

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

WILLIAM WHITFORD, ROGER ANCLAM,)
EMILY BUNTING, MARY LYNNE DONOHUE,)
HELEN HARRIS, WAYNE JENSEN,)
WENDY SUE JOHNSON, JANET MITCHELL,)
ALLISON SEATON, JAMES SEATON,)
JEROME WALLACE, and DONALD WINTER,)

No. 15-cv-421-bbc

Plaintiffs,)

v.)

GERALD C. NICHOL, THOMAS BARLAND,)
JOHN FRANKE, HAROLD V. FROEHLICH,)
KEVIN J. KENNEDY, ELSA LAMELAS, and)
TIMOTHY VOCKE,)

Defendants.)

**PLAINTIFFS’ MOTION TO ADMIT CERTAIN TRIAL EXHIBITS AND
STATEMENTS FROM LEARNED TREATISES INTO EVIDENCE**

Plaintiffs William Whitford, et al., through their undersigned counsel, hereby move the Court for an order admitting into evidence certain exhibits used at trial, and certain statements from learned treatises identified during trial, that are not reflected in the Court Trial Exhibit List (Dkt. 146) as having been offered or admitted in evidence.¹ In support of this motion, Plaintiffs state as follows:

1. During the trial of this action, Plaintiffs’ counsel moved the Court at various times to admit into evidence certain exhibits from the Plaintiffs’ Trial Exhibit List (Dkt. 146). For example, on the first day of trial, Plaintiffs’ counsel moved into evidence all exhibits on

¹ Plaintiffs’ counsel has conferred with Defendants’ counsel on this motion. Defendants’ counsel has informed Plaintiffs’ counsel that the Defendants will respond to this motion on an exhibit by exhibit basis, reserving their objections to the admission of some exhibits listed herein but not objecting to the admission of others.

Plaintiffs' Trial Exhibit List to which Defendants had not tendered an objection. Tr. (I) 7:11-8:13. At other times during trial, Plaintiffs' counsel moved exhibits into evidence as they were used, or at the conclusion of a witness's testimony. Plaintiffs' counsel kept a running list of exhibits offered into evidence, with an indication of the Court's ruling on each exhibit.

2. In addition, during the examinations of Plaintiffs' experts Professors Kenneth Mayer and Simon Jackman, Plaintiffs' counsel moved into evidence pursuant to Fed. R. Evid. 803(18) highlighted statements contained within certain learned treatises relied upon by Professors Mayer and/or Jackman that had been marked as Plaintiffs' Trial Exhibits. Consistent with Rule 803(18), Plaintiffs' counsel requested that the Court receive in evidence only the highlighted statements themselves, and not the entirety of the articles marked as Trial Exhibits.

3. At the end of trial, the Court indicated to the parties that the Court's official record of exhibits offered and admitted into evidence, the Court Trial Exhibit List (Dkt. 146), would be available for the parties' review. After trial concluded, Plaintiffs' counsel reviewed the Court Trial Exhibit List and compared that official record with the list of admitted trial exhibits maintained by Plaintiffs' counsel.

4. Upon review of the Court Trial Exhibit List, the Plaintiffs' counsel have identified several relevant exhibits, raised at trial, that Plaintiffs' counsel's own exhibit list reflects were offered in evidence, but that the Court's Trial Exhibit List identifies as not yet having been formally offered and/or admitted into evidence during trial. To resolve any discrepancies and to clarify the record, Plaintiffs now request that the Court to admit the following Plaintiffs' exhibits and statements from learned treatises into evidence:

- **Exhibits 118-119 (highlighted statements only).** *See* Tr. (III) 15:5-24 (witness Dr.

Mayer identifying the highlighted portions of Exhibits 118 and 119 as reliance material);

Tr. (II) 135:14-136:6 (moving the highlighted reliance material into evidence, with the Court reserving ruling on the hearsay objection and learned treatise rule exception); *but see* Dkt. 146 (not listing Exhibits 118 and 119 as offered or admitted).

- **Exhibit 147.** *See* Tr. (I) 3:3, 7:15, 8:13 (listing Exhibit 147 as one offered by stipulation and admitted by the Court); *but see* Dkt. 146 (not listing Exhibit 147 as offered or admitted).
- **Exhibits 150-152 (highlighted statements only).** *See* Tr. (III) 3:24-4:23, 15:25-16: 16 (witness Dr. Mayer identifying the highlighted portions of Exhibits 150-152 as reliance material); and Tr. (II) 135:14-136:6 (moving the highlighted reliance material into evidence, with the Court reserving ruling on the hearsay objection and learned treatise rule exception); *but see* Dkt. 146 (not listing Exhibits 150-152 as offered or admitted).
- **Exhibit 156 (highlighted statements only).** *See* Tr. (II) 251:12-254:5 (witness Dr. Mayer identifying the highlighted portions of Exhibits 156 as reliance material); Tr. (II) 135:14-136:6 (moving the highlighted reliance material into evidence, with the Court reserving ruling on the hearsay objection and learned treatise rule exception); *but see* Dkt. 146 (not listing Exhibits 156 as offered or admitted).²
- **Exhibit 325.** *See* Tr. (III) 276:2-10; 278:2-3 (moving Exhibit 325 into evidence without objection, received by the Court); *but see* Dkt. 146 (not listing Exhibit 325 as offered or admitted).
- **Exhibit 329.** *See* Tr. (III) 276:2-12; 278:2-3 (moving Exhibit 329 into evidence without objection, received by the Court); *but see* Dkt. 146 (listing Exhibit 329 as offered but not

² The admissibility of the article authored by Dr. Jowei Chen, embodied in Exhibits 156-160, is further addressed in the Plaintiffs' post-trial brief. Although Plaintiffs restate in this motion their request that the Court admit in evidence the highlighted statements contained in Exhibit 156 because it is not so listed on the Court's Trial Exhibit List, Plaintiffs' counsel nonetheless understand that the Court will reserve ruling on this exhibit (as well as others) until after the parties have submitted their post-trial briefs.

admitted).

- **Exhibits 346-352.** *See* Tr. (I) 3:4, 7:17, 8:13(listing Exhibits 346-352 as offered by stipulation and admitted by the Court); *but see* Dkt. 146 (not listing Exhibits 346-352 as offered or admitted).
- **Exhibits 354-356.** *See* Tr. (I) 3:4, 7:17, 8:13(listing Exhibits 354-356 as offered by stipulation and admitted by the Court); *but see* Dkt. 146 (not listing Exhibits 354-356 as offered or admitted).
- **Exhibit 357.** *See* Tr. (II) 117:10-24 (moving Exhibit 357 into evidence, admitted by the Court); *but see* Dkt. 146 (not listing Exhibit 357 as offered or admitted).
- **Exhibit 394 (highlighted statements only).** *See* Tr. (III) 4:24-6:1 (witness Dr. Mayer identifying the highlighted portions of Exhibit 394 as reliance material); Tr. (II) 135:14-136:6 (moving the highlighted reliance material into evidence, with the Court reserving ruling on the hearsay objection and learned treatise rule exception); *but see* Dkt. 146 (not listing Exhibit 394 as offered or admitted).
- **Exhibit 417.** *See* Tr. (III) 166:23-167:222 (moving Exhibit 417 into evidence, with the Court admitting Exhibit 417 inasmuch as it was the basis of the witness's testimony and reserving ruling on the hearsay objection); *but see* Dkt. 146 (not listing Exhibit 417 as offered or admitted).³
- **Exhibit 470.** *See* Tr. (II) 36:3-10 (moving Exhibit 470 into evidence, admitted by the Court); *but see* Dkt. 146 (not listing Exhibit 470 as offered or admitted).
- **Exhibit 475-481.** *See* Tr. (II) 1:16-2:2 (moving Exhibits 475-481 into evidence, admitted

³ It appears that the Court's Trial Exhibit List may have inadvertently listed Exhibit 416 and/or 471 as offered rather than Exhibit 417. Plaintiffs' Exhibit 416 was withdrawn and not offered by Plaintiffs or admitted by the Court. Plaintiffs' Exhibit 471 was not offered by Plaintiffs or admitted by the Court. Therefore, both Exhibit 416 and Exhibit 471 should be struck from the Trial Exhibit List and replaced by Exhibit 417.

by the Court); *but see* Dkt. 146 (not listing Exhibits 476-481 as offered or admitted).

- **Exhibit 485.** *See* Tr. (I) 88:15-89:1 (moving Exhibit 485 into evidence, admitted by the Court); *but see* Dkt. 146 (not listing Exhibit 485 as offered or admitted).
- **Exhibit 498 (highlighted statements only).**⁴ *See* Tr. 231:24-232:3 (witness Dr. Mayer identifying the highlighted portions of Gary King, *Why Context Should Not Count*, Political Geography 15:159-163 (1996) as reliance material); and Tr. 135:14-136:6 (moving the highlighted reliance material into evidence, with the Court reserving ruling on the hearsay objection and learned treatise rule exception); *but see* Dkt. 146 (not listing statements in King article as offered or admitted).

WHEREFORE, Plaintiffs William Whitford, et al., respectfully request that the Court admit in evidence the Trial Exhibits and statements identified in this motion.

Respectfully submitted

/s/ J. Gerald Hebert

One of the attorneys for the plaintiffs

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⁴ Not previously marked as an exhibit but included in the binder of Dr. Mayer's reliance material, Tab 12, with the relevant portions for admission highlighted.