UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

BARBARA C. LAWRENCE	CASE NO. 97-11258
Debtor	Chapter 11

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is a motion *in limine* filed on March 25, 20008, on behalf of Barbara C. Lawrence, Lawrence Group, Inc., Lawrence United Corp. Insurance Agency of Southern California, Inc., A.W. Lawrence and Company, Lawrence Agency Corp., Lawrence United Corporation, Lawrence Health Care Administrative Services, Inc., Global Insurance Company and Senate Insurance Company (collectively referred to as the "Movants"). Movants seek an Order pursuant to Rule 104 of the Federal Rules of Evidence ("Fed.R.Evid.") determining the admissibility of certain documents. Opposition to the motion was filed on behalf of Peter Barton, et al. ("Respondents")[1] on April 10, 2008. Movants filed their reply on April 15, 2008. The motion was submitted for decision on April 15, 2008, without oral argument.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(N) and (O).

[1] Respondents are comprised of certain individuals, as well as the corporate entities of Mechanical Technology, Inc. ("MTI") and First Albany Companies, Inc. ("First Albany"). The latter two are represented by the law firm of Milbank, Tweed, Hadley & McCloy, LLP. The individual respondents are represented by the law firms of Boies Schiller & Flexner LLP and Harvey and Mumford.

FACTS

The Court will assume familiarity with its prior rulings in this case, specifically, the Court's prior decisions, dated September 19, 2003, July 10, 2006, March 5, 2007, and February 20, 2008. In addition, the Court will assume familiarity with the facts as set forth by the United States Court of Appeals for the Second Circuit in *Lawrence v. Wink (In re Lawrence)*, 293 F.3d 615 (2d Cir. 2002).

With respect to the pending motion *in limine*, the Movants seek a determination as to the admissibility of certain documents apparently submitted in the course of a mediation between the parties in 1997.[2] It is their contention that "the subject Motion *in limine* will promote the efficiency of this case as it will resolve the issue of what documents each party's expert may rely on in preparing their reports and testimony." *See* Affirmation of John W. Bailey, Esq., dated April 15, 2008, attached to Movants' Reply, at ¶ 4.

The Respondents have acknowledged, for admissibility purposes, the authenticity of all but one of the documents. *See* Respondents' Memorandum in Opposition at 2. However, the Respondents contend that the Movants have otherwise failed to lay a foundation for the admissibility of the documents, including their relevancy to the matter under consideration.

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[2] The parties do not dispute that documents that existed independent of the mediation may be admissible under law or rule of evidence addressing authenticity, relevancy, privilege and hearsay. Section § 4547 of the New York Civil Practice Law and Rules provides that "evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations" shall not be excluded." N.Y.C.P.L.R. § 4547 (McKinney's 2007); *see also* Advisory Committee Notes to 2006 Amendment of Fed.R.Evid. 408, applicable to Compromise and Offers to Compromise, in which it is stated "the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations."

DISCUSSION

The purpose of an *in limine* motion is "'to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of the trial.'" *National Union Fire Ins. Co. of Pittsburgh v. L.E. Myers Co. Group*, 937 F.Supp. 276, 283 (S.D.N.Y. 1996), quoting *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (citation omitted). According to Black's Law Dictionary, it is a motion "raised preliminarily, esp. because of an issue about the admissibility of evidence believed by the movant to be prejudicial." BLACK'S LAW DICTIONARY at 803 (8th ed. 2004). It is often filed in order to shield a jury from inadmissible evidence or to afford a basis for advance planning of trial strategy. *See* HON. BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 103.8 (2007). It is solely the latter basis on which the Movants seek the Court's ruling.

Movants acknowledge that Fed.R.Evid. 703 permits an expert to rely on evidence that is otherwise inadmissible as long as it is of the type that is "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . . ." Nevertheless, the Movants seek a ruling on the admissibility of documents provided to them in prior mediation, presumably because these documents are not of a type "reasonably relied upon by experts."

In the view of the Court, the current motion is too "sweeping in scope to be decided *in limine*." *National Union*, 937 F.Supp. at 287. The Court has not even been apprized of the nature of the proposed expert report, which makes it difficult, if not impossible, to determine whether the documents hold any relevancy to a report/testimony by the expert. Also, there are

documents that are undated and unsigned for which some foundation is necessary in order to determine their relevance and whether or not they constitute hearsay or an exception thereto. For example, Exhibit D, sub-exhibit "S" of the Movant's motion, appears to be a letter "stamped," but not dated, June 16, 1997. The letter is unsigned. The same sub-exhibit also contains a transcription of what is identified as "DOE News For Immediate Release." Again, there is no date or proof that the information contained therein was actually released to the public.

Movants also contend that the documents are relevant to an issue of "the material inside information of Respondents that was undisclosed to the sellers or the Court prior to the MTI Shares Sale." *See* Movants' Reply Memorandum of Law, dated April 15, 2008 at 3. Movants assert that the "issue is not whether documents were 'provided to Respondents who negotiated the price of the MTI Shares' . . . [but] [r]ather, the issue is whether they had such information; regardless of whether it was procured or self-generated by Respondents." *Id.* As this Court has previously indicated, the issue before the Court involves what "non-public" information was possessed by those negotiating the sale of stock of Mechanical Technology, Inc., which ultimately resulted in the execution of a Stock Purchase Agreement on July 25, 1997. Even if, as the Movants contend, the documents are relevant to this issue, they still must establish that the documents are not hearsay or that an exception to the hearsay rule applies.

In that regard, Movants argue that the documents should be excepted from the general hearsay rule because they are records kept in the ordinary course of business. Fed.R.Evid. 803(6). They contend that "the very act of production[3] by Respondents is sufficient to satisfy

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[3] Respondents take issue with the Movants' assertion that the documents were "produced" by Respondents. According to the dictionary, "produce" has two definitions: "1. To bring into existence, to create. 2. To provide (a document, witness, etc.) in response to subpoena

Rule 803's business records exception," as well as the requirements of Fed.R.Evid. 807. *See* Movants' Memorandum of Law at 10. In support of their position, the Movants cite to *John Paul Mitchell Systems v. Quality King Distrib., Inc.*, 106 F.Supp.2d 462 (S.D.N.Y. 2000) for the proposition that the act of production indicated the defendant's belief that the documents were maintained in the ordinary course of business. In *John Paul Mitchell*, the court found that Robert Seibel, the lawyer and custodian of records for China Distribution & Marketing, Ltd. ("CDM"), one of the corporate defendants, had provided certain documents in response to a subpoena. In the course of the hearing, Seibel invoked his Fifth Amendment right and refused to testify. Most of the discussion in *John Paul Mitchell*, in the context of a request for a preliminary injunction, addressed the issue of authenticity. The court determined that "the act of production implicitly authenticated the documents." *Id.* at 472. However, authenticity is not at issue in the matter currently under consideration, except for one document.

After determining that the business records were authentic, the court in *John Paul Mitchell* concluded that the act of production by Seibel, as custodian of the records, supported the assertion that the documents recorded "the shipment of certain Paul Mitchell products to Europe and were maintained in the ordinary course of CDM's business." *Id.* at 473. In this case, Movants point out that some of the documents were actually authored and/or signed by MTI or First Albany Corp., both of which are among the named Respondents. However, the Court has no clear understanding of the context in which the documents were provided. For example, it is unknown what the request was by the Movants/Mediator that resulted in the documents being

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or discovery request." BLACK'S LAW DICTIONARY 1245 (8th ed. 2004). In this case, it is the latter "production" that apparently occurred in the prior mediation.

provided to the Movants.

Movants also contend that the documents are admissible under Fed.R.Evid. 807. As noted by the court in *John Paul Mitchell*, a court "may admit hearsay documents pursuant to Fed.R.Evid. 807 where (i) the hearsay is particularly trustworthy, (ii) the hearsay bears on a material fact, (iii) the hearsay is the most probative evidence addressing the fact, (iv) the proffer follows adequate notice to the adverse party, and (v) the admission is consistent with the rules of evidence and advances the interests of justice. *Id.*, citing *United States v. Bryce*, 208 F.3d 346, 350 (2d Cir.1999).

Fed.R.Evid. 807 is a "residual exception" to the hearsay rule, and it was not contemplated that the rules [Fed.R.Evid. 803(24) and 804(b)(5)] would provide "an unfettered exercise of judicial discretion." *In re Fill*, 68 B.R. 923, 931 (Bankr. S.D.N.Y, 1987), citing to MCCORMICK, EVIDENCE § 324.1 at 907 (Cleary 3d ed. 1984).[4] Whether to admit evidence under the residual hearsay exceptions is committed to the discretion of the trial court. *United States v. Tome*, 61 F.3d 1446, 1454 (10th Cir.1995). It is to be used sparingly as Congress intended it to be used only in "rare and exceptional circumstances." *Mutual Service Cas. Ins. Co., Inc. v. Armbrecht*, Case No. C99-3099. 2001 WL 34008479, at *3 (N.D.Iowa, Sept. 4, 2001); *see also Boca Investerings Partnership v. U.S.*, 128 F.Supp.2d 16, 22 (D.D.C. 2000) (stating that "'[t]he residual hearsay exception was meant to be reserved for exceptional cases. It was not intended to confer a broad license on trial judges to admit hearsay statements that do not fall within one

[4] The contents of Rule 803(24) and Rule 804(b)(5) were combined and transferred to the new Rule 807. With the exception of the additional requirement under Rule 804(b)(5) that the declarant be unavailable, the text of the two former rules was virtually identical. The Advisory Committee's Note to Rule 807 specifies that, in combining the two Rules, "[n]o change in meaning [was] intended."

of the other exceptions contained in rules 803 and 804(b).'"(quoting 5 WEINSTEIN'S FEDERAL EVIDENCE § 807.02[1])).

In considering whether to admit the documents pursuant to Fed.R.Evid. 807, the first factor is of particular importance, namely, the trustworthiness of the prior statement. *See In re Alder, Coleman Clearing Corp.,* Case No. 95-08203, 1998 WL 160039, * 10 (Bankr. S.D.N.Y. April 3, 1998). "[T]rustworthiness is measured, *inter alia*, by "whether the statement was under oath" and "an ad hoc assessment of reliability based upon the totality of the surrounding circumstances including an assessment of credibility of the out of court declarant, considered in light of the class-type exceptions to the hearsay rule supposed to demonstrate such characteristics.'" *Matewski v. Orkin Exterminating Co.,* Case No. Civ. 02-233, 2003 WL 21516577, at *7, n. 26 (D.Me., July 1, 2003) (citation omitted). The Movants have simply not provided sufficient facts from which the Court might determine the trustworthiness of the documents sought to be admitted, other than to indicate that they were provided by Respondents in the course of mediation. Nor have they provided what the Court would consider "rare and exceptional circumstances" for the Court to rule on their admission at this time.

The Movants have directed the Court to two decisions in support of their motion *in limine*, namely, *Highland Capital Mgmt., L.P. v. Schneider*, Case No. 02 Civ. 8098, 2008 WL 282769 (S.D.N.Y. Jan. 31, 2008) and *Commerce Funding Corp. v. Comprehensive Habilitation Servs., Inc.*, Case No. 01 Civ. 3796, 2005 WL 1026515 (S.D.N.Y. May 2, 2005). A review of both cases indicates that the motions *in limine* sought the exclusion of certain documents, not the admission, as is the case herein. The Court agrees with the definition of an *in limine* motion as set forth in Black's Law Dictionary, namely, that its application is more appropriately considered in the

situation where the evidence is believed to be prejudicial and the argument is made that it should not be admitted. *See National Union*, 937 F.Supp. at 287 (noting that evidentiary rulings should be deferred unless the evidence is clearly inadmissible on all potential grounds in the context of an *in limine* motion). Accordingly, the Court concludes, notwithstanding any detrimental effect a delayed ruling on admissibility might have on the preparation of an expert report, that it would be more appropriate to reserve judgment on the admissibility of the documents, attached as Exhibit D of the Movant's motion, until the evidentiary hearing when it can consider the factual context in which the Movants seek to have them admitted.

IT IS SO ORDERED.

Dated at Utica, New York

this 16th day of May 2008

/s/ Hon. Stephen D. Gerling
STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge