IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al*.,	*	
Plaintiffs,	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE., *et al*.,	*	
Defendants.	*	

* * * * * * *

MOTION TO EXCLUDE PORTIONS OF THE DECLARATION OF MICAH D. STEIN IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL SUMMARY JUDGMENT BRIEF AND RELATED MATERIAL

For the reasons stated in the accompanying memorandum, the Defendants, Linda H. Lamone, State Administrator of Elections, and David J. McManus, Jr., Chair, State Board of Elections, move under Federal Rules of Civil Procedure 7(b) and 56(c)(2), (4), to exclude from the Court's consideration portions of the declaration of plaintiffs' attorney Micah D. Stein, ECF 210-3, to the extent it contains (1) facts not otherwise in the record that are not subject to judicial notice under Rule 201 of the Federal Rules of Evidence and (2) Mr. Stein's own analyses of data, which constitute lay opinions that would be inadmissible under Rule 702. The Court should similarly exclude references to those same facts and opinions in plaintiffs' supplemental memorandum in support of their motion for summary judgment, ECF 210.

A proposed order is attached.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Sarah W. Rice

_____

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Attorneys for Defendants

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* * * * * * *

MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE PORTIONS OF THE DECLARATION OF MICAH D. STEIN IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL SUMMARY JUDGMENT BRIEF AND RELATED MATERIAL

The Court should exclude from its consideration portions of the declaration of plaintiffs' attorney Micah D. Stein, ECF 210-3, to the extent it contains (1) facts not otherwise in the record that are not subject to judicial notice under Rule 201 of the Federal Rules of Evidence and (2) Mr. Stein's own analyses of data, which constitute lay opinions that would be inadmissible under Rule 702. The Court should similarly exclude references to those same facts and opinions in plaintiffs' supplemental memorandum in support of their motion for summary judgment, ECF 210.

Materials submitted in support of or opposition to a summary judgment motion must be capable of being "presented in a form that would be admissible in evidence," Fed. R. Civ. Pro. 56(c)(2), and a supporting affidavit or declaration must be limited to "facts that would be admissible in evidence, *id.* Rule 56(c)(4). These requirements are not satisfied

by Mr. Stein's declaration. Rather, its references to material drawn from campaign finance reports and his own analyses of precinct-specific election results, which are repeated or displayed in plaintiffs' supplemental briefing, appear to be an effort to circumvent the requirements of Rule 56(c) and the Rules of Evidence as a way to avoid the consequences of plaintiffs' own decision not to re-open discovery. That is, Mr. Stein's declaration attempts to summarize certain campaign finance reports made by the Washington, Allegany, and Garrett County Republican Central Committees to display the amounts raised by those committees, facts which are not properly the subject of judicial notice. Mr. Stein's declaration also presents new evidence that is not admissible standing alone, but would require additional expert witness testimony. These categories of new evidence, submitted after plaintiffs represented to the Court that further discovery was unnecessary, are inadmissible and should therefore be excluded from consideration in resolving the cross-motions for summary judgment.

I. MR. STEIN'S DECLARATION CONTAINS INFORMATION WHICH IS NOT THE PROPER SUBJECT OF JUDICIAL NOTICE.

If, as in this instance, a fact is not "generally known within the trial court's territorial jurisdiction," judicial notice is unavailable unless the fact "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1) and (2). It is therefore appropriate to take judicial notice of election results, which appear on the State Board of Elections website, because the State Board of Elections is the government agency charged with reporting accurately the official results of elections.

See Shapiro v. McManus, 203 F. Supp. 3d 579, 606 n.5 (D. Md. 2016) (citing *Hall v. Virginia*, 385 F.3d 421, 424 n. 3 (4th Cir. 2004)).

However, when the State Board of Elections displays campaign finance reports submitted by third parties, the source *may* "reasonably be questioned," Rule 201(b)(2), and in fact routinely *is* questioned as to its accuracy. Partisan and candidate-specific finance reports are regularly subject to challenge from opposing parties and candidates. *See* Kate Magill, "GOP files complaint against Ball's campaign finance reporting," Howard County Times Columbia Flier (Feb. 7, 2018) available at http://www.baltimoresun.com/news/maryland/howard/columbia/ph-ho-cf-calvin-ball-complaint-0215-story.html; Luke Broadwater and Doug Donovan, "Dixon campaign finance reports under scrutiny," Baltimore Sun (Feb. 12, 2016) available at http://www.baltimoresun.com/bs-md-dixon-probe-20160212-story.html. And the General Assembly judged the chance of error high enough to enact penalties against intentional misstatement. Md. Code, Election Law § 13-601(a). The State Board of Elections also conducts audits of the reports, although these audits address technical reporting requirements as opposed to assessing the accuracy of the reports. Maryland State Board of Elections, "Summary Guide: Maryland Candidacy and Campaign Finance Laws" Chapter 15.1 (March 2017) available at https://elections.maryland.gov/campaign_finance/documents/Summary_Guide_2017_final.pdf. The contents of these reports lack the reasonably unquestionable accuracy necessary for judicial notice under Rule 201(b)(2). Therefore, the Court may not take judicial notice of Mr. Stein's references to that information in paragraphs 29 to 37 of his declaration, along

with the attached exhibits. The information is otherwise inadmissible and should be excluded from consideration because Mr. Stein does not purport to have the "personal knowledge" of the information required by Rule 56(c)(4) and Fed. R. Evid. 602; instead, his knowledge of the information is, at best, secondhand and derived from reports generated by third parties. Because the referenced campaign finance report information is unsupported by competent affidavit on personal knowledge and is not judicially noticeable, it would not be admissible in evidence and, therefore, should not be considered in deciding the cross-motions for summary judgment. *See* Rule 56(c)(4).

Moreover, even if a source of information's "accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b)(2), a court cannot take judicial notice unless the fact "can be accurately and readily determined" from the source material. Fed. R. Evid. 201(b)(2). But Mr. Stein's declaration goes beyond simple and "readily determin[able]" operations on publicly available elections data when it purports to compare the performance of specific precincts pre- and post-redistricting. Some information *is* accurately and readily determinable from the State Board of Elections website—that information that appears on the face of the State Board of Elections' reports and information that is derived by simple compilation of these reports. One of the pieces of information apparent on the face of the State Board of Elections reports is that the precincts under the 2002 maps did not remain the same for subsequent elections under the 2011 maps. *Compare* Maryland State Board of Elections, "Number of Precincts and Polling Places by County" (August 13, 2010), available at https://elections.maryland.gov/elections/2010/precincts_by_county.pdf *with* Maryland

State Board of Elections, "Number of Precincts and Polling Places by County" (October 3, 2012), available at https://elections.maryland.gov/elections/2012/precinctsbycounty.pdf (showing, for example, 7 more precincts in Montgomery County in 2012 than 2010; 13 more precincts in Frederick County in 2012 than 2010; and 3 more precincts in Washington County in 2012 than 2010). The difficulty and complexity of an analysis comparing election precinct results between congressional districting maps has been described previously by plaintiffs' own expert witness, Dr. McDonald, whose opening report described the detailed methodology he used to assign votes from orphaned precincts in Montgomery County. ECF 186-19 at 28-29 (McDonald Opening Report). Nor does Mr. Stein's declaration make any mention or accounting of limitations in State Board of Elections data, which, as acknowledged by plaintiffs and defense experts, do not include early and absentee voting at the precinct level. *See* ECF 186-48, 17-18 (explaining methodology for apportioning county-wide early and absentee voting results). The consequences of this oversight on his part are particularly significant, because Mr. Stein's calculations do not account for the difference in availability of early voting across his chosen elections. *See* 2009 Md. Laws ch. 445 (initially establishing Maryland early voting for the 2010 elections); 2013 Md. Laws chs. 157, 158 (expanding the availability of early voting). The information set forth in paragraphs 11 through 17 of the declaration is therefore inaccurate, and cannot be the proper subject of judicial notice under Fed. R. Evid. 201(b)(2). It too must be excluded from consideration in resolution of the cross-motions for summary judgment.

II. THE PORTIONS OF MR. STEIN'S DECLARATION RELATING TO SPECIFIC PRECINCT RESULTS ARE NOT ADMISSIBLE AS LAY TESTIMONY.

If an "expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," the expert is permitted to testify "in the form of an opinion or otherwise" as long as she meets the other requirements set forth in Federal Rule of Evidence 702. By contrast, a non-expert may not testify as to her opinion unless it is "not based on scientific, technical, or other specialized knowledge." Fed. R. Evid. 701. As a threshold matter, for purposes of Rules 701 and 702, "opinion," as the term is used, is inclusive of "inference." In 2011, the Advisory Committee deleted the word "inference" from Rule 701 as a stylistic change, while stating that "any 'inference' is covered by the broader term 'opinion'" and recognizing that "[c]ourts have not made substantive decisions on the basis of any distinction between an opinion and an inference." 2011 Advisory Committee Note, Fed. R. Evid. 701. Courts have therefore analyzed technical analyses of data under the rubric of the interaction between Federal Rules of Evidence 701 and 702. *E.g.*, *United States v. Hamaker*, 455 F.3d 1316, 1330–32 (11th Cir. 2006) (addition and subtraction using Excel spreadsheet within range of opinions admissible under Rule 701); *United States v. Ganier*, 468 F.3d 920, 925–27 (6th Cir. 2006) (testimony describing output of computer forensic software involved specialized knowledge and therefore is governed by Rule 702).

Comparing electoral results between precincts in successive elections under two different districting maps is, as the expert testimony in this case demonstrates, not a matter of simple addition and subtraction. In order to identify "precincts that are part of the current

(post-2011) or former (pre-2011) Maryland Sixth Congressional District," ECF 210-3, ¶ 12, experts in this case applied "technical" and "specialized knowledge" to identify discrepancies in the data, to gauge the interaction of precinct and geographic census boundaries, and to account for the problems posed by these issues. *See*, *e.g.*, ECF 186-19, 28-29 (McDonald Report); ECF 186-41, 10:6-13:16 (McDonald Depo., describing data required to merge election data with district boundaries); ECF 186-23, 7 (Lichtman Supp. Report, describing resolution of expert dispute about precinct-level elections data); ECF 186-48, 17-18 (McDonald Rebuttal Report, discussing dispute about interpretation of precinct-based electoral results given deficits in State Board of Elections data). Evaluating precinct-level election data is much more complex than the types of calculations courts have permitted as lay testimony. That is, when examining the State Board of Election precinct-level results, methods more complex than simple calculations are necessary to arrive at the assertions made in Mr. Stein's declaration, including his representations that the precincts were equivalent for the elections from 2008 to 2016, and his opinion that it is useful to compare shares of reported precinct-level results among these elections (despite the fact that early and absentee voting results are omitted, and absentee voting availability differed significantly throughout the examined time period).

These complexities distinguish Mr. Stein's declaration from the type of business records summaries courts may admit as lay testimony. Mr. Stein has not "simply added and subtracted numbers from a long catalogue of [business] records, and then compared those numbers in a straightforward fashion," *Hamaker*, 455 F.3d at 1331, because the numbers he reports required judgments about assigning precincts to districts given the

features of the State Board of Elections data. Moreover, Mr. Stein did not derive the testimony from his personal familiarity with the records of the State Board of Elections; Mr. Stein is an associate at a law firm, not a state employee or elections researcher. *Compare Texas A&M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 403 (5th Cir. 2003) (business owners or officers permitted to offer lay testimony based on particularized knowledge derived from their position). Mr. Stein's assessment and presentation of statistics derived from the State Board of Elections precinct data files would have required him to "apply knowledge and familiarity with" the data "well beyond that of the average layperson," *see Ganier*, 468 F.3d at 926, if his assessment were reliable. Although the average layperson may well be able to examine county-wide or district-wide results from the State Board of Elections data, and also perform simple mathematical operations on that data, Mr. Stein's use of the precinct-level data removed his testimony from the knowledge and familiarity accessible to the average layperson. In *Ganier*, the Sixth Circuit addressed the analogous argument that the average layperson's familiarity with computers had risen to a level that a layperson could interpret the output of commercially available software. *Id.* at 924-26. The *Ganier* court drew a distinction between "[s]oftware programs such as Microsoft Word and Outlook," which "may be as commonly used as home medical thermometers" and forensic tests performed by the government's witness, which the Court found to be "more akin to specialized medical tests run by physicians." *Id.* at 926. Here, the same need to differentiate between lay understanding and more complex expertise also applies to interpretation of State Board of Elections data, as explicated in the expert reports in this case.

Preserving the line between lay and expert testimony is an essential component of Federal Rules of Evidence 701 and 702. In 2000, the Advisory Committee recommended an amendment, which was adopted, to add language specifying that admissible lay opinion testimony may not be "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c). As the Committee Note explains, the change was proposed "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." The Committee specifically noted that the change "ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 . . . by simply calling an expert witness in the guise of a layperson." As the Fourth Circuit has repeatedly stated, "[a]t bottom ... Rule 701 forbids the admission of expert testimony dressed in lay witness clothing." *United States v. Johnson*, 617 F.3d 286, 292 (4th Cir. 2010) (quoting *United States v. Perkins*, 470 F.3d 150, 156 (4th Cir. 2006)). But that is exactly what plaintiffs attempt to accomplish in this case, by attempting to introduce, through the testimony of plaintiffs' counsel, evidence of a sort previously the subject of expert witness testimony. This attempt to circumvent the discovery rules and deadlines in the case should not be permitted, and any evidence of precinct-level election results or analysis derived from those results should be excluded from consideration of the cross-motions for summary judgment.

CONCLUSION

Paragraphs 11 through 17 and 33 through 37, of the declaration of Micah D. Stein, along with all exhibits referenced in those paragraphs, appearing at ECF 210-3; 210-4; 210-

8; 210-9; 210-10 and all references to and demonstrative summations of such material appearing in plaintiffs' supplemental briefing, which appears at ECF 210, are inadmissible and should be excluded from the Court's consideration of the cross-motions for summary judgment.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Sarah W. Rice

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* * * * * * *

ORDER

Upon consideration of Defendants' motion to exclude and any opposition thereto, it is this _____ day of _____, 2018, ORDERED:

Paragraphs 11 through 17 and 33 through 37, of the declaration of Micah D. Stein, along with all exhibits referenced in those paragraphs, appearing at ECF 210-3; 210-4; 210-8; 210-9; 210-10 and all references to and demonstrative summations of such material appearing in plaintiffs' supplemental briefing, which appears at ECF 210, are INADMISSIBLE; and

The Court SHALL NOT consider the above listed material when resolving the cross-motions for summary judgment.

_____
United States District Judge
James K. Bredar

_____
United States District Judge
George L. Russell, III

_____
United States Court of Appeals Judge
Paul V. Niemeyer