

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANNE HARDING, et al.,

Plaintiffs,

v.

COUNTY OF DALLAS, TEXAS, et al.,

Defendants.

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C.A. NO. 3:15-CV-00131-D

DEFENDANTS' MOTION TO EXCLUDE OPINIONS OF DR. PETER MORRISON
AND
BRIEF IN SUPPORT OF THEIR MOTION

Defendants respectfully move to exclude the testimony and opinions of Plaintiffs' expert, Dr. Peter Morrison ("Morrison"). Morrison's opinions must be excluded because his opinions are unreliable, unfinished and have not been fully and properly disclosed.

ARGUMENT

A. Standard for admitting expert testimony.

Rule 702 of the Federal Rules of Evidence provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or 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." Rule 702 only allows opinion testimony 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.” Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993), the trial court has a preliminary responsibility to determine whether an expert witness is qualified to give the testimony he or she proffers. Rule 702 requires that a qualifying expert have sufficient specialized knowledge to assist the jurors in deciding fact issues in the case. See *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1178 (1999). The burden of proof during a court's preliminary Daubert assessment is on the proponent of the expert testimony. See *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

In addition to being qualified as an expert, Rule 702 requires that an expert demonstrate his opinion is based on a reliable source or methodology, more than a mere “subjective belief” or “unsupported speculation.” *Daubert*, 509 U.S. at 590. The Fifth Circuit has repeatedly upheld the exclusion of expert testimony when the district court determined there was no reliable basis for the alleged expert opinion. *Hathaway v. Bazany*, 507 F.3d 312, 318 (5th Cir. 2007) (holding the “existence of sufficient facts and a reliable methodology is in all instances mandatory.”); *Mac Sales, Inc. v. E.I. du Pont de Nemours & Co.*, 24 F.3d 747, 752 (5th Cir. 1994) (holding the district court should exclude expert testimony that lacks an adequate foundation where a market analyst who researched domestic markets was not qualified to testify on foreign markets); *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987) (when “the source upon which an expert’s opinion relies is of such little weight...the jury should not be permitted to receive that opinion.”).

A party offering expert witness testimony must submit a written report that gives “a complete statement of all opinions the witness will express and the basis and reasons for them.” Expert witnesses are required to provide a factual basis for all opinions expressed in their report. *Sierra Club v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 571 (5th Cir. 1996) (holding a one and a half page expert report and a one paragraph expert report were not sufficiently “detailed and complete” because there

were only conclusory opinions without factual support); *Elder v. Tanner*, 205 F.R.D. 190, 193 (E.D.Tex. 2001) (holding “[t]he expert reports must contain some discussion of their reasoning and thought process that lead to their ultimate opinions.”). According to the Advisory Committee notes on Rule 26, an expert report must be “detailed and complete” in order “to avoid the disclosure of ‘sketchy and vague’ expert information.” See, *Sierra Club*, 73 F.3d at 571.

As demonstrated below, Morrison’s opinions cannot be the product of a reliable, scientific methodology because his analysis is admittedly incorrect (he analyzed the wrong redistricting map), incomplete, and untimely given that the deadline for experts to complete their analysis has passed (with one exception not relevant here). Accordingly, Morrison’s opinions reflected in his report make them utterly useless to assist the Court either at the summary judgment stage or at trial.

B. Testimony of Dr. Morrison should be excluded

Morrison attempts to offer opinions roughly divided into two categories. In the first category of opinions, Dr. Morrison criticizes the 2011 plan challenged by Plaintiffs, which he refers to as the Enacted Plan or “EP.” App. 4-11. In the second category of opinions, Morrison advocates for a plan he prepared at Plaintiffs’ request which he refers to as the Remedial Plan or “RP.” App. 11-18. Both categories of opinions should be excluded because they are supported by an analysis that is riddled with errors and, in any event, is incomplete.

1. Morrisons’ criticism of the Enacted Plan is unreliable and incomplete

Federal Rule of Civil Procedure 26(2)(C) forbids surprise expert testimony and reports. Under that rule, a party “must” make expert disclosures “at the times and in the sequence that the court orders.” The consequences of failing to do so are well-established. “A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness

or information not so disclosed.” Fed. R. Civ. P. 37(c)(1).

Despite the fact that Plaintiffs have had three years since the filing of this lawsuit to prepare their expert opinions, Morrison's opinions and analysis remain incomplete and the deadline for his expert report has now passed. Furthermore, what analysis Morrison has performed on the Enacted Plan utilized the *wrong map*,¹ a reality Morrison was informed of when Defendants' served their expert witness rebuttal reports. Despite this notification, plaintiffs failed to correct Morrison's erroneous analysis before his November 8 deposition or otherwise seek the Court's permission to supplement his analysis.² It is too late now for Morrison to do what he had three years to complete and allowing him to correct his analysis, after the close of discovery and after the pendency of dispositive motions, would cause Defendants and the Court prejudice.

The keystone of Morrison's criticism of the Enacted Plan is that it cuts too many cities and that this condition proves the purpose and effect of discrimination against Anglo voters. The Court's review of Morrison's expert reports will reveal that all of Morrison's opinions concerning intent against Anglo voters are hinged upon the splitting of communities of interest that Morrison now says he is unsure about. Whatever other criticisms Morrison levels against the EP are also unreliable because they are based upon the wrong map.

Morrison's testimony at deposition is fatal to the reliability of his opinions concerning the EP. In one example, Morrison tries to downplay the import of his error:

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3. . . . Q. . Isn't that though ~ that analysis and .

¹ Morrison clearly had the correct map because it is graphically laid out on page 5 of his initial report. App 5. However, the map on page 8 of his report which purports to reflect the city splits is the wrong map. App. 8.

² Under the agreed scheduling order, Plaintiffs and Defendants served their opening expert reports simultaneously on August 22, 2017. Simultaneous rebuttal reports were due on October 13, 2017 and Plaintiffs timely served rebuttal report of Matt Angle clearly identified that Morrison used the wrong map.

4• process ~ isn't that, sort of, the keystone to your •
5• conclusion that the enacted map split too many •
6• precincts or cities? •
7• . . . A. • It's not a keystone conclusion; it's a •
8• peripheral issue. • I'm saying that ~ well, let me •
9• put it this way. • I haven't yet completed that
10• analysis, so I'm going to say that analysis is still
11• in the works. • My opinion would not change if that
12• analysis proved to be completely flawed and
13• misunderstood on my part in terms of the boundaries
14• that I see.

App. 1344.

In another exchange, Morrison was confronted with the detailed rebuttal by Angle that showed Morrison's list of city splits to be inaccurate or otherwise explained:

Page 135:

12• . . . A. • Truthfully, I have not delved in any great
13• detail into these responses. • Because at this point,
14• I would have to look at each one of these in detail
15• and I would have to do a fairly detailed study of
16• each one. • I haven't yet done that.
17• • So I would say my opinion about these
18• assertions is I haven't had a chance to examine each
19• one in enough detail that I can say he's correct or
20• he's incorrect.

App. 1345.

When asked about one of Morrison's specific claimed splits in Cockrell Hill, he explained:

Page 144:

•4• . . . A. • I think that this may be a correction I •
5• have to make from the original Table 4. • That •
6• Cockrell Hill ~ I'm not sure why I have it in there •
7• if there was no evidence of a split. • I'm not sure •
8• if that was an incomplete cell that I didn't fill. •
9• • That's why I say, I'm not prepared to rely
10• on these data or draw any conclusions from them yet
11• because I have to quality control them.

App. 1347.

Ultimately, Morrison backed away from the central conclusion he espouses in his expert report that the Anglo population was cracked and packed in the EP:

Page 142:

19. . . . Q. . Are you able to tell us which of the
20. . splits harmed the Anglo community?
21. . . . A. . Not at this point.
22. . . . Q. . Well, then how can you conclude they're
1. . inexcusable? .
2. . . . A. . I may reach the conclusion that none of .
3. . them passed the test of being inexcusable. .
4. I don't rule out the possibility that my .
5. . entire analysis in Table 4, when it's finally .
6. . completed and I get all the numbers right, may end .
7. . up showing there is no real obvious, apparent .
8. . statistical footprint of intent to pack Anglos. . In .
9. . which case, my conclusion is I guess it wasn't done
10. . here, but the demographic data showed it was
11. . accomplished.

App. 1347.

The rest of Morrison's opinions concerning the EP are unreliable because they rely upon population figures derived from the wrong plan and not the actual enacted plan utilized by the County. For example, how is it that Morrison can opine as to the "devaluation of the votes cast by Whites and Blacks" (App. 9-11) in the EP when the map he relies upon as the EP is of his own creation and not the one adopted by the county? All of Morrison's criticisms of the EP should be excluded.

This Court would not be first to find issue with Morrison's methodology or opinions. In one case, the Court questioned where Dr. Morrison obtained his population figures because they were unsupported by the record evidence. See *DeBaca v. Cnty. of San Diego*, 794 F.Supp. 990, 997 (S. D. Ca. 1992). In another case, the district court rejected one assertion by Dr. Morrison after another. See *U.S. v. Village of Port Chester*, 2008 WL 190502, *8-10 (S.D. N.Y. January 17, 2008). See

also, *See U.S. v. Village of Port Chester*, 704 F.Supp. 2d 411, , fn. 9 & fn. 11 (S.D. N.Y. January 17, 2008).³

Morrison, who relied heavily on CVAP data in this case, has previously questioned its accuracy; his opinions in this regard have been previously rejected. *See Montes*, 40 F. Supp. 3d at 1392-93. *See also, Cmte. for Fair and Balanced Map v. Illinois State Bd. of Elections*, 835 F.Supp 2d 563, 586 (N.D. Il. 2011)(rejecting Morrison's criticisms of ACS data). One court found that Dr. Morrison set a key benchmark that was unsupported by evidence or methodology. *See Baldus v. Members of Wis. Gov. Accountability Bd.*, 862 F.Supp. 2d 860, 862-63 (Ed. Wis. 2012). The Ninth Circuit has held a district court in error for relying upon Dr. Morrison's "projections" of voting behavior. *See Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988).

Despite this remarkable history, incredibly, Morrison testified at deposition that he could not recall "one case" where the Court found his opinions unpersuasive. App. 134, 13:12.

Furthermore, Morrison has had issues in the past with turning in his analysis late. Courts have given him a pass before but this pattern of conduct, which at this point must be purposeful, requires Court attention. *See Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1389-90 (E.D. Was. 2014) (holding that Morrison's report was submitted late but Plaintiffs were not prejudiced).

2. *Morrisons' opinions in favor of the Remedial Plan are incomplete and unreliable*

Plaintiffs learned for the first time at Morrison's deposition that he actually did not draw the Plaintiffs remedial plan but instead was assisted by Thomas Bryan. App. 1319, 30:9-32:11. Mr. Bryan, who was in Maryland, would draw up draft maps and Morrison would review them in

³ Interestingly, one of the opinions Morrison attempts to offer in his rebuttal report is that much of the population in Dallas County is from elsewhere. App. 43-44. Morrison has previously tried this strategy of claiming that a considerable portion of the Latino population emigrated from elsewhere and the Court rejected it. *See Port Chester*, 704 F. Supp. 2d at fn. 24.

Massachusetts. App. 1327, 62:8-65:16. At this point, there are drafts of those remedial maps, with corresponding data files, and plaintiffs have failed to disclose any of these to Defendants. *Id.* There were at least four revisions to Plaintiffs' map. App. 1329, 71:2-18. The actual decisions on where to place lines were made by Bryan (not Morrison) based upon data parameters that Morrison was seeking:

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17 Q. And it sounds like from your testimony ~
18 and don't let me misstate it ~ the granular
19 decisions of which voting precincts go in which
20 district, those decisions were made by Mr. Bryan,
21 and you were giving him the general parameters to
22 use to make those decisions and watching the metrics

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1 along the way to make sure you were working towards
2 the goals you would set.

3 Is that about accurate?

4 A. That's all correct with the caveat that
5 the units of geography we're working with are not
6 voting precincts, but census blocks or census block
7 groups.

App. 1330. At this point, Defendants have not been provided a report by Bryan, nor have they received any explanation as to how and why Bryan placed voters where he did in the Plaintiffs' map (or earlier iterations of the maps Bryan created).

Without bothering the Court with the day by day details, it has consistently been a problem receiving timely expert disclosures from Plaintiffs. Although Plaintiffs produced their reports on the ordered deadlines, they were often not accompanied by the underlying documents or data required under Rule 26. Such information would come later only after defense counsel requests. Defense counsel sent multiple follow up requests for background data, including specific information. For example, Morrison's expert report failed to identify any of the city splits he relies upon so heavily in his report. Defense counsel had to obtain that information from Plaintiffs'

counsel after Morrison submitted his initial expert report. And, after all that effort to try to obtain complete expert disclosures, it was not until Morrison's deposition on November 8, 2017 that Defendants learned that much more information has yet to be disclosed. At some point, enough is enough. The Court should exclude Morrison's opinions concerning the EP because Plaintiffs have failed to timely produce all of Morrison's data and analysis (including what he was provided by Bryan) concerning the construction of plaintiffs' proposed plan.

Even if the Court allows Morrison to proffer and describe the Plaintiffs' remedial plan, the Court should exclude the portion of Morrison's opinions where he compares the plan he has drawn with the enacted plan because he used the wrong map for the enacted plan and thus his comparison is erroneous and unreliable.

CONCLUSION AND PRAYER

Defendants pray that the Court exclude the opinions of Dr. Morrison as described herein.

Dated this 1st day of December, 2017.

Respectfully submitted,

BRAZIL & DUNN

/s/ Chad W. Dunn

Chad W. Dunn

SBN 24036507

4201 Cypress Creek Pkwy., Suite 530 Houston,
Texas 77068

Telephone: (281) 580-6310

chad@brazilanddunn.com

J. Gerald Hebert (*Pro Hac Vice*)

VA Bar No. 38432

J. Gerald Hebert, PC

191 Somerville Street, #405

Alexandria, VA 22304

(703) 628-4673

hebert@voterlaw.com

Rolando Leo Rios
SBN: 16935900
Law Office of Rolando L. Rios
115 E. Travis, Suite 1645
San Antonio, Texas 78205 Telephone: (210) 222-2102
Facsimile: (210) 222-2898 rrios@rolandorioslaw.com

Peter L. Harlan
SBN: 9011300
Dallas County District Attorney's Office
Frank Crowley Courts Building 133 N. Riverfront
Blvd., 11th Floor Suite C4-2LB 19
Dallas Texas 75207
Telephone: (214) 653-3690
Facsimile: (214) 653-2899 pharlan@dallascounty.org

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December 2017, a true and correct copy of the foregoing was served by the Court's Electronic Case Filing System on all counsel of record.

By: /s/ Chad W. Dunn

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C.A. NO. 3:15-CV-00131-D

ORDER GRANTING DEFENDANTS' MOTION TO EXCLUDE
OPINIONS OF DR. PETER MORRISON

The Court has considered the Defendants' Motion to Exclude Opinions of Dr. Peter Morrison.

The Court hereby GRANTS the motion and excludes Plaintiffs' expert witness Dr. Peter Morrison and his accompanying expert report. Furthermore, the Court excludes any testimony by Dr. Morrison regarding his opinions.

SIGNED this ____ day of _____, 2017.

PRESIDING JUDGE

APPROVED AND ENTRY REQUESTED:

BRAZIL & DUNN

/s/ Chad W. Dunn

Chad W. Dunn

SBN 24036507

4201 Cypress Creek Pkwy., Suite 530

Houston, Texas 77068

Telephone: (281) 580-6310

chad@brazilanddunn.com

J. Gerald Hebert (*Pro Hac Vice*)

VA Bar No. 38432

J. Gerald Hebert, PC

191 Somerville Street, #405

Alexandria, VA 22304

(703) 628-4673

hebert@voterlaw.com

Rolando Leo Rios

SBN: 16935900

Law Office of Rolando L. Rios

115 E. Travis, Suite 1645

San Antonio, Texas 78205

Telephone: (210) 222-2102

Facsimile: (210) 222-2898

rrios@rolandorioslaw.com

Peter L. Harlan

SBN: 9011300

Dallas County District Attorney's Office

Frank Crowley Courts Building

133 N. Riverfront Blvd., 11th Floor

Suite C4-2, LB 19

Dallas Texas 75207

Telephone: (214) 653-3690

Facsimile: (214) 653-2899

pharlan@dallascounty.org

Counsel for Defendants