclude Undisclosed Damages Evidence [Doc. No. 247] is RESERVED.

5. Global Traffic's Motion to Exclude Expert Testimony of Hearsay Conversations [Doc. No. 248] is DENIED.

6. Global Traffic's Motion to Exclude Expert Opinion of a Reasonable Royalty based on a Hypothetical Negotiation Date in 2005 [Doc. No. 249] is GRANTED.

7. Global Traffic's Motion to Present the Jury with the Spoilation Inference During Global Traffic's Case-In-Chief [Doc. No. 250] is GRANTED. The Court will read to the jury the following adverse inference instruction during Global Traffic's case-in-chief:

As part of this case, Tomar destroyed and withheld relevant documents and emails. This was a violation of the Court's rules and it was improper. Because we do not know what these destroyed Tomar documents said, you may infer that Tomar destroyed documents that supported Global Traffic's damages claim and were unfavorable to Tomar's defense.

8. Global Traffic's Motion to Preclude Tomar from Presenting Evidence or Argument regarding Noninfringement or its 2008 Activities [Doc. No. 251] is RESERVED.

9. Tomar's Motion in Limine [Doc. No. 256] is GRANTED in part and DENIED in part as follows: the Motion to Exclude Prior Sanctions Orders in Global Traffic's Case-in-Chief is GRANTED and the Motion to Exclude Global Traffic's Injunction Phase Exhibit List and to Enforce Pretrial Scheduling Order is DENIED.

D.Minn.,2008.
Global Traffic Technologies, LLC v. Tomar Electronics, Inc.
Not Reported in F.Supp.2d, 2008 WL 6397825 (D.Minn.)

END OF DOCUMENT

IN RE: UNIVERSAL SERVICE FUND TELEPHONE BILLING PRACTICES LITIGATION; This Order Relates to All Cases

Case No. 02-MD-1468-JWL

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

2008 U.S. Dist. LEXIS 74548

September 26, 2008, Decided
September 26, 2008, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part *In re Universal Serv. Fund Tel. Billing Practices Litig., 2009 U.S. Dist. LEXIS 13443 (D. Kan., Feb. 20, 2009)*

PRIOR HISTORY: *In re Universal Serv. Fund Tel. Billing Practices Litig., 2008 U.S. Dist. LEXIS 73829 (D. Kan., Aug. 15, 2008)*

COUNSEL: [*1] For In Re Universal Service Fund Telephone Billing Practice Litigation, Plaintiff: Emmanuel N. Ayuk, LEAD ATTORNEY, Stinson Morrison Hecker LLP-Walnut, Kansas City, MO; Isaac L. Diel, LEAD ATTORNEY, Sharp McQueen P.A., Overland Park, KS.

For Plaintiffs: Isaac L. Diel, LEAD ATTORNEY, Sharp McQueen P.A., Overland Park, KS; Jennifer Fountain Connolly, LEAD ATTORNEY, Wexler Wallace, LLP, Chicago, IL; Marc R. Stanley, LEAD ATTORNEY, Stanley Mandel & Iola-Dallas, Dallas, TX.

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For Harris, Wiltshire & Grannis, LLP, Respondent: Fred Campbell, Michael Nilsson, Patrick O'Donnell, LEAD ATTORNEYS, Harris, Wiltshire & Grannis, LLP, Washington, DC.

Patricia C. Howard, Miscellaneous, Pro se, Washington, DC.

For Pam Hattaway, formerly known as Pam Holloway, George Hattaway, [*2] Objectors: Charles M. Thompson, LEAD ATTORNEY, Birmingham, AL.

T. J. Adamczyk, Objector, Pro se, Chicago, IL.

JUDGES: John W. Lungstrum, United States District Judge.

OPINION BY: John W. Lungstrum

OPINION

MEMORANDUM AND ORDER

This multidistrict litigation proceeding involves class actions against defendant AT&T Corporation ("AT&T") alleging a price-fixing antitrust conspiracy in connection with Universal Service Fund ("USF") fees, occurring between August 1, 2001, and March 31, 2003. A subclass of AT&T's California residential customers also maintain a claim for breach of contract under New York state law relating to USF fees. This matter is now before the court on AT&T's motions to exclude certain testimony by plaintiff's experts, Simon Wilkie and Michael Williams, concerning issues of liability (Doc. # 905) and damages (Doc. # 907). For the reasons set forth below, AT&T's motion concerning these experts' liability opinions is **denied** in its entirety. AT&T's motion concerning these experts' damages opinions is **granted in part and denied in part**. Specifically, the court grants the motion with respect to the experts' opinions regarding damages attributable to MCI's business customers, but denies the motion in all other [*3] respects.

I. Governing Standards

In *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, the Supreme Court instructed that district courts are to perform a "gatekeeping" role concerning the admission of expert scientific testimony. *See id. at 589-93*; *see also Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 147-48, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. The governing rule of evidence states as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

In order to determine that an expert's opinions are admissible, this court must undertake a two-part analysis: first, the court must determine that the witness is qualified by "knowledge, skill, experience, training, or education" to render the opinions; and second, the Court [*4] must determine "whether the witness' opinions are 'reliable' under the principles set forth" in *Daubert and Kumho Tire. See Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965, 969 (10th Cir. 2001)*. The rejection of expert testimony is the exception rather than the rule. *See Fed. R. Evid. 702* advisory committee notes.

In its present motions, AT&T does not challenge the qualifications of Drs. Wilkie and Williams, but instead focuses on the reliability of their opinions. In determining whether the proffered testimony is reliable, the court assesses whether the reasoning or methodology underlying the testimony is "scientifically" valid and whether that reasoning or methodology can be properly applied to the facts in issue. *See Daubert, 509 U.S. at 592-93*. The *Daubert* Court listed four factors relevant to assessing reliability: (1) whether the theory has been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error associated with the theory; and (4) whether the theory has attained widespread or general acceptance. *Id. at 592-94*. In *Kumho Tire*, however, the Supreme Court emphasized that these four factors are not a "definitive [*5] checklist or test" and that a court's inquiry into reliability must be "tied to the facts of a particular case." *Kumho Tire, 526 U.S. at 150*. In some cases, "the relevant reliability concerns may focus upon personal knowledge or experience," rather than the *Daubert* factors and scientific foundations. *Id.* (quoted in *Bitler v. A.O. Smith Corp., 400 F.3d 1227, 1235 (10th Cir. 2004))*. The district court has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id. at 152*.

II. Motion to Exclude Expert Liability Opinions (Doc. # 905)

A. *Analyses of Conduct Parameters and Price-Cost Margins*

AT&T first seeks to exclude testimony by Drs. Wilkie and Williams (who jointly authored expert reports) concerning their analyses of the allegedly conspiring carriers' conduct parameters and price-cost margins. In their initial report, the experts cited those analyses as "independent bases" for their conclusion that the carriers' actions were contrary to their self-interests absent an agreement and were best explained by the existence of a price-fixing agreement. AT&T argues that those analyses lack the necessary "fit" or relevance [*6] to the antitrust claim in this case--that a price-fixing agreement existed with respect to USF charges--because the analyses were based on data that excluded USF figures. AT&T thus argues that such analyses cannot reliably demonstrate the existence of an agreement, in part because the results of the analyses would be the same whether or not an agreement actually existed.

The court rejects AT&T's challenge to the experts' testimony based on these analyses. Since their initial report, the experts have made clear that they do not hold the opinion that the studies, in and of themselves, demonstrate the existence of a price-fixing agreement; rather, their opinion is that those analyses are factors that contribute to their overall opinion that an agreement likely existed, based on the totality of all of the economic evidence. [1] Specifically, the experts conclude that the analyses demonstrate conduct by the carriers concerning long-distance rates that was contrary to their self-interests absent an agreement. It is true that the alleged conspiracy involves USF charges and not long-distance rates; nevertheless, the experts opine that the analyses demonstrate conditions in the underlying market [*7] that would facilitate successful implementation of a price-fixing agreement concerning USF charges. Thus, the two analyses may be relevant to the ultimate question of whether the carriers' conduct concerning USF charges resulted from a price-fixing agreement.

1 The court therefore rejects AT&T's alternative request to bar the experts from testifying that the analyses show conduct regarding USF charges contrary to the carriers' self-interest absent an agreement.

Moreover, plaintiffs have submitted credible evidence, in the form of affidavits from Drs. Wilkie and Williams and from two additional expert economists, that such a method is generally accepted in the field as material to a determination concerning price-fixing. The court rejects AT&T's argument that this method is not sufficiently "falsifiable". As one of the additional experts points out, the method is falsifiable, as that term is understood in this field, because different results in the two analyses (showing an underlying market that was *not* conducive to implementation of a USF price-fixing agreement) would weigh differently in determining ultimately whether an agreement likely existed. Accordingly, the court denies AT&T's [*8] motion to exclude as unreliable the opinions of Drs. Wilkie and Williams concerning the carriers' conduct paramaters and price-cost margins.

The court also denies AT&T's request to exclude this evidence under *Fed. R. Evid. 403*. Plaintiffs' experts relied on these analyses as bases for their ultimate opinion concerning whether a price-fixing agreement existed. Thus, the probative value of the evidence is significant, and that value is not substantially outweighed by any danger of unfair prejudice, confusion, or delay demonstrated by AT&T. *See id.*

B. *Over-Recovery*

Drs. Wilkie and Williams also opined that the carriers' over-recovery of USF charges from their customers, in excess of the carriers' USF obligations to the government, was contrary to their self-interests absent an agreement, and that such conduct therefore weighed in favor of finding a price-fixing agreement. AT&T challenges the admissibility of that opinion on three grounds.

First, AT&T argues that the opinion is not "based upon sufficient facts or data," as required by *Rule 702*, because the experts did not rely on empirical studies showing that, in the absence of an agreement, companies actually do compete with each other by [*9] passing through less than 100 percent of a tax to their customers. The court rejects this argument. The experts based this opinion on a substantial "pass-through" analysis, which was based on data concerning the market, prices, costs, and other factors, as well as on data from which they conclude that AT&T actually did over-recover USF charges from customers. Thus, the opinion satisfies this requirement of the rule. AT&T has not provided any authority requiring a reliance on "empirical" studies. AT&T's argument concerning the bases for the experts' opinion goes to the weight of the opinion, and not to its admissibility.

Second, AT&T argues that the experts' pass-through analysis is not a reliable method for detecting conduct contrary to self-interest or the existence of a price-fixing agreement. AT&T relies primarily on the classic *Daubert* factors, arguing that the method of using a pass-through analysis to detect a price-fixing agreement has not been tested, published, or peer-reviewed, and that the experts have not cited an error rate or confidence interval or controlling standards.

Again, the court concludes that the experts' opinion is sufficiently based in principles generally-accepted [*10] in the field of economics. Plaintiffs' experts and the additional experts retained for purposes of this motion confirm that the underlying pass-through analysis is non-controversial and based on a number of sources and authorities. Drs. Wilkie and Williams employed that method to conclude that, under the specific conditions found in the telecommunications industry, in a competitive market an item which they deem to be equivalent to an ad valorem tax, such as the USF, would be expected to be under-recovered by the carriers. Based on their conclusion that the carriers actually over-recovered USF charges from their customers, they further concluded that a price-fixing agreement was indicated. Those conclusions were not dependent upon the type of precision concerning variables and error rates that AT&T urges. AT&T's arguments--including those based on the presence of variables and studies that allegedly show over-recovery of taxes in other industries--are better reserved for the jury and go to weight instead of admissibility.

Third, AT&T argues that the experts' method was not reliably applied in this case, as required under *Rule*

702. Specifically, AT&T argues that in determining whether [*11] the carriers actually exceeded the expected pass-through rate for the USF charges, the experts erroneously looked only at the line-item USF charges collected from customers, instead of properly looking at the carriers' "all-in" total prices for the customers. The court rejects this argument as well. Plaintiffs' experts did analyze the carriers all-in prices, and they also have provided a number of reasons why consideration of the all-in prices are unnecessary for this purpose. Again, AT&T's challenges to the manner in which the experts applied their opinion to the facts of this case may be presented to the jury, but they do not affect the admissibility of the experts' opinion.

Accordingly, the court denies AT&T's motion to exclude this expert opinion.

C. *Fact Testimony -- Sunk Costs and Opportunities to Communicate*

As a further basis for their ultimate opinion concerning a price-fixing agreement, Drs. Wilkie and Williams rely on evidence that the carriers attempted to charge USF fees to their customers in amounts high enough to offset prior under-recoveries. In the experts' opinion, in trying to recover such "sunk costs", the carriers acted contrary to their self-interests absent an agreement. [*12] In support of this opinion, the experts cited various documents as evidence that the carriers did in fact attempt to recover sunk costs in this way. As a separate basis for their ultimate price-fixing opinion, the experts have also stated that their review of various documents show that the carriers had opportunities to communicate concerning their USF charges to customers and did in fact engage in such communications.

AT&T seeks to exclude any "fact testimony" by the experts in support of these opinions. AT&T disputes these facts regarding whether the carriers did attempt to recover sunk costs and whether they did engage in such communications, and it argues that the determination of such facts from the evidence is not properly within the experts' province. AT&T also argues that an expert is not needed to make the point to the jury that it is easier to conspire if you communicate.

The court denies AT&T's motion at this time. In their testimony, the experts may properly identify the documentary evidence on which they base their economic opinions. For instance, the experts may properly testify that, assuming that the carriers did in fact try to recover sunk costs concerning USF charges, [*13] such conduct would be contrary to self-interest absent an agreement, which supports the existence of an agreement under economic principles. It is true that the experts may not merely parrot or recite factual evidence, without offering a valid expert opinion based on such evidence; nor may they attempt to lend credibility, as experts, to certain evidence relevant to disputed issues of fact. *See Ash Grove Cement Co. v. Employers Ins. of Wausau, 246 F.R.D. 656, 661, 663 n.5 (D. Kan. 2007)*. They may, however, identify the factual bases for the assumptions concerning sunk costs and communications on which they rely, in the context of rendering economic opinions based on those assumptions.

Moreover, with respect to communications, the court agrees that the experts may not opine that any particular documents reflect collusion by the carriers. *See City of Tuscaloosa v. Harcros Chems., 158 F.3d 548, 565 (11th Cir. 1998)*. They may, however, testify that, assuming that the carriers did have communications and opportunities to communicate regarding the setting of USF charges (as suggested by documents reviewed by the experts), such conduct would weigh in favor of finding a price-fixing agreement [*14] under the relevant economic inquiry.

Accordingly, the propriety of the experts' "factual" testimony depends on the actual testimony given, and the court therefore denies the motion to exclude at this time, without prejudice to AT&T's raising the issue at trial as appropriate.

D. *Ultimate Opinion Regarding Existence of Price-Fixing Agreement*

AT&T seeks to exclude the ultimate opinion of Drs. Wilkie and Williams that, based on various analyses and considering the totality of the economic evidence, the existence of a price-fixing agreement is "more likely than not," or is "indicated", or is supported by the "weight of the evidence," or "better explain[s]" the carriers' conduct. AT&T argues that the experts have not identified an objective, reliable method by which they combined all of their underlying analyses and contributing factors to reach their ultimate opinion. AT&T argues that the experts' actual method of merely weighing the underlying factors without use of an objective system of combining those factors is improperly subjective and untested (constituting mere "*ipse dixit*"), and is therefore unreliable.

The court rejects AT&T's argument that the experts were, in essence, required [*15] to use some sort of mathematical formula or weighting system in order to render their opinion that, based on the totality of the economic evidence, a price-fixing agreement is indicated. AT&T has not provided any authority in the caselaw for its position that an economist may not weigh underlying factors and analyses in this way. [2] The experts' opinion here is not simply "subjective" in the sense that it is without basis; rather, their opinion is based on specific economic factors and analyses. Thus, the opinion does not represent the type of mere intuition or unscientific speculation or mere hunch that the courts decried in the cases cited by AT&T. *See Zenith Electronics Corp. v. WH-TV Broadcasting Corp., 395 F.3d 416, 419 (7th Cir. 2005)*; *Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318-19 (7th Cir. 1996)*. Plaintiffs have sufficiently established that their experts' ultimate opinion involves "real science". *Cf. Rosen, 78 F.3d at 318*.

> 2 The opinion at issue in this case is easily distinguished from the expert opinion ruled inadmissible in *Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000)*, which AT&T cites. In Elcock, the court rejected an expert's novel synthesis of two discrete methods [*16] to reach a particular disability rating percentage. *See id. at 748-49*. In the present case, the experts have not combined their underlying analyses to attempt to reach a particular mathematical figure or range, as in *Elcock*. Rather, the experts have weighed analyses and factors to determine whether a particular fact is indicated or not, in the context of their expertise as economists. Thus, the experts' "method" of considering the totality of the economic circumstances is more akin to the cross-checking of multiple methods sanctioned by the *Elcock* court. *See id. at 748 n.6*.

AT&T's reliance on the case of *Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003)*, is similarly misplaced. In that case, the court upheld the exclusion of an expert's opinion that certain facts raised an inference of collusion, on the basis that the opinion was not helpful to the jury because it did not distinguish between lawful conscious parallelism and unlawful price-fixing. *See id. at 1323*. In this case, however, the experts have specifically opined that the factors and analyses that they considered lead to a conclusion of price-fixing. Thus, the opinion goes to the same question at issue [*17] in the case, and would therefore be helpful to the jury.

The court also rejects AT&T's argument that the experts' method is unreliable because there is no means by which another expert could reproduce the weighing and get the same results. Certainly, in almost every contested case, the parties' opposing experts disagree with respect to their ultimate opinions; that fact does not make one expert's methodology inadmissible. Moreover, this type of expert opinion, involving the weighing of factors to reach the most reasonable explanation, does not lend itself to the type of "objective" mathematical approach upon which AT&T insists.

Finally, the only evidence supplied by the parties on this question of the experts' method comes from plaintiffs, who submitted affidavits from these and other experts. Those experts state that the method of weighing the relevant economic evidence to reach a conclusion concerning the existence of a price-fixing agreement is generally accepted and proper within the field of economics. AT&T has not rebutted that evidence. For all these reasons, the court concludes that the ultimate opinion by Drs. Wilkie and Williams, as set forth above, is sufficiently reliable [*18] and helpful to the jury to be admissible, and that AT&T's arguments concerning the method in which that opinion was reached go only to the weight of that opinion before the jury. Accordingly, the court denies the motion to exclude this opinion.

E. *Offset of Alleged USF Over-Recovery*

AT&T has taken the position that plaintiffs cannot demonstrate the requisite injury to each class member unless they show that the carriers' total "all-in" prices charged to customers were higher than they would have been absent the alleged price-fixing agreement concerning USF charges. In that regard, AT&T notes that Drs. Wilkie and Williams have focused on the carriers' line-item USF charges to customers in forming their opinion that the carriers over-recovered USF charges from customers, in excess of the pass-through rate expected in the absence of an agreement. This argument by AT&T is relevant because the carriers might actually have competed concerning the pass-through of the USF charges by lowering their all-in prices in such amount as to offset completely any over-recovery in the line-item USF charges; thus, the actual pass-through of the USF charge to customers might not have exceeded the pass-through [*19] rate expected in the absence of an agreement, and no price-fixing agreement would then be indicated.

In response, plaintiffs' experts have opined that the customers did suffer injury and the carriers did over-recover, based on an analysis of the line-item charges, because the all-in prices did not decline over time in an amount sufficient to offset the carriers' actual over-recovery with respect to the USF charges alone. [3] AT&T now seeks to exclude that opinion, arguing that the experts did not identify a reliable basis for that opinion.

> 3 In rejecting AT&T's absence-of-injury argument on summary judgment, the court relied not only on this opinion by Drs. Wilkie and Williams, but also on the existence of evidence that AT&T in fact chose to pass through its USF obligations as a separate line-item, instead of choosing to under-recover in order to compete with other carriers. *See* Memorandum and Order of June 30, 2008 (Doc. # 887) at 69.

The court rejects this argument for exclusion of the experts' testimony. The experts have clearly explained that this opinion was based on multiple analyses of the carriers' all-in prices. The fact that those analyses were independent of USF charges (and would [*20] have come out the same way whether or not a conspiracy existed) would not appear to be relevant to this specific determination of whether the all-in price (exclusive of the USF line-item charge) was purposefully reduced enough to offset over-recoveries in the separate USF line-item charge. Therefore, the court denies AT&T's motion to exclude this expert testimony, and AT&T's motion is denied in its entirety.

III. Motion to Exclude Expert Damages Opinions (Doc. # 906)

By separate motion, AT&T seeks to exclude certain expert damages opinions by Drs. Wilkie and Williams relating to plaintiffs' antitrust claim. [4]

4 In addition to the two arguments addressed below, AT&T argues in this motion that the experts' antitrust damages opinions should be excluded in their entirety on the basis that the experts failed to establish an effect on the all-in prices, and therefore that the plaintiff customers did not suffer injury or damages, for the reasons set forth in AT&T's motion to exclude the experts' liability opinions. For the same reasons set forth above, the court also rejects this argument in the context of damages. *See supra* Part II.E.

A. *Damages Attributable to MCI's Business Customers*

AT&T first [*21] seeks to exclude the calculations by Drs. Wilkie and Williams of the damages suffered by MCI's business customers during the relevant period from August 2001 through March 2003. The only basis for those calculations identified by the experts is a spreadsheet produced by MCI in discovery that appears to contain USF data for a prior time period. The spreadsheet was not identified by any witness in discovery, however, and there is no evidence by which a foundation for the document could be established. AT&T argues that the experts' calculations cannot be based solely on a document that completely lacks foundation.

Plaintiffs respond that the evidence underlying an expert's opinion need not be admissible, and that AT&T's concerns about the reliability of the underlying information go merely to the weight to be afforded the opinion. [5] The applicable rule provides, however, that the underlying facts or data need not be admissible if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Fed. R. Evid. 703*. Thus, AT&T's objection does not merely go to the weight of the opinion. Rather, the relevant inquiry is whether [*22] expert economists, in performing damage calculations, reasonably rely on a spreadsheet in instances in which they do not know how or when or why or by whom the spreadsheet was created, or anything else about the reliability of the figures contained therein.

5 Plaintiffs also suggest that the wrongdoer should bear any risk of uncertainty regarding the underlying data if that party caused the lack of evidence; however, plaintiffs have not explained how AT&T could be responsible for plaintiffs' failure to obtain additional evidence or discovery from MCI, including basic foundational evidence.

Plaintiffs have not directly addressed this question. Although they have submitted affidavits by Drs. Wilkie and Williams and by two additional experts as well, which were created solely for the purpose of responding to AT&T's motions, none of those affiants indicates or suggests that experts in their field would reasonably rely on such a spreadsheet as the sole basis for a damage calculation. Nor have plaintiffs, in their response brief, even attempted to argue that expert economists reasonably rely on documents without any foundation. Accordingly, the court concludes that expert economists do not [*23] reasonably rely on such spreadsheets, and the resulting damage calculations must therefore be excluded.

This conclusion is supported by the Tenth Circuit's opinion in *TK-7 Corp. v. Estate of Barbouti, 993 F.2d 722 (10th Cir. 1993)*. In that case, the court held that an expert's opinion based on conclusions reached in an inadmissible study authored by someone else did not provide sufficient evidence in support of a claim for lost future profits. *See id. at 731-34*. First, the court noted that, although an expert may base an opinion on underlying factual assumptions, there must be admissible evidence supporting those assumptions. *See id. at 731-32*. In the present case, plaintiffs cannot cast this damage calculation as one based on the assumption of particular figures from the prior years because they have failed to identify any admissible evidence relating to those prior-year figures.

The Tenth Circuit next concluded in *TK-7* that the expert there did not reasonably rely on the study under *Rule 703* because there was no indication that he had any familiarity with the methods or reasoning used by the study's author in reaching the pertinent conclusions, or that he knew much of anything at all [*24] about the author. *See id. at 732*. That lack of knowledge precluded any assessment of the validity of the underlying basis through cross-examination of the expert. *See id.* Similarly here, Drs. Wilkie and Williams have not shown that they know anything at all about the spreadsheet on which they rely, and therefore the reliability of the data on that spreadsheet cannot be assessed at trial by AT&T. Simply put, there is no reliable or admissible evidence supporting these damage calculations by Drs. Wilkie and Williams. Plaintiffs cannot cure the lack of foundation for the spreadsheet simply by making that spreadsheet a basis for an expert's opinion.

Accordingly, the court grants AT&T's motion to exclude this opinion, and Drs. Wilkie and Williams will not be permitted to testify concerning their calculation of antitrust damages relating to MCI's business customers. [6]

6 In light of this ruling, the court need not address AT&T's alternative argument that the experts' method of extrapolating damages for the relevant claims period from prior-year figures is unreliable.

B. *Over-Recovery Damages*

Finally, AT&T seeks to exclude the damages calculations of Drs. Wilkie and Williams relating to the carriers' [*25] "over-recovery" of more than 100 percent of their USF obligations from their customers. In this case, plaintiffs have alleged that the carriers unlawfully conspired to collect from their customers at least 100 percent of their USF obligations. AT&T has argued that because the alleged conspiracy does not extend to an agreement to *over-recover* those obligations, there can be no causal relationship between the alleged conspiracy and any damages for amounts recovered in excess of 100 percent (over-recoveries). In denying AT&T's motion for reconsideration of the court's summary judgment order, the court rejected this argument, ruling that "a trier of fact could conclude that any over-recovery by the carriers (just like full recovery) was the result of the conspiracy." Memorandum and Order of July 17, 2008 (Doc. # 892) at 5.

AT&T again revives this argument in an attempt to knock out any claim for over-recovery damages, this time under the guise of an attack on the experts' damages calculations. AT&T points out that Drs. Wilkie and Williams have concluded that the carriers likely entered into a price-fixing agreement to recover at least 100 percent of their USF obligations, while disclaiming [*26] any opinion that the carriers unlawfully agreed to recover *in excess of* 100 percent of those obligations. Thus, AT&T argues that the experts' calculations relating to over-recovery damages do not "fit" with their liability opinion, and should therefore be excluded. AT&T argues that the experts have no basis for concluding that all over-recoveries resulted from the alleged conspiracy, and that they improperly failed to consider alternative explanations for over-recovery, such as forecasting errors.

The court once again rejects this attack. The experts' damages calculations that include over-recoveries do not lack an underlying basis. The experts have concluded that the carriers would not have passed through more than 95 percent (using the most conservative figure) of their USF obligations absent an agreement, and that any recovery over that level (including over-recoveries in excess of 100 percent of their obligations) was therefore caused by the conspiracy. AT&T's expert has opined that forecasting errors could explain some over-recoveries, but Drs. Wilkie and Williams have rebutted that opinion. This dispute among the experts concerning whether other events caused over-recoveries of [*27] USF charges must be left for the jury. *See, e.g., McCoy v. Whirlpool Corp., 258 Fed. App'x 189, 196 (10th Cir. Dec. 5, 2007)* (expert testimony should not have been excluded for failure to address alternative arguments adequately; resolution of dispute between experts was properly within the province of the jury). The court denies AT&T's motion to exclude this testimony.

IT IS THEREFORE ORDERED BY THE COURT THAT AT&T Corp's Motion to Exclude the Liability Opinions of Plaintiffs' Experts (Doc. # 905) is **denied**.

IT IS FURTHER ORDERED BY THE COURT THAT AT&T Corp.'s Motion to Exclude the Damages Opinions of Plaintiffs' Experts (Doc. # 907) is **granted in part and denied in part**, as set forth herein.

IT IS SO ORDERED.

Dated this 26th day of September, 2008.

/s/ John W. Lungstrum

John W. Lungstrum

United States District Judge

United States District Court,
S.D. New York.
U.S INFORMATION SYSTEMS, INC., Odyssey Group, Inc. and Blue Diamond Fiber Optic Networks, Inc., Plaintiffs,
v.
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NUMBER 3, AFL-CIO, A R Communication Contractors Inc., ADCO Electrical Corporation, Five Star Electric Corporation, Forest Electric Corporation, Hugh O'Kane Electric Company LLC, IPC Communications, Inc. and NEAD Information Systems, Defendants.
No. 00 Civ. 4763 RMB JCF.

Aug. 1, 2006.

MEMORANDUM AND ORDER

FRANCIS, Magistrate J.

***1** The defendants in this antitrust action previously moved for summary judgment. They now seek an order striking evidence cited in the plaintiffs' brief in opposition to the summary judgment motion as well as portions of the plaintiffs' statement of facts submitted pursuant to Local Civil Rule 56.1. The defendants argue that the plaintiffs' brief and their Local Rule 56.1 statement rely upon inadmissible evidence and that, in addition, the plaintiffs' Local Rule 56.1 statement fails to comply with basic requirements of the rule. For reasons that follow, the defendants' motion to strike is granted in part and denied in part.

Background

The plaintiffs are contractors who employ members of the Communication Works of America, AFL-CIO (the "CWA") to install low-voltage telecommunications and data ("tel-data") wiring for commercial customers. The defendants are Local Union Number 3 ("Local 3"), AFL-CIO, of the International Brotherhood of Electrical Workers (the "IBEW") and several electrical contractors employing Local 3 members. The plaintiffs allege that the defendants have engaged in a concerted effort to coerce building owners, tenants, construction managers, general contractors, information technology consultants, and others in the construction industry to exclude CWA contractors from the tel-data marketplace in violation of § 1 of the Sherman Antitrust Act, [FN1] 15 U.S.C. § 1, and New York State's Donnelly Act, N.Y. Gen. Bus. Law § 340. (Second Complaint ("SC"), ¶¶ 36, 70-92). According to the plaintiffs, the defendants advance their conspiracy by, for example, threatening to withdraw manpower from construction sites as soon as CWA contractors show up for work, refusing to engage in overtime, and threatening and carrying out acts of vandalism on construction sites. The alleged purpose of all of these acts has been to convince commercial construction executives that hiring CWA contractors will result in delays and drive up costs. (SC, ¶ 41).

FN1. The plaintiffs initially asserted claims under §§ 1 and 2 of the Sherman Antitrust Act but have since withdrawn their § 2 claims. (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pl. SJ Memo." at 27).

On August 26, 2005, the defendants filed a motion for summary judgment, arguing, among other things, that the plaintiffs do not have any evidence, except inadmissible hearsay, of an agreement among the defendants or of illegal conduct by Local 3 contractors or union agents. The defendants further contend that, even if the plaintiffs can prove a conspiracy, they cannot prove an anti-competitive effect because the tel-data market place is a highly competitive one that allows new contractors to enter and thrive. The plaintiffs responded on November 22, 2005, with a memorandum of law opposing summary judgment, pointing to Local 3's long history of unlawful conduct against the CWA and describing multiple incidents at construction job sites from which, the plaintiffs asserted, an antitrust conspiracy could be inferred.

As required by Local Civil Rule 56.1(a) of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York (the "Local Rules"), the defendants annexed a statement of material facts to their brief. (Defendants' Joint Statement of Facts About Which There Is No Genuine Dispute ("Def. Rule 56.1 Statement")). Each of the eight defendants contributed a section addressing specific allegations of misconduct. In total, the defendants' Local Rule 56.1 statement consists of 563 numbered paragraphs.

***2** Under the Local Rules, parties opposing summary judgment must also file a statement of facts. Local Civil Rule 56.1(b). The non-moving party's statement is to respond to the facts in each of the numbered paragraphs in the moving party's statement. Accordingly, the plaintiffs here filed a Local Rule 56.1 statement with numbered paragraphs addressing each of the defendants' 563 assertions. (Plaintiffs' Response to Defendants' Joint Statement of Purported Undisputed Facts ("Pl. Rule 56.1 Statement" or "counterstatement")).

Shortly after the parties completed their summary judgment submissions, the defendants' filed this motion seeking an order to strike eighty statements in the plaintiffs' memorandum of law and nearly every entry in the plaintiffs' Local Rule 56.1 counterstatement. Their contentions can be summarized as follows: (1) the plaintiffs rely on hearsay in their brief and their counterstatement and have failed to establish that those statements are subject to any hearsay exception; (2) they use their expert's report as a conduit for hearsay evidence in both the brief and the counterstatement; (3) they improperly rely on past judicial and agency determinations to prove Local 3's current conduct in both documents; (4) they offer documents that lack authentication; (5) their factual assertions are not supported by the evidence they cite or the evidence is irrelevant, and (6) their Local Rule 56.1 counterstatement violates the fundamental requirements of the rule.

The plaintiffs respond that statements identified as hearsay are in many instances not assertions at all but, rather, verbal acts, and that those statements that are assertions are admissible under Rule 803(3) of the Federal Rules of Evidence. They contend that they have cited their expert's report properly, even where the cited portions include hearsay, because experts are permitted to testify to opinions based on inadmissible evidence. And they argue that evidence of Local 3's battles with the CWA before the courts and the National Labor Relations Board (the "NLRB") over the years is admissible under Rule 406 of the Federal Rules of Evidence to prove that the union's conduct in this case was in conformity with its routine practices. Finally, the plaintiffs argue that the defendants have misidentified the evidentiary burden borne by plaintiffs seeking to prove an antitrust conspiracy and that proof of the illegal agreement can rest on circumstantial evidence alone.

Because the volume of statements under dispute is so large, a roadmap is in order. This memorandum addresses the legal issues raised by the defendants' motion. To the extent that analysis permits categorical decisions about disputed evidence, I have attached an appendix showing statements covered by categorical decisions. To the extent a categorical decision is not possible, I have addressed testimony and documents individually.

Discussion

A. *Compliance with Local Rule 56.1*

***3** The defendants seek to strike statements that they contend fail to adhere to basic requirements of Local Rule 56.1. Compliance with the rule can be determined categorically.

Local Civil Rule 56.1 provides the method by which parties are to set their factual disputes before district courts in the Southern and Eastern Districts of New York. Under the rule, assertions in the moving party's statement of material facts "will be deemed admitted *for purposes of the motion* unless *specifically* controverted by *a correspondingly numbered paragraph* in the statement required to be served by the opposing party." Local Civil Rule 56.1(c) (emphases in original). Every statement in the parties' Local Rule 56.1 submissions must be supported by citations to record evidence. Local Civil Rule 56.1(d). "*Rule 56.1 statements are not argument.* They should contain factual assertions with citation to the record. They should not contain conclusions." *Rodriguez v. Schneider*, No. 95 Civ. 4083, 1999 WL 459813, at n. 3 (S.D.N.Y. June 29, 1999) (emphasis in original); *seealsoGiannullo v. City of New York*, 322 F.3d 139, 142 (2d Cir.2003) (unsupported facts in moving party's Local Rule 56.1 statement disregarded); *Holtz v. Rockefeller & Co., Inc.,* 258 F.3d 63, 74 & n. 1 (2d Cir.2001) (same).

A non-moving party cannot create a factual dispute merely by denying a movant party's factual statement; rather, the non-moving party must identify controverting evidence for the court. *SeeAristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, No. 04 Civ. 10014, 2006 WL 1493132, at *5 (S.D.N.Y. May 31, 2006); *Blackmon v. Unitel*, No. 03 Civ. 9214, 2005 WL 2038482, at *2 (S.D.N.Y. Aug. 25, 2005); *Chimarev v. TD Waterhouse Investor Services, Inc.*, 280 F.Supp.2d 208, 223 (S.D.N.Y.2003). Moreover, plaintiffs cannot evade the impact of accepting a fact by adding legal argument to their counterstatements. *Goldstick v. The Hartford, Inc.,* No. 00 Civ. 8577, 2002 WL 1900629, at

(S.D.N.Y. Aug. 19, 2002) (defendants' motion to strike granted insofar as plaintiffs' counterstatement consisted of more than admission or denial of assertion and citation to record). This requirement goes to the very purpose of the rule, which is "to streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties." *Holtz*, 258 F.3d at 74. Courts rely on Local Rule 56.1 to assist them "in understanding the scope of the summary judgment motion by highlighting those facts which the parties contend are in dispute." *Rodriguez*, 1999 WL 459813, at *1 n. 3.

The plaintiffs here give every indication of having thrown up their hands in frustration when they encountered the defendants' 563-paragraph statement. In close to four hundred and fifty responding paragraphs, the plaintiffs object-strenuously-to the kind and amount of material in the defendants' statement:

> ***4** This is not a proper issue for inclusion in a Rule 56.1 Statement. Whether true or not it adds nothing to the determination to be made by the Court.... (Pl. Rule 56.1 Statement, ¶¶ 189, 191-96, 210-12, 396-99).

> Objection on the ground that the statement is merely the opinion of the witness, lacks foundation and is speculation, is not relevant, and is not material for purposes of a Rule 56.1. statement. (Pl. Rule 56.1 Statement, ¶¶ 295).

> Objection on the ground that the cited document speaks for itself and that this is not a material fact; thus its inclusion in a Rule 56.1 statement is inappropriate. Moreover, the assertion is argumentative and self-serving and is inconsistent with actual practice. (Pl. Rule 56.1 Statement, ¶¶ 138-43).

> Objection on the ground that what is "important" is merely the opinion of the declarant, there is no foundation for the assertion and it is speculative. Moreover, this is a circular, self-serving argument because defendants have, through their unlawful concerted action (including the threats of a refusal to provide overtime, threats of sabotage, threats of vandalism and the actual occurrences of such actions) fostered the concern among building owners and other end users that there might be labor disharmony if a CWA contractor is utilized on a construction project. Thus, defendants have creatred the need for dispute resolution before the Building and Construction Trade Council. If, in fact, defendants did not engage in such unlawful behavior, there would be no need to provide a mechanism to resolve it.... (Pl. 56.1 Statement, ¶ 113).

In over two hundred entries, the plaintiffs dispute the factual assertions in the defendants' corresponding paragraphs with objections alone. That is, they punctuate their objections with the word "disputed" and fail to cite evidence. The plaintiffs have not provided any authority for this method of contesting a moving party's Local Rule 56.1 statement, and the tactic directly violates the rule. Assuming that the plaintiffs had meritorious objections, they had an alternative to sidestepping the rule; they could have filed a motion to strike. *See* *Glynn v. Bankers Life and Casualty Co.*, No. 3:02CV1802, 2005 WL 2028698, at *1 (D.Conn. Aug. 23, 2005) (motion to strike is appropriate vehicle to challenge admissibility of summary judgment materials); 11 James Wm. Moore et al., Moore's Federal Practice § 56.14[4][a] (same).

To the extent the plaintiffs proclaim factual assertions to be in dispute without identifying evidence in the record, the plaintiffs thwart the basic purpose of the rule. Therefore, the defendants' motion to strike is granted with regard to all entries in the counterstatement that purport to dispute the defendants' assertions without providing citations to the record. The paragraphs to be struck on this ground are listed in the appendix attached to this opinion under the heading Plaintiffs' Local Civil Rule 56.1 Paragraphs to be Struck. Under Local Rule 56.1(c), facts admitted by the plaintiffs' failure to properly dispute them are deemed admitted for the purposes of the summary judgment motion only.

B. *Admissibility of Evidence*

***5** When ruling on summary judgment, courts need only consider admissible evidence. *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir.1997) ("The principles governing admissibility of evidence do not change on a motion for summary judgment."). Rule 56(e) of the Federal Rules of Civil Procedure requires that affidavits "be made on personal knowledge, [and] set forth such facts as would be admissible in evidence." Fed.R.Civ.P. 56(e). Accordingly, courts are free to strike or disregard inadmissible statements in parties' summary judgment submissions. *See* *Patterson v. County of Oneida*, 375 F.3d 206, 219, 222-23 (2d Cir.2004); *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 197-98 (2d Cir.1999); *United States v. Private Sanitation Industry Association of Nassau/Suffolk, Inc.*, 44 F.3d 1082, 1084 (2d Cir.1995); 11 James Wm.

Moore et al., Moore's Federal Practice § 56.14[4][a] (affidavits, deposition testimony, and documents containing inadmissible evidence properly disregarded).

1. *Authentication*

The defendants challenge the authentication of a group of documents submitted by the plaintiffs in opposition to the motion for summary judgment. (*See* Exhibits 11, 14-15, 24, 27-29, 33,[FN2] 34, 47, and 52, attached to the Declaration of John E. Andrews in Opposition to Defendants' Motion for Summary Judgment ("Andrews Decl.")).[FN3] The plaintiffs counter that (1) the burden imposed by the Federal Rules of Evidence for authentication is a low one; (2) the fact of production during discovery implicitly authenticates documents, and the appearance of a Bates stamp number on the document is therefore sufficient to guarantee authenticity; and (3) several of the documents have been identified by witnesses at depositions.

FN2. Exhibits 14 and 33 are identical.

FN3. All numbered exhibits referenced in this opinion are attached to the Andrews Declaration.

Rule 901(a) of the Federal Rules of Evidence, which governs authentication, requires parties to provide "evidence sufficient to support a finding that the matter in question is what its proponent claims." The rule "does not erect a particularly high hurdle." *United States v. Dhinsa,* 243 F.3d 635, 658 (2d Cir.2001) (citation and internal quotation marks omitted). It is satisfied "if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." *United States v. Ruggiero,* 928 F.2d 1289, 1303 (2d Cir.2001) (internal quotation marks omitted). "[T]he standard for authentication, and hence admissibility, is one of reasonable likelihood." *United States v. Pluta,* 176 F.3d 43, 49 (2d Cir.1999) (internal quotation marks omitted). "If in the court's judgment it seems reasonably probable that the evidence is what it purports to be, the command of Rule 901(a) is satisfied, and the evidence's persuasive force is left to the jury." *Dhinsa,* 243 F.3d at 658 (citation and quotation marks omitted). Under Rule 901(b)(4), the requirements are met if the "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances," indicate that the document is what it is purported to be.

***6** The plaintiffs' argument that the process of discovery provides an implicit guarantee of authenticity is well-founded. In *John Paul Mitchell Systems v. Quality King Distributors, Inc.,* 106 F.Supp.2d 462 (S.D.N.Y.2000), the plaintiff sought to introduce corporate records obtained from a defendant during discovery. Because the defendant's custodian of records invoked his right under the Fifth Amendment of the United States Constitution not to testify, the plaintiffs were unable to authenticate the documents through testimony. *Id.* at 471. The court held that the act of production itself authenticated the documents. However, the court did not rely on the presence of a Bates stamp in its analysis. Rather, the court considered the circumstances under which the defendant produced the document. There was no dispute that the defendant's custodian of records had produced the documents; that fact, along with the fact that had he testified he would have been able to authenticate the document, persuaded the court that the records were admissible. *Id.* at 472. Nothing in the decision provides authority for authenticating documents on the basis of the presence of a Bates stamp alone.

For reasons set forth below, the documents identified as Exhibits 11, 14, 24, 27, 28, 34 and 52 are sufficiently authenticated to be admitted for the purposes of the summary judgment motion, and with respect to them, the defendants' motion to strike is denied. It is granted with respect to one of the documents in Exhibit 29 and the correspondence identified as Exhibit 47.

Exhibit 11 was produced by IPC Communications, Inc., a defendant in this lawsuit. A party producing a document is in a better position to know whether the document is authentic than the party seeking it in discovery. It is disingenuous for the producing party to dispute the document's authentication without proffering some basis for questioning it.

Exhibit 14 is a letter dated November 29, 1999, by Harold Lyons, vice president of Lehrer McGovern Bovis, Inc., a general contractor. The plaintiffs state that the letter was produced in discovery and that it was identified by Fred Lott at his deposition on July 18, 2002. (Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Strike ("Pl. Strike Memo.") at 11.) However, the plaintiffs have not provided the court with a copy of the cited page of the deposition transcript in which Mr. Lott made the identification. Nevertheless, taking together the content of the letter, its appearance, the fact that it describes contemporaneous events and opinions, and was written before litigation began, it is reasonably probable that the letter is authentic, and it is therefore admitted.

Exhibit 15, a letter by James D. Alger dated May 26, 2000, is authenticated by a declaration, also in Exhibit 15, in which Mr. Alger identifies the document as a letter he wrote. An attachment to the letter, a handwritten memorandum written by Leo Martin, is authenticated by Mr. Alger's reference to it in his letter. Mr. Alger's letter and the attachment are admitted.

***7** Exhibits 24, 27, 28, and 34 are a series of e-mail exchanges among members of a team at Credit Suisse First Boston ("CSFB") who discussed the particulars of construction and cabling contracts for CFSB construction projects in great detail. These exhibits were produced in discovery pursuant to subpoena. The content of the exchanges, in particular the detail about meetings and about progress on construction sites, as well as the fact that they were produced by a third party in response to a subpoena in a lawsuit in which the party has no interest make it reasonably likely that these are authentic, and they are admitted.

Exhibit 29 consists of two types of documents: (1) minutes of March 1999 meetings of a team involved in the construction of offices for the law firm Sherman & Sterling, and (2) an e-mail dated March 10, 2000. Again, the plaintiffs cite deposition testimony that is not before the court; they state that Michael Yee and Peter Babigian identified the documents at their depositions, (Pl. Strike Memo at 13), but they have not provided copies of the cited pages. The minutes nevertheless have sufficient internal indicia of authenticity to meet the requirements of Rule 901(a). They are printed on the letterhead of the general contractor, StructureTone, list the names of team members who attended and those who did not, and describe in considerable detail contemporaneous tasks to be completed. The same cannot be said of the March 10, 2000 e-mail, however. The plaintiffs have offered no proof that it is what it purports to be. For these reasons, the minutes are admitted but the e-mail is not.

Exhibit 47, a memorandum from Tom Yuen of NBC to Rina Peller of NBC, cannot be admitted because the plaintiffs have not offered any evidence that it is authentic other than the fact that it bears a Bates stamp. Nor are there internal indicia demonstrating that it is an authentic document. It is not on letterhead, there are no addresses on it, and it is undated. This document is therefore struck.

Exhibit 52 consists of bid proposals submitted to the law firm Shearman & Sterling by four contractors, including defendant Adco Electrical Corporation, Nead Electric Company, which the plaintiffs claim is affiliated with defendant Nead Information Systems, and two others. Each bid is on corporate letterhead and contains significant detail regarding the cost and job requirements of the project. The defendants are in the best position to draw the Court's attention to any indication that these documents are not authentic, but they have not done so. These documents are, therefore, admitted.

2. *Hearsay*

The defendants seek to strike paragraphs in the plaintiffs' counterstatement and dozens of sentences from the plaintiffs' brief on the basis that the underlying evidence is hearsay.[FN4] (*See* Statements In Plaintiffs' Brief That Should Be Struck As Inadmissible ("Def.App.A"), attached as Appendix A to Memorandum of Law in Support of Defendants' Motion to Strike ("Def. Strike Memo.")). There is no basis for striking sentences from a legal brief. Parties may draw the inferences they deem appropriate. It is for the decision-maker, in this case, the court ruling on summary judgment, to determine whether the party's inferences and conclusions are persuasive.

FN4. Unless otherwise noted, "plaintiffs' brief" refers to the Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.

***8** The plaintiffs have expressly declined to respond to the defendants' hearsay challenges to evidence in their Local Rule 56.1 counterstatement. They maintain that the defendants' Local Rule 56.1 statement, which is the point of departure for their counterstatement, is an unworkable document for this purpose and limit their advocacy to supporting the contested statements in their brief. (Plaintiffs' Response to Defendants' Appendix A at 1).

The defendants are correct that the plaintiffs have relied on inadmissible hearsay, but they overstate the case. They have minimized the scope of the "state-of-mind" exception found in Rule 803(3) of the Federal Rules of Evidence, which permits evidence of customer motives in antitrust cases; and they have confused perceptions drawn from ordinary inferences with knowledge based on hearsay.

i. *Exceptions under Rule 803(3)*

Two federal appellate court decisions illustrate the application of Rule 803(3), the "state-of-mind" exception, in antitrust cases. In *Callahan v. A.E.V., Inc.,* 182 F.3d 237 (3d Cir.1999), the court reversed, in part, summary judgment granted in favor of the defendants because the district court mistakenly excluded evidence it deemed hearsay. The plaintiffs were beer retailers who ran "mom-and-pop" beer stores; the defendants were a supermarket-type beer distributor and employees who had allegedly applied illegal pressure on a major beer wholesaler to obtain exclusive discounts. *Id.* at 240. The issue of liability was not before the appeals court; after excluding deposition testimony, the district court ruled that the plaintiffs could not prove antitrust damage. The excluded evidence included deposition testimony by the plaintiffs that their customers had reported that they had switched to purchasing beer from the defendants because of the lower prices. *Id.* at 250. The appeals court held that these hearsay statements were admissible under Rule 803(3) of the Federal Rules of Evidence to show why the customers had taken their business elsewhere-though not to prove that the defendants engaged in misconduct. *Id.* at 251-52. "As we have explained, statements of a customer as to his reasons for not dealing with a supplier are admissible for this limited purpose, i.e., the purpose of proving customer motive, but not as evidence of the facts recited as furnishing the motives." *Id.* at 252 (quotation and internal punctuation omitted).

Hydrolevel Corporation v. American Society of Mechanical Engineers, Inc, 635 F.2d 118 (2d Cir.1981), is a similar case. There the defendants challenged the statements of a witness who testified about his conversations with the plaintiff's customers about their reluctance to purchase the plaintiff's product. *Id.* at 128. The court ruled that the statements were admissible to prove that antitrust conduct, if otherwise proved, caused damage. *Id.*

The plaintiffs maintain that evidence they cited in a section of their brief titled "In The Terrorem Use of Direct and Indirect Threats" is admissible under 803(3) to prove their customers' motives. (*See* Pl. SJ Opp. at 17-20). To the extent the section is devoted to that purpose, the evidence they cite is properly admitted under Rule 803(3). A word of caution is in order, though. As drafted, the section's purpose is ambiguous. Its introductory statements blur the distinction drawn by the courts in *Callahan* and *Hydrolevel* between proving a customer's motive and proving the facts recited as furnishing the motives:

> ***9** In the relatively small, closed community of building owners ... and general contractors in major commercial buildings in New York City, it is now clearly understood that hiring a CWA contractor will likely create a Local 3 problem.... As reflected in internal documents and the deposition testimony of customers (through their representatives) and statements to plaintiffs, Local 3 and the defendant contractors fostered this extortionate environment: either use Local 3 contractors for VDV installation or risk the consequences. Many customers admittedly caved in and either refused to award contracts to CWA contractors or cancelled existing contracts.

(Pl. SJ Opp. at 17). A court ruling on summary judgment, however, can disregard the evidence to the extent that it goes beyond the limited scope for which it is admitted and weigh it for its proper purpose. As discussed below, much of the evidence cited in the "In Terrorem" section is admissible under Rule 803(3) for the limited purpose of proving customer intent.

As mentioned earlier in this opinion, Exhibit 15 includes a letter of Mr. Alger, president of a CWA cabling contractor, in which he stated that soon after his company won a contract to do work on a Manhattan construction project, a Local 3 business agent came to the site and instructed electricians to cease working overtime, and, shortly after that, the project's architect called Mr. Alger to cancel his contract. As cited in the plaintiffs' "In Terrorem" section of their brief and in ¶¶ 71-74, 76, 90 and 103 of the Plaintiffs' Local Rule 56.1 Statement, the evidence is admitted under Rule 803(3). However, as cited in a section of the brief titled "Defendants' Acts of Interference," (Pl. SJ Opp. at 14-17), the evidence is struck because it is offered to prove that the defendants engaged in anticompetitive conduct.

The cited evidence from Exhibit 18 is inadmissible hearsay. Christopher Shannon of Blue Diamond Fiber Optic Networks, Inc. ("Blue Diamond"), one of the plaintiff companies, testified that Qwest Communications International, Inc. ("Quest") had agreed to hire Blue Diamond to install telecommunication cables at a Manhattan construction site but then reassigned the job exclusively to defendant Hugh O'Kane Electric Company ("O'Kane"), after O'Kane electricians already employed at the site ceased working overtime and did not appear for work the following morning. Mr. Shannon obtained this information from Gary Pinney, general manager of Fiber Pro, LLC. (Exh. 18 at 256-60). Mr. Pinney, in turn, obtained the information from Patrick Marshall, a Qwest representative. (Exh.

17, ¶ 8). Had Mr. Shannon's testimony been that Mr. Marshall told him directly about the reassignment, it would have been admissible under Rule 803(3). However, no exception renders Mr. Pinney's out-of-court remarks to Mr. Shannon admissible. Mr. Shannon's testimony regarding Qwest's reasons for terminating its contract with his company must, therefore, be struck.

***10** In contrast to Mr. Shannon's testimony, his e-mail correspondence with Mr. Marshall in Exhibit 19 is admissible. Mr. Shannon and Mr. Marshall exchanged e-mails in which Mr. Marshall informed Mr. Shannon that until Blue Diamond joined the ranks of Local 3 contractors, Qwest would be unable to hire the company. This exchange falls well within the exception carved out by Rule 803(3).

Michael Lagana is a principal of one of the defendants, U.S. Information Systems, Inc. ("USIS"). In their brief, the plaintiffs cite his testimony as reflected in Exhibit 23 to argue that Equitable Life, Random House, and Globix hired Local 3 contractors to avoid threatened slowdowns and sabotage. (Pl. SJ Opp. at 19-20 (citing Exh. 23 at 283, 288, 590-92, 1060)). The testimony concerning Equitable Life and Random house is admissible under Rule 803(3) for the purpose of showing the motive of the customer. The same is true of the Globix testimony on page 1060. However, Mr. Lagana's testimony that a client told him a general contractor held one of the defendants responsible for damaged electrical cables (Exh. 23 at 1010) is inadmissible.

The plaintiffs also cited Mr. Lagana's testimony in their Local Rule 56.1 statement. The evidence is admitted as cited in paragraphs 130-32 and 383 (citing Exh. 23 at 597-603), paragraph 327 (citing Exh. 23 at 42-50), and paragraphs 384-386 (citing Exh. 23 at 598, 603). At paragraph 557, pages 490-92 of Mr. Langana's testimony are admitted, but the other pages are not. Pages 952, 956 and 965, cited in paragraph 509, are admitted to prove the truth of the matter asserted, not soley for the limited purpose of Rule 803(3), because the testimony is based on Mr. Lagana's personal knowledge of the refusal to work overtime.

The plaintiffs also cited Exhibits 24, 27-28, and 34. These are e-mails circulated among a team of managers at Credit Suisse First Boston ("CSFB") chronicling decisions the managers made to hire Local 3 contractors instead of CWA contractors, despite their frustration with the higher cost, to avoid the risk of vandalism and work stoppages. As cited in their brief the evidence is admissible (*See* Pl. SJ Opp. at 1, 28, 19, 25 and 31); as cited in paragraphs 77, 78, and 305 of their Local Rule 56.1 statement the evidence is struck because there the plaintiffs cited the e-mails to prove the underlying misconduct.

Exhibit 30 is a letter of the chief operating officer of PM Contracting Company recommending that Cushman & Wakefield, a real estate management firm, hire one of the defendants, ADCO Electrical Corporation, rather than a CWA contractor because Local 3 members had informed PM Contracting that they would not perform overtime work if a CWA contractor was present at the job site. This is admitted under Rule 803(3).

Exhibit 31 consists of the deposition of David Kaliff, a principal of Walsh-Lowe, a technology consulting firm. The plaintiffs cited excerpts where Mr. Kaliff testified about meetings among representatives of Random House, a general contractor, and Walsh Lowe. (*See* Exh. 31 at 180-89, 310-19).[FN5] Random House and the general contractor rejected Walsh Lowe's recommendation to invite CWA contractors, including USIS, to bid on a cabling job because of the potential for labor unrest at the construction site. This evidence is admitted as cited in the brief (Pl. SJ Opp. at 20, 21, and 31), and in paragraphs 130-32 of the counterstatement under Rule 803(3). Mr. Kaliff also testified about work conducted a Two Penn Plaza, and those statements are inadmissable hearsay. (Exh. 31 at 110). As cited in paragraph 226 of the counterstatement, this testimony is struck.

FN5. The plaintiffs cited pages 180-84 but the material they identified extends from page 180 to page 189.

iii. *Personal Knowledge Acquired through Others*

***11** The defendants seek to strike evidence given by witnesses who obtained their knowledge of events through interactions with other people. Personal knowledge however, is not so narrowly defined. "Although first-hand observation is obviously the most common form of personal knowledge, that is not the only basis for it." 3 J. Weinstein et al., Weinstein's Evidence, § 602.03[1][a]. In *Agfa-Gevaert, A.G. v. A.B. Dick Co.*, 879 F.2d 1518, 1523 (7th Cir.1989), Judge Posner pointed out that business executives' testimony about their products was not hearsay, even though their knowledge came from engineers instead of from first hand inspection.

All perception is inferential, and most knowledge social; since Kant we have known that there is no unmediated contact between nature and thought. Knowledge acquired through others may still be personal knowledge within the meaning of Fed.R.Evid. 602, rather than hearsay, which is repetition of a statement made by someone else-a statement offered on the authority of the out-of-court declarant and not vouched for as to truth by the actual witness.

Id. With respect to Exhibits 7, 9, 12, 14, 16-17, 21, 25, 26, 31-32, 41 and 45, for the most part, the defendants' hearsay objections are without merit because the cited testimony is founded on personal knowledge acquired through others.

Exhibit 7 consists of the deposition transcript of Joseph Ramellini of DVI Communications, Inc., a tel-data consultant who performed as project manager on several sites in New York City. He testified that (1) six or seven firms compete in the medium size cabling market in New York (Exh. 7 at 95-98); (2) it can be "disastrous" to hire electricians to do the more technically demanding aspects of cabling work (Exh. 7 at 220-21); and (3) approximately 600 cables were cut at a site he supervised (Exh. 7 at 127 & 135). The defendants argue that Mr. Ramillini's testimony is based on hearsay. However, all of his testimony rests on knowledge of the marketplace gained through years of experience and his personal knowledge of particular jobs. Mr. Ramillini's testimony is admitted.

In his deposition, the transcript of which is Exhibit 9, an executive vice president of defendant Nead Information Systems,[FN6] Robert Eccles, testified that he had met with Howard Cohen, business manager of Local 3, to complain about the number of bids he was losing to lower-priced CWA contractors. (Exhibit 9 at 108). The plaintiffs cited this testimony as evidence of the start of the conspiracy between contractors and Local 3. The defendants' contentions that Mr. Eccles's remarks lack foundation and are hearsay are meritless.

FN6. The parties dispute whether Nead Information Systems, the named defendant, and Nead Electric, a company that engaged in some of the alleged misconduct charged by the plaintiffs, are distinct entities.

Exhibit 12 consists of the testimony of Fred Lott, construction manager for a hotel company, who testified that after USIS arrived at the construction site of the Sofitel Hotel, (1) one of the defendant contractors, Five Star Electric Company, turned off electrical supply to lights and elevators at the site; (2) Five Star refused to deliver labor to the project; and (3) Rodney Graves, a Five Star assistant superintendent whom Mr. Lott identified as holding a union position, threatened Mr. Lott personally. Mr. Lott testified that he saw Five Star employees shut down lights and power as many as ten times (Exhibit 12 at 109), and witnessed Howie Tenser, a foreman, directing electricians to turn off the power. (Exhibit 12 at 118-19). He testified that he had multiple conversations about the company's refusal to deliver labor with Mr. Tenser, with Robert King, Five Star's project manager, and with Gary Segal, Five Star's president. (Exhibit 12 at 106). Mr. Lott stated that he was told that Mr. Graves held a union position. (Exhibit 12 at 139). All of Mr. Lott's testimony is admissible except his statement that he was told that Mr. Graves held a union position. That statement is hearsay and is struck.

***12** The plaintiffs cited Exhibit 14, a letter written by Harold Lyons, a vice president of Lehrer McGovern Bovis, Inc., the general contractor on the Sofitel Hotel project, in which Mr. Lyons discussed problems Lehrer McGovern Bovis was encountering because of USIS's presence at the construction site. This information was within Mr. Lyons's personal knowledge as a senior manager of the company performing the services of general contractor over the site and, thus, is admitted.

Exhibit 16 consists of the testimony of Brad Ickes, president of a non-party CWA firm, BMI Telecommunications, who testified that (1) his client, AT & T, called him and told him that 60 fiber cables installed by BMI had been found cut in a manhole; (2) when Mr. Ickes and his employees got to the manhole they found electricians employed by one of the defendants, Hugh O'Kane Electric Company LLC, at the manhole; and (3) and when the BMI employees descended to the splice box inside the manhole they found the message "non-union scum" scrawled on the box. (Exh. 16 at 191-98). The plaintiffs offered Mr. Ickes's testimony as evidence that Hugh O'Kane had cut cables of a CWA contractor. Whether this is the proper conclusion to draw from the evidence is appropriate for determination on summary judgment or at trial, not here. The testimony is based on personal knowledge, and the defendants' argument that it is hearsay because Mr. Ickes did not see the cables being cut and was not present when the cut cables were discovered is without merit.

The plaintiffs cited Exhibit 17, the declaration of Gary Pinney, general manager of Fiber Pro, LLC, a fiber optic cabling company. Mr. Pinney's declaration concerns his efforts to hire one of the plaintiffs, Blue Diamond Fiber Optic Networks, Inc., as a subcontractor on jobs that Fiber Pro performed for Qwest Communications. Mr. Pinney stated that (1) Qwest agreed to hire Blue Diamond on a job at a site in Manhattan, and that during an initial walk-through at the site, a Hugh O'Kane shop steward rebuffed an attempt by members of the group, which included Mr. Pinney, to introduce themselves to him (Exh. 17, ¶¶ 5-6); (2) as soon as the group left the site all of the Local 3 members working for Hugh O'Kane walked off the site (Exh. 17, ¶ 7); (3) the shop steward threatened to pull Hugh O'Kane electricians off all Qwest jobs (Exh. 17, ¶ 8); and (4) as a result of the threats, Qwest reassigned the work from Blue Diamond to Hugh O'Kane (Exh. 17, ¶ 8). The defendants argue that all of these statements are hearsay: Mr. Pinney did not personally hear the shop steward rebuff the group's overture; he learned about the Local 3 walkout and threats from Patrick Marshall, Qwest's regional splicing manager; and he learned of Qwest's decision to replace Blue Diamond from an unidentified person.

Three of the four statements are admissible. The first two are examples of personal knowledge obtained from others. Mr. Pinney was part of the group that attempted to greet the Hugh O'Kane shop steward and could infer from the facts that members of the group approached the shop steward and that the introductions did not take place that the shop steward turned down the overture. Nor was it necessary for Mr. Pinney to personally witness the electricians walking off the job to know that they did so. In contrast, Mr. Pinney's repetition of Patrick Marshall's statement about the shop steward's threat is hearsay because the information is based entirely on Mr. Marshall's statement. The plaintiffs contend that the threats attributed to the shop steward are verbal acts and, hence, not hearsay. They are correct that threats are not hearsay, *see* *Tompkins v. Cyr*, 202 F.3d 770, 779 n. 3 (5th Cir.2000); 5 J. Weinstein et al., Weinstein's Evidence, § 801.11[3], and if Mr. Pinney had received the threats himself he could have recounted them, but he was not the recipient. The fourth statement is admissible, under Rule 803(3), to demonstrate causation, which is how the plaintiffs use it.

***13** The plaintiffs cited the testimony of Liz Pastore, facilities manager for Agency.com, a company that undertook an office construction project and engaged both USIS and Nead Electric. (*See* Exhibit 21). Ms. Pastore testified that (1) the project was on a tight schedule requiring overtime by the electricians (Exh. 21 at 51); (2) as soon as USIS began its portion of the work the Nead electricians stopped working overtime (Exh. 21 at 51); (3) as a result, construction ended two weeks late (Exh. 21 at 63); (4) there were three incidents of vandalism (Exh. 21 at 42-48, 84-92, 107-08, 111-23, 127, 131, 134, 137-38, 156, 218); and (5) Ms. Pastore believed the general contractor and Nead Electric split the cost of replacing severed cable (Exh. 21 at 107). The plaintiffs cited Ms. Pastore's testimony in their brief as evidence supporting their assertion that Local 3 electricians and the Nead company engaged in misconduct at Agency.com's construction site.

The defendants claim that Ms. Pastore's testimony concerning the work slowdown was hearsay because the employees who stopped working overtime did not personally tell her that they were walking off. This is a misunderstanding of the nature of personal knowledge. Ms. Pastore and representatives of her general contractor, her architects, and Nead Electric held a meeting to talk about the problem as soon as the men stopped working overtime. She did not need to hear directly from the employees to know there was a slowdown. The defendants also claim that Ms. Pastore's testimony about three incidents of severed or nicked telecommunications cables is hearsay because she did not see the damaged cables. But, as she testified, she did see the cut cable in one instance (Exh. 21 at 111), stood directly beneath workers as they inspected the cables in a ceiling installation in the second instance (Exh. 21 at 88-90), and sent one of her employees to the site as soon as she learned of the third severed cable so that she could begin making phone calls to rectify the situation. (Exh. 21 at 123). Ms. Pastore did not need to see the cables to know they were cut, and her testimony is admitted. However, her statement that she believed the general contractor and Nead Electric split the cost of new cables was based on hearsay and is struck. (*See* Exh. 21 at 107).

Exhibit 22 is the deposition transcript of Dana Reed, an employee of The Nead Organization, who testified that he knew Local 3 electricians had refused to work overtime on the Agency.com project. (Exhibit 22 at 105). The plaintiffs cited this testimony as evidence of the misconduct of Nead and Local 3. The defendants maintain that Mr. Reed's statement contains hearsay. The claim is meritless. Mr. Reed's statement is based on his personal knowledge.

The plaintiffs cited Exhibit 25, the declaration of Stan

Walczak, as evidence that Local 3 electricians employed by ADCO Electrical Corporation engaged in misconduct. Mr. Walczak was senior project manager for NBC's facilities department and oversaw construction of NBC's retail store. He stated that immediately after USIS began its work at the site, ADCO electricians, who had worked overtime regularly for six months, engaged in work shutdowns, forcing NBC to terminate its contract with USIS and to replace it with ADCO. (Exh. 25, ¶¶ 9-12). The defendants contend that Mr. Walczak's statement is hearsay. The defendants' objection to Mr. Walczak's declaration suffers from the same analytical error as their objections to Ms. Pastore's and Mr. Reed's testimony. Mr. Walczak did not have to hear directly from the protesting electricians to know that they had ceased working overtime. All of the evidence cited from Mr. Walczak's declaration is admitted.

***14** Exhibit 26 is the declaration of James R. Kitchen, a manager for Securities Services and Technologies ("SST"), a company that installs security systems for commercial clients. He stated that (1) his company awarded a subcontract to USIS to install cable on an AT & T project (Exh. 26 ¶¶ 5-6); (2) shortly after USIS won the subcontract, Local 3 electricians staged a slowdown (Exh. 26 ¶ 7); and (3) the AT & T project manager informed Mr. Kitchen that SST would have to cancel its contract with USIS and retain Forest Electric Corporation, which was already performing electrical work on the project (Exh. ¶ 7). Mr. Kitchen did not need to learn directly from the Local 3 electricians that they were engaged in a slowdown to have personal knowledge of the action. His repetition of what the AT & T manager told him with respect to canceling the USIS contract is admissible to prove the slowdown caused AT & T to choose a Local 3 contractor over USIS because Mr. Kitchen's statement contains information based on personal knowledge.

The plaintiffs cited Exhibit 32, testimony given by Russell Ramey of the law firm Shearman & Sterling, to support their contention that Local 3 contractors and the union worked in tandem to advance a common agenda. Mr. Ramey testified that participants at construction project meetings routinely discussed Local 3 threats. (Exhibit 32 at 44-46). He also testified that Nead's performance was the worst he had witnessed in five years of working as a facilities manager (Exh. 32 at 115-116); that USIS's performance was generally good (Exh. 32 at 121, 144-45); and that Shearman and Sterling was under pressure to hire a Local 3 contractor instead of USIS. (Exh. 32 at 199, 205). The defendants contend that these remarks are hearsay, but Mr. Ramey's knowledge of what took place at meetings, of the strengths and weaknesses of the contractors with whom he dealt, and of the pressures confronting his firm are all part of his personal knowledge. The evidence is admitted.

Exhibit 41 is the declaration of Patrick Marshall, regional splice manager of Qwest Communications International, Inc., who participated in the same events described in Mr. Pinney's declaration, discussed above. Mr. Marshall stated that he was dissatisfied with the performance of O'Kane at Qwest job sites throughout New York City and wanted to hire Blue Diamond to install cabling at a Manhattan site. Mr. Marshall was among the group, described by Mr. Pinney, who performed a walkthrough of the site. He stated that the Local 3 slowdown, which began as soon as the group finished its tour, spread to Qwest sites all over Manhattan and that as a result he reassigned Blue Diamond's work to O'Kane. Within a day and a half, he stated, the walk-out at Qwest's projects throughout the city stopped. All of the cited portions of Mr. Marshall's declaration are based on personal knowledge and are admissible.

Finally, Exhibit 45 consists of the deposition transcript of Richard Mastropolo, an employee of CWA's District 1, which covers the northeast United States. He testified that in his position at the CWA District office he responded to complaints from CWA contractors about IBEW threats and attempted to resolve the disputes. He stated that on one occasion he spoke to Mark Hanson, a business agent of Local 3, about a disruptions at a construction on a site, and Mr. Hansen responded that the situation was beyond his control (Exh. 45 at 135-40). All of the cited testimony is admitted. Mr. Hansen's remarks to Mr. Mastropolo are not hearsay at all because they are the admissions of a party opponent, Fed.R.Evid. 801(d)(2), and Mr. Mastropolo's testimony about ongoing disputes between CWA and Local 3 workers is based on his personal knowledge.

iv. *Remaining Hearsay Objections*

***15** Statements by a party's employees offered against the party are not hearsay so long as the statements concern a matter within the scope of employment and are made during the term of employment. Fed.R.Evid. 801(d)(2)(D). Rule 805 of the Federal Rules of Evidence permits hearsay within hearsay to be admitted as long as "each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Fed.R.Evid. 805.

The plaintiffs cited Exhibit 13, the testimony of Robert J. King, Five Star's project manager on the Sofitel Hotel project, and Exhibit 42, the testimony of Salvatore Caputo, chief operating officer for Forest Electric Corporation. Mr. King testified that (1) the electricians refused to work overtime because of USIS's presence; (2) he asked Rodney Graves, a Five Star assistant superintendent, and Howie Tenser, a foreman on the Sofitel Hotel project, to speak to the men; and (3) Graves and Tenser reported that they were unable to convince the men to resume working overtime. (Exh. 13 at 118-21). Mr. King's testimony that the electricians refused to work overtime is based on his personal knowledge. His statements about the conversations between Mr. Graves, Mr. Tenser, and the electricians are admissible under admissible under Rules 801(d)(2)(D) and 805 of the Federal Rules of Evidence.

The testimony of Salvatore Caputo, in Exhibit 42, that Phil Altheim, the chief executive officer of Forest, spoke to Mark Hansen of Local 3 to see if he could head off a refusal to work overtime at one of the CFSB construction sites (Exh. 42 at 159-64), is also admitted.

3. *Dr. Dunbar's Report*

The defendants object to the plaintiffs' citation of reports prepared by Dr. Frederick C. Dunbar, the plaintiffs' expert, charging that the plaintiffs have violated the limitations set by my 2004 determination of the defendants' *Daubert* motion, *U.S. Information Systems, Inc. v. IBEW Local Union Number 3,* 313 F.Supp.2d 213 (S.D.N.Y.2004). Specifically, the defendants portray my opinion as prohibiting Dr. Dunbar from testifying about any aspect of liability except that having to do with market conditions, quoting the portion of the opinion that states that Dr. "Dunbar 'would not be permitted to state that the defendants did or did not engage in anticompetitive conduct." ' (Remaining Bases On Which Statements in Plaintiffs' Brief Should Be Struck As Inadmissible ("Def. Reply App. A"), attached as Reply Appendix A to Defendants' Reply Memorandum of Law in Support of their Motion to Strike, at 65).

This is a misreading of the decision on two counts. First, the ruling does not limit Dr. Dunbar's liability testimony to the subject of market conditions. Rather, it prohibits him from relying on his data sample as a basis for testimony. *Id.* at 235. In order to test his thesis that the defendants wield monopoly market power, Dr. Dunbar analyzed the prices of contract bids submitted by Local 3 and CWA contractors and found that in each case the Local 3 bid price was considerably higher than the CWA bid. *Id.* at 228. I found nothing wrong with his method. However, I concluded that his data sample was tainted because the bids were obtained from participants in the particular projects listed in the plaintiffs' complaint. "[I]t can certainly be inferred that the projects identified in the Complaint were the most egregious examples and were likely to reflect a greater price differential." *Id.* at 234. Nothing in the ruling prohibited Dr. Dunbar from testifying about any of his conclusions based on evidence other than the data sample.

***16** Second, the defendants have mischaracterized the point of the passage they quote. In stating that Dr. Dunbar "would not be permitted to state" that the defendants engaged in anticompetitive conduct, I was merely incorporating the rule that bars expert witnesses from stating legal conclusions. *Id.* at 239-40 (citing *Andrews v. Metro North Commuter Railroad Co.,* 882 F.2d 705, 709-10 (2d Cir.1989); *F.H. Krear & Co. v. Nineteen Named Trustees,* 810 F.2d 1256, 1258 (2d Cir.1987)). It only reiterated that it is for the judge to instruct the jury on the applicable law, and for the jury to apply the law to the facts. *Id.* at 240. Nothing in the prior decision bars Dr. Dunbar from discussing the conduct that is the basis for such a legal conclusion, and, in fact, the opinion goes on to state that Dr. Dunbar "could, however, point to factors that would tend to show anticompetitive conduct in a market." *Id.*

The defendants also charge that the plaintiffs have used the expert's reports to channel into evidence hearsay that would otherwise be inadmissible. The plaintiffs counter that experts may rely on inadmissible evidence in forming their opinions-so long as experts in the field reasonably rely on such evidence. (Pl. Strike Opp. at 19-20 (quoting *Howard v. Walker,* 406 F.3d 114, 127 (2d Cir.2005)). Although the plaintiffs are correct that under Rule 703 of the Federal Rules of Evidence they may quote Dr. Dunbar's conclusions and opinions, even if he has relied on inadmissible evidence in reaching them, they may not use his report as a " 'mere conduit' for the hearsay of another." *Wantanabe Realty Corp. v. City of New York,* No. 01 Civ. 10137, 2004 WL 188088, at *2 (S.D.N.Y. Feb. 2, 2004); *see also* *Hutchinson v. Groskin,* 927 F.2d 722, 725-26 (2d Cir.1997).

In ruling on the defendants' *Daubert* motion in this case, I had occasion to evaluate Dr. Dunbar's reliance on deposition testimony from various witnesses. The defendants had objected to Dr. Dunbar's use of the testimony on the ground that it was insufficiently scientific. They argued "that '[t]here was no economics or science to [Dr.] Dunbar's analysis: he simply read parts of the record then reached a verdict.' (Def. Memo at 6)." *U .S. Information Systems, Inc.*, 313 F.Supp.2d at 236. I found otherwise. Dr. Dunbar applied his expertise to the facts contained in those depositions and drew conclusions from them. For the most part, he relied on the depositions to provide background on the nature of the market. *Id.* He also "applie[d] economic principles to determine whether the situation described was one that tended to show economic indicators of market dominance and monopoly leveraging." *Id.* at 237.

Thus, the plaintiffs may quote Dr. Dunbar's summaries of depositions, even those containing hearsay, to convey his view of the economic background in which the events in this case took place and his expert opinion on whether such economic conditions tend to show market dominance. The plaintiffs have not, however, used his expert opinion in this way in their submissions opposing summary judgment. Rather, they have used his summaries of testimony to prove that the defendants engaged in misconduct.

***17** For example, in their brief opposing summary judgment, the plaintiffs state, "Dr. Dunbar has identified several instances where Local 3 contractors threatened customers so that a competing Local 3 contractor would win the VDV contract, an act which is patently inconsistent with self-interest." (Pl. SJ Opp. at 22). This statement is followed by five illustrations, taken from Dr. Dunbar's report, of Local 3 contractors refusing to work overtime, making threats, and harassing workers:

1. Petrocelli, the high voltage contractor at 5 World Trade Center did not even bid on the VDV job, yet refused to work overtime if the VDV contract was awarded to a CWA contractor. (Ex. 2 (Dunbar Rebuttal Report) at 10 and cited exhibits.)

2. At the Eleven Madison Avenue job, Forest was the electrical contractor and made numerous threats that enabled defendant IPC to get the VDV job. (*Id.*)

3. At the Institutional Investors project at 255 Park Avenue South, USIS had won the bid and started working, when Forest, doing another job in the same building, not only harassed USIS workers, but informed the general contractor that their electricians would not work overtime and would not utilize cable pulled by USIS so that AJ Electric, a Local 3 contractor, could get the job. (*Id.*)

4. In the bid meeting on the McGraw Hill job at 2 Penn Plaza, not only did ADCO state that there would be problems if USIS got the contract, but information was circulated that Forest had cut 600 USIS installed cables on another project in the same building. The general contractor selected ADCO. (*Id.* at 11.)

5. On another McGraw Hill project at 55 Water Street, where USIS was the lowest qualified bidder, ADCO used its control over the job at 2 Penn Plaza so that IPC could get this job. (*Id.*)

(Pl. SJ Opp. at 22).[FN7]

FN7. Dr. Dunbar relied on hearsay evidence in drafting the report, including CSFB e-mails (Supplemental Report Dr. Fredrick Dunbar Filed Dec. 17, 2002, attached as Exh. 2 to Andrews Decl. at 10-12, nn. 19-24). As discussed above, those e-mails are admissible, to prove customer motive only. Dr. Dunbar also relied on Fred Lott's testimony, which as discussed above, is entirely admissible. The plaintiffs may cite Mr. Lott's testimony directly.

As presented here, and in almost every citation in the plaintiffs' Local Rule 56.1 Statement, the testimony serves to prove misconduct. As such, the plaintiffs' citation of Dr. Dunbar's rebuttal report is struck from their Local Rule 56.1 statement.

C. *Local 3's History of Misconduct*

The defendants challenge the plaintiffs' reliance on a series of adverse judicial and administrative decisions documenting Local 3's "total job policy" of using work stoppages, violence, and vandalism to obtain low voltage work. The defendants contend that the rulings are, in essence, character evidence prohibited under Rule 404(b) of the Federal Rules of Evidence. Rule 404(b) bars evidence of prior misconduct to show that a defendant had a propensity to engage in the conduct charged. Fed.R.Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

The plaintiffs ask the court to take those rulings into account, arguing that the "total job policy" described in those opinions is in effect today. (Pl. SJ Opp. at 11). Under the "total job policy", all Local 3 members were required to engage in certain improper practices to maintain Local 3's jurisdictional claim over electrical work. The plaintiffs maintain that descriptions in prior opinions of the total job policy-and the misconduct the policy has induced in members-are admissible under Rule 406 as evidence of Local 3's routine practice.

***18** Under Rule 406, evidence of an organization's routine practice is admissible to show that the organization acted "on a particular occasion in conformity with [its] habit or routine practice." Fed.R.Evid. 406. Routine practice evidence is more probative than character evidence because routines consist of automatic, nonvolitional acts. The theory is that an act is more likely to be repeated if it is an automatic response to a particular occurrence than if it requires deliberation. *See*Fed. R. Evid 406 advisory committee's note. Because there is a risk that routine practice evidence will be used improperly as character evidence, courts insist that proponents of the evidence demonstrate the frequency and consistency of the practice in question. "[A]dequacy of sampling and uniformity of response are the controlling considerations governing admissibility." *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1533 (11th Cir.1985); *see* *United States Football League v. National Football League*, 842 F.2d 1335, 1373 (2d Cir.1988).

The plaintiffs' argument is less persuasive than it would have been before 1988. Throughout the 1960s, 1970s, and 1980s, the N.L.R.B. and federal courts repeatedly issued orders to stop Local 3 from engaging in work stoppages, vandalism, and violence to keep CWA contractors out of the tel-data market. *See* *N.L.R.B. v. Local 3, IBEW*, 861 F.2d 44, 45-46 (2d Cir.1988) ("Indeed, we publish this opinion only to render the historical record of Local 3's offenses complete. Since 1960, Local 3 has been found to violate Section 8(b) of the National Labor Relations Act ... at least twenty-three times ...." (citing cases); *N.L.R.B. v. Local 3, IBEW, AFL-CIO*, 730 F.2d 870, 880 (2d Cir.1984) (reprimanding union as "an incorrigible secondary boycotter with a two decade-long history of secondary boycott activity" and identifying multiple adverse rulings); *United Technologies Communications Co. v. IBEW, Local 3*, 597 F.Supp. 265, 270 n. 8 (S.D.N.Y.1984) (citing multiple adverse rulings); *Silverman v. Local 3, IBEW*, 81 Civ. 6936, 1981 WL 2234, at *1 n. 3 (S.D.N.Y. Dec. 23, 1981) (same).

The plaintiffs in each of these cases challenged the "total job policy," which at the time was embodied in a union by-law.[FN8] Ultimately, the union removed the offending by-law, but the plaintiffs in this case maintain that the policy is still in force. (Pl. SJ Opp. at 11). According to Thomas Van Arsdale, business manager of Local 3, the IBEW and the CWA have entered a period of labor peace, having signed an agreement some time ago at the national level to handle disputes. (Affidavit of Thomas van Arsdale dated August 23, 2005, ¶ 21).

> FN8. The by-law commanded Local 3 members to bar others tradesmen from performing Local 3 work. Courts repeatedly found the by-law to be an illegal inducement to members to commit acts of violence, vandalism and illegal slowdowns.

> The "total job policy" finds expression in section 12 of Article XIII of the by-laws of Local 3 which are given to members of the Local: "No member is to give away work coming under the jurisdiction of this Local, or to allow any other tradesmen to do work coming under this Local's jurisdiction."
>
> *United Technologies*, 597 F.Supp. at 270-71 (citation omitted).

Whatever the status of the policy, there has been a steep decline in litigation about it in the last eighteen years. In contrast to dozens of earlier adverse rulings, there have been only three such decisions since 1988 in New York federal courts. One of these was favorable to Local 3, *Building Industry Fund v. Local Union No. 3, IBEW*, 992 F.Supp. 162 (E.D.N.Y.1996); one involved a dispute with a non-union shop over high voltage work, *Local Union No. 3, IBEW*, 329 NLRB 337 (1999); and the third was brought by the lead plaintiff in this case, *Local 3, IBEW*, 324 NLRB 604 (1997). The sample is too small to establish that a routine practice of the 1960s through the 1980s extends into the present, and it would distort the sample to permit the plaintiffs to expand it to include the evidence contained in opinions from before 1988. The defendants' motion to strike prior agency and judicial opinions is therefore granted. The sharp decline in the number of opinions, together with the elimination of Local 3's total job policy by-law, require this result.

4. *Evidence That Fails to Support the Asserted Fact*

***19** The defendants argue that the Court should strike statements in the plaintiffs' submissions on the ground that the plaintiffs have cited evidence that does not controvert the defendants' assertions. This argument is entirely without merit. In each instance that the defendants have asserted this argument, their dispute is with the weight of the evidence, not its admissibility. The motion is denied with respect to the defendants request to strike evidence on this basis.

Conclusion

The rulings contained in this decision are summarized in an attached appendix. In brief, the defendants' motion to strike is granted with respect to paragraphs in the plaintiffs' Local Rule 56.1 statement that do not conform to the requirements of the rule and with respect to evidence that (1) is unauthenticated, (2) rests on hearsay, or (3) cites Dr. Dunbar's report to prove the defendants' misconduct. The motion is denied with respect to sentences in the plaintiffs' brief and evidence that is subject to a hearsay exception or is otherwise admissible. Counsel shall contact my chambers promptly to schedule a conference to discuss renewal of the defendants' summary judgment motions.

SO ORDERED.

PLAINTIFFS' LOCAL CIVIL RULE 56.1 PARAGRAPHS TO BE STRUCK FOR FAILING TO COMPLY WITH THE RULE

38-40, 53-57, 66, 69-70, 82-84, 89, 91-93, 96, 98-102, 108-09, 11-112, 113, 117-119, 121-128, 134-144, 154-162, 164, 166, 169-171, 173, 180-85, 188-96, 202, 204-16, 218-22, 227, 230-35, 237-46, 248-51, 254-58, 260, 264, 273, 275-77, 283-88, 292-93, 295-97, 300-04, 306, 308, 314-16, 319, 322-26, 329-32, 334-35, 345-46, 348-49, 363-64, 368, 374-75, 378-79, 395-437, 449-55, 475-80, 492-94, 500-05, 511, 526, 534, 536, 540-43, 554

II. HEARSAY RULINGS

This chart presents individual rulings on evidence in the plaintiffs' Local Rule 56.1 statement that the defendants contest as resting on hearsay.

Paragraph	Cited Exhibits	Determination
71-72	Exh. 15, Alger; Exh. 40, McDonough; Exh. 26,	Exhs. 15 and 40: inadmissible as cited here. Exh. 40: admissible.
	Kitchen	
73	Exh. 15, Alger; Exh. 40, McDonough; Exh, 26,	Exhs. 15 and 40, cases: inadmissible as cited here. Exh. 40: admissible
	Kitchen; cases	
74	Exh. 15, Alger; Exh. 40, McDonough; Exh. 26	Exhs. 15 and 40, cases: inadmissible. Exhs. 26, 12, 13, 17 and 22:
	Kitchen; Exh. 12, Lott; Exh. 13, King; Exh.	admissible.
	17, Pinney; Exh. 22, Reed; cases	
76	Exh 41, Trainor; Exh. 17, Pinney; Exh. 41;	Exh. 41 not provided to the court: no determination. Exhs. 15 and 40:
	Marshall; Exh 15, Alger; Exh. 40, McDonough;	inadmissible as cited here. Exhs. 17, 41, 26 and 12: admissible
	Exh. 26, Kitchen; Exh. 12, Lott	
77	Exh. 42, Caputo; Exh. 24, CFSB	Exh. 24: inadmissible as cited here. Exh. 42: admissible.
78	Exh. 42, Caputo; Exh. 24, CFSB	Exh. 24: inadmissible as cited here. Exh. 42: admissible.
85	Exh. 21, Pastore	Exh. 21: admissible.

90	Exh. 12, Lott; Exh. 15, Alger	Exhs. 12 and 15: inadmissible as cited here.
103	Exh. 15, Alger	Exh. 15: admissible.
130	Exh. 31, Kaliff; Exh. 32, Ramey; Exh. 23, M.	Exhs. 31, 32 and 23: admissible.
	Lagana	
131	Exh. 31, Kaliff; Exh. 32, Ramey; Exh. 23, M.	Exhs. 31, 32 and 23: admissible.
	Lagana	
132	Exh. 31, Kaliff; Exh. 32, Ramey; Exh. 23, M.	Exhs. 31, 32 and 23: admissible.
	Lagana	
165	Exh. 45, Mastropolo	Exh. 45: admissible.
172	Exh. 15, Alger; Exh. 45, Mastropolo	Exh. 15: not admissible as cited here. Exh. 45: admissible.
224	Exh. 2, Dunbar supplemental report, at 11-12	Exh. 2: inadmissible.
226	Exh. 2, Dunbar supplemental report, at 10;	Exhs. 2 and 31 inadmissible as cited here. Exh. 46: admissible.
	Exh. 46 Conte; [9] Exh. 31, Kaliff	
228	Exh. 2, Dunbar supplemental report, at 10;	Exhs. 2 and 31 inadmissible as cited here. Exh. 46: admissible.
	Exh. 46 Conte; Exh. 31, Kaliff	
236	Exh. 2, Dunbar supplemental report, at 11-12	Exh. 2: admissible.
261	Exh. 25, Walczak; Exh. 49, Yuen; Exh. 48 NBC	Exhs. 25 and 46: admissible. Exh. 49: unauthenticated. NBC document
	0009; Exh 46 Conte	listed as Exh. 48 missing and no determination made.
262	Exh. 25, Walczak; Exh. 49, Yuen; Exh 48 NBC	Exhs. 25 and 46: admissible. Exh. 49: unauthenticated. NBC document
	0009; Exh 46 Conte	listed as Exh. 48 missing and no determination made.
278-79	Exh. 2, Dunbar supplemental report, at 12-13	Exh. 2: inadmissible as cited here
280-82	Exh. 2, Dunbar supplemental report, at 12-13;	Exh. 2: inadmissible as cited here. Exh. 12: admissible.
	Exh. 12, Lott	
305	Exh. 28, CFSB e-mails	Exh. 28: inadmissible as cited here.
317	Exh. 48, J. Lagana; Exh. 49, R Lagana	Exhs. 48 and 49: inadmissible as cited here.
327	Exh. 23, M. Lagana	Exh. 23: admissible
350	Exh. 28, CFSB e-mails	Exh. 28: inadmissible as cited here.
361	Exh. 7, Ramellini	Exh. 7: admissible.

369	Exh. 2, Dunbar supplemental report, § IIIA	Exh. 2: inadmissible as cited here.
	(1), (2), (3), (4) and evidence cited	
	therein	
373	Exhs. 1, Dunbar report; and Exh. 2, Dunbar	Exhs. 1 and 2: inadmissible as cited here.
	supplemental report, § IIIA (1), (2), (3),	
	(4) and evidence cited therein	
383	Exh. 23, M. Lagana	Exh. 23: admissible.
439	Exh. 2, Dunbar supplemental report, at 9-17	Exh. 2: inadmissible as cited here.
440-48	Exh. 2, Dunbar supplemental report, at 9-17;	Exh. 2: inadmissible as cited here. Exh. 51: admissible.
	Exh. 51, Gerofsky	
458-64	Exh. 2, Dunbar supplemental report, at 10-12	Exh. 2: inadmissible as cited here.
	and cited evidence therein	
469	Exh. 29, Ramey e-mail	Exh. 29 unauthenticated.
470	Exh. 2, Dunbar supplemental report, at 10-12	Exh. 2: inadmissible as cited here.
474	Exh. 4, Babigian; Exh. 29	Exh. 4: cited testimony not provided to the court: no determination.
		Exh. 29 unauthenticated.
506	Exh. 21, Pastore; Exh. 32, Ramey	Exhs. 21 and 32: admissible.
509	Exh. 23, M Lagana; Exh. 7, Ramellini	Exhs. 23 and 7: admissible.
512	Exh. 23, M. Lagana; Exh. 7, Ramellini; Exh.	Exhs. 23, 7, 21: admissible.
	21, Pastore	
513-21	Exh. 21, Pastore	Exh. 21: admissible.
522	Exh. 21, Pastore; Exh. 9, Eccles; Exh. 10	Exhs. 21, 9 and 10: admissible.
529	Exh. 21, Pastore	Exh. 21 admissible.
530	Exh. 21, Pastore; Exh. 7, Ramellini	Exhs. 21, 7: admissible.
533, 535	Exh. 21, Pastore	Exh. 21: admissible.
547-50,	Exh. 32, Ramey	Exh. 32: admissible.
552		
557	Exh. 23, M. Lagana	Exh. 23: pages 590-92, admissible; the rest inadmissible.
559-61	Exh. 1, Dunbar report; Exh. 2, Dunbar	Exhs. 1 and 2: inadmissible as cited.
	supplemental report and evidence cited	
	therein	
562-63	Exh. 1, Dunbar report; Exh. 2, Dunbar	Exhs. 1 and 2: inadmissible as cited. Exh. 21: admissible.

	supplemental report and evidence cited
	therein; Exh. 21 Pastore

FN9. Mr. Conte's deposition is mislabeled in the plaintiffs' briefs as Exhibit 48; it is actually Exh. 46 of the Andrews Decl.

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U.S. Information Systems, Inc. v. International Broth. of Elec. Workers Local Union Number 3
Not Reported in F.Supp.2d, 2006 WL 2136249 (S.D.N.Y.), 2006-2 Trade Cases P 75,510

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