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.	*	

* * * * * * *

REPLY 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

After representing that the cross-motions for summary judgment "are fully briefed and ripe for decision . . ., and the plaintiffs will not move to reopen discovery,"[1] (ECF 209) plaintiffs nevertheless attached a new affidavit to their "simultaneous supplemental summary judgment brief[]," which briefs the parties had agreed were necessary only to "allow the parties to address" subsequent legal authority. In that affidavit, Mr. Stein, an

[1] Defendants continue to adhere to the position that the motions are fully briefed and ripe for decision. The additional evidentiary material is not highly probative to this Court's consideration of the complaint and, therefore, it would be entirely appropriate for the Court to reserve ruling on these issues until such time (if any) as "that material becomes relevant to the Court's adjudication of this matter." *Mould v. NJG Food Serv. Inc.*, 37 F. Supp. 3d 762, 768 (D. Md. 2014). In other words, if the Court agrees that the additional factual material is not probative to its resolution of the cross-motions, there is no obligation for this Court to rule at this time on this motion to exclude.

attorney in this case, averred to the public availability of documents he attached and also purported to conduct simple calculations on data obtained from the State Board of Elections. From the nature of the foundational facts to which Mr. Stein attested, defendants perceived that plaintiffs were requesting that this Court take judicial notice of those facts, a procedure that, for properly noticeable facts, would be appropriate at any stage of the case. Now, in their response in opposition, plaintiffs have asserted additional bases for their belief that the material can be considered on summary judgment. But in so doing, plaintiffs ignore that for evidence to be admissible at trial for purposes of Rule 56(c)(2), it must have been disclosed "as required by Rule 26(a) or (e)," unless the nondisclosure was "substantially justified" or "harmless." Fed R. Civ. Pro. 37(c)(1). Here, plaintiffs are attempting to introduce evidence that could only be made admissible through the additional testimony of undisclosed witnesses or expert opinions. Their unilateral judgment that "further discovery was infeasible as a matter of timing," (ECF 217 at 1 n.1) does not grant them license to supplement the evidentiary record with undisclosed information and witnesses.

REPLY ARGUMENT

I. PRECINCT-LEVEL MARYLAND ELECTIONS DATA CANNOT BE ACCURATELY OR RELIABLY ANALYZED WITHOUT EXPERT TESTIMONY.

Plaintiffs have represented to this Court that they have "further evidence of generally stable political cohesion and bloc voting." ECF 210 at 8. For this proposition, they rely on the compilations of State Board of Elections data attached to and summarized by Mr. Stein's affidavit. *Id.*; *see also id.* at Table 1. In their supplemental briefing,

plaintiffs highlight what they assert are electoral differences over time from geographic territory (precincts) purportedly "retained," "removed," and "added" to the Sixth District as a result of the 2011 redistricting, and opine that "[t]hese data corroborate the relative stability of voters in the Sixth District over time." *Id.* But plaintiffs admitted that they added the descriptors "retained," "removed," and "added" to the State Board of Elections data, ECF 217 at 8, and Mr. Stein himself discloses that those descriptors are not present in the original data downloads. 217-3, ¶ 4.

Plaintiffs' assertion that this compilation of precinct-level data is "further evidence" of political cohesion and bloc voting is undisputedly the stuff of expert testimony, because the same kind of evidence was the subject of Plaintiffs' own expert's testimony.[2] Dr. McDonald compiled and testified to the share of registered voters moved into and out of the Sixth District, ECF 177-19 at 5-6—precisely the operation plaintiffs now characterize as "simple" based on precinct-level party registration data. And Dr. McDonald gave many opinions about the correct way to assess polarization, or bloc voting. He explained that he would normally perform "ecological inference," a complex statistical technique, "to correlate election results with the partisan composition of each precinct." ECF 186-41 at 39:20-40:04. But, he went on to explain he did not do so because he "only had the election date results within each precinct," *id.* at 40:9-10, and that gap in the State Board of Elections' data would impede an accurate analysis. Dr. McDonald went on to

[2] The following discussion of plaintiffs' expert reports and testimony is merely meant to illustrate the late-breaking change in plaintiffs' approach to proffering expert testimony; the flaws in these opinions and analyses have been explicated elsewhere in defendants' briefing.

opine on an alternate method comparing pre-election voting attitudes to post-election voting attitudes, ECF 177-19 at 9; nowhere did he suggest that any evidence of bloc voting could be had solely from election results, let alone the precinct-level, election date results he had already rejected. [3] Moreover, in the polarization analysis Dr. McDonald offered, he did not purport to compare results across elections in which the candidates differed.[4] *See* 177-19 at 8.

Plaintiffs also betray their ignorance of the datasets on which they purport to perform simple operations. They do not and cannot support their claim that none of the presented calculations or analyses "were tied substantively to the geographic identity of the precincts." ECF 217, at 10. In footnote 7 of their response motion they expressly engage in just that analysis, by opining "that just 13 precincts of the 328 total precincts meet" their description of precincts that Mr. Stein "could not accurately say" were "added" or "removed" because the precinct "straddles the boundary" of the pre-2011 or post-2011 Sixth District. Plaintiffs suggest, with no explanation or support, that "[r]emoving those precincts from the calculus would not materially change the results of Mr. Stein's

[3] Plaintiffs assert that defendants "cannot deny that data concerning election night votes sheds meaningful light on the breakdown of votes cast in—and, over time, the political stability of—precincts" because defendants "relied on these very datasets in its discovery responses." ECF 217 at 9-10 & n.6. This is wrong for the simple fact that defendants did not rely on these same datasets, but rather included the State Board's *official election results* in their response to an *interrogatory*. Merely identifying potential sources of data in a discovery response does not, as plaintiffs appear to suggest, represent a concession that all manner of manipulation and use of that data is admissible.

[4] For example, the results from the 2008 and 2010 elections for precincts "added" to the Sixth District would have reflected contests involving different candidates in the prior districts, not the re-election of Congressman Bartlett, the subject of the "retained" precinct results for those years.

calculations," but this is exactly the sort of opinion that falls more properly in the realm of expert testimony.

Plaintiffs' assertion that just 13 precincts could not be classified as "added" or "removed" from the Sixth District proceeds solely on their say-so, since no method for identifying the precincts is explained. Moreover, there is no reason to think that all alterations to precincts that resulted in territory splitting could be identified through examining the State Board of Elections data on its face, without reference or tie-in to geography. Local Boards of Elections may "create and alter the boundaries of precincts within each county," and "combine or abolish precincts." Md. Code Ann., Elec. Law § 2-303. There is no way to determine, for example, if the precinct in Frederick County numbered 21-3, which was apparently removed from the Sixth District in 2011, comprised the same territory before and after redistricting, especially when precinct 21-4 was added to the Sixth District after redistricting.[5] That is, there is no way to know whether, for the 2008 and 2010 elections, the votes in 21-3 should be assigned to the "removed" column or "added" column, or somehow apportioned between the two. It is this work which Dr. McDonald asserts he accomplished by dasymmetric mapping for specific Montgomery County precincts, ECF 186-19 at 27. Plaintiffs have not provided or explained any alternative methodology, nor could they.

[5] Plaintiffs' contend that no amount of shuffling among precincts could have altered their analysis for Washington, Alleghany, and Garrett Counties, but this is beside the point. The State Board of Elections reports county-level elections data containing complete results from all voting phases, including absentee and early voting, that both plaintiffs and defendants have cited to and which this Court has previously taken judicial notice of.

Plaintiffs' experts never conducted the analyses plaintiffs now seek to submit as evidence for the Court's consideration. Instead, plaintiffs have attempted to do-it-yourself, but have gone beyond the facts that "can be accurately and readily determined" from the source material, Fed. R. Evid. 201(b)(2), by making assumptions and making analytical statements that are the proper subject of expert testimony. When Mr. Stein attempted to label precincts as "added," "removed," or "retained," even though no such label appeared in the State Board of Elections dataset, he went beyond the simple mathematical calculations permitted by lay witnesses or which might be accurately and readily determined by judges. As Rule 37(c)(1) makes clear, plaintiffs are "not allowed" to use information in support of a motion that was not timely disclosed under Rule 26(e), governing expert disclosures. Plaintiffs could have asked for more discovery, including a re-opening of expert discovery, but chose not to. That choice rendered any attempt to introduce additional expert testimony at this stage neither "substantially justified" nor "harmless," Rule 37(c)(1). Plaintiffs should not be permitted to create an end-run around the Rules' requirements by conducting their homegrown analyses in the guise of judicially noticeable facts or as lay testimony from an undisclosed witness, more than a year after the close of discovery and the summary judgment motions were "fully briefed."

II. THERE IS NO BASIS ON WHICH THE CAMPAIGN FINANCE REPORTS MAY BE FOUND TO BE ADMISSIBLE AT TRIAL.

Plaintiffs have relied on the campaign finance reports attached to Mr. Stein's affidavits and demonstrative tables compiled from those reports to make affirmative factual

statements about the level of campaign fundraising that actually took place in the relevant years. But here, too, plaintiffs run afoul of the rules of evidence.

As plaintiffs acknowledge, this Court "does not take judicial notice of the truth of the underlying facts in such public documents." *In re Municipal Mortg. & Equity, LLC, Sec. & Derivative Litig.*, 876 F. Supp. 2d 616, 626 n.7 (D. Md. 2012), *aff'd sub nom. Yates v. Municipal Mortg. & Equity, LLC*, 744 F.3d 874 (4th Cir. 2014); *accord Feinberg v. T. Rowe Price Grp., Inc.*, No. CV MJG-17-0427, 2018 WL 3970470, at *4 n.3 (D. Md. Aug. 20, 2018). Plaintiffs attempt to avoid the impact of this rule on the admissibility of the contents of publicly-filed campaign finance reports by invoking the different standards of review applicable to motions to dismiss and summary judgment, ECF 217 at 5 n.2, but such a distinction is unsupported by the reasoning in *In re. Municipal Mortgage & Equity*. There, the Court made its analysis under Fed. R. Evid. 201, which remains whether "a fact must not be subject to reasonable dispute in that it is capable of 'accurate[ ] and read[y] determin[ation] from sources whose accuracy cannot reasonably be questioned,'" *In re Municipal Mortg. & Equity, LLC, Sec. & Derivative Litig.*, 876 F. Supp. 2d at 626 n.7, regardless of the phase of the case. Plaintiffs have provided no authority to support their suggestion that judges can make "reasonable inferences," ECF 217 at 5 n.2, that facts contained in the reports are drawn "from sources whose accuracy cannot reasonably be questioned," because the sources, in this case, would be the campaign committees and not the State Board of Elections. It is clear that Rule 201 requires a judicial determination about the accuracy of these sources.

Plaintiffs provide numerous other bases for admission of the finance reports outside of judicial notice that are equally unavailing for the same reason—each basis requires additional foundational facts not currently in the record, and therefore the reports would likely not be admissible at trial under Fed. R. Civ. Pro. 37(c)(1). The factors used by the Fourth Circuit to determine whether a failure to disclose was "substantially justified" or "harmless" are: "'(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence." *Hill v. Coggins*, 867 F.3d 499, 507 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 1003 (2018) (quoting *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003)). Here, the surprise is evident as plaintiffs seek to introduce evidence that has never been disclosed in discovery about topics they previously asserted did not need evidentiary support, ECF 191 at 11 (stating plaintiffs' theory not contingent on their membership in a political "minority class"); *id.* at 15 (stating chilling is not an element of their claim). Moreover, the ability to cure any surprise is hampered by the close of discovery and plaintiffs' own position that further discovery is "infeasible as a matter of timing," ECF 217 at 1. Plaintiffs have asked this Court to set a trial date "in no event later than October 2018." ECF 209 at 1. Reopening discovery would certainly significantly disrupt plaintiffs' sought-after trial schedule. Further, the amounts raised by local Republican central committees is not particularly useful as a proxy for political spending or activity among

Republicans in the former or current Sixth District, and so plaintiffs would not be particularly disadvantaged by exclusion of this evidence.

Finally, plaintiffs have not acknowledged that their proffered bases for admission of the campaign finance reports rely on undisclosed evidence, nor have they provided any explanation for the late-breaking nature of their reliance on reports that have been available on the State Board of Elections' website through the pendency of this litigation. First, plaintiffs assert that the campaign finance reports are admissible because they suffice as sworn statements under Fed. R. Civ. Pro. 56(c)(4). A cursory examination of the swearing statement reveals that the campaign finance statements are not "made on personal knowledge," *id.*. Each statement requires two signatories to endorse the statement "Under penalty of perjury, we declare that we have examined this report, including the accompanying schedules, and to the best of our knowledge and belief they are complete and accurate." *E.g.*, ECF 210-11 at 3. The inclusion of "and belief" coupled with the statement that the signatories have only examined the report, not prepared it, means that this statement does not meet the requisites of Fed. R. Civ. Pro. 56(c)(4). While the requisites of Rule 56(c)(4) are not to be applied mechanically, *see Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. 312, 315–16 (D. Md. 1983) (form language that is contradicted by substance of affidavit will not preclude admissibility), here there are *no other statements* from the signatories explaining how they reviewed, compiled or formed a belief about the truth of the amounts reported. *E.g.*, ECF 210-11. Moreover, the affiants could not be asked for further explanation about the circumstances of the affidavits at a future phase of the case; they were not disclosed as potential witnesses in

discovery. *Compare* ECF 210-11, 210-12, and 210-13 (listing Marilee Esther Kerns, Raymond Givens, Timothy Wayne Miller, Brenda J. Butscher, Erich Michael Bean, and Wayne Thurman Foote as signatories), *with* Plaintiffs' Responses to Defendants' First Set of Interrogatories, attached as Exhibit 1. As explained above, the plaintiffs are therefore not permitted to rely on their testimony "to supply evidence on a motion, at a hearing, or at a trial." Rule 37(c)(1).

Second, the campaign finance reports cannot satisfy the requisites of Federal Rules of Evidence 902(11) and 803(6) because they do not "show[] by a certification of the custodian" or another that the record "meets the requirements of Rule 803(6)(A)—(C)." Fed. R. Evid. 902(11).[6] In other words, in order to meet the business records exception without any further testimony, the finance reports would need to contain information satisfying the foundational requirements that the record was made near the time of the event, the record was kept in the regular course of business, and making the record was a regular practice of the entity. But here, the campaign finance reports contain none of those foundational facts, and neither do they appear elsewhere in the record. To establish them, plaintiffs would need witness testimony, and, as explained above, none of the signatories of the reports were timely disclosed as potential witnesses in this case and plaintiffs should not be permitted to use the liberalization of Rule 56(e) to bootstrap the admission of evidence excludable under Rule 37(c)(1).

[6] Whether the record is authentic is not in dispute, and plaintiffs provide no authority that compliance with Fed. R. Evid. 902(4) would somehow entitle them to satisfy the business records exception or any other exception to the rule against hearsay.

For all of these reasons, plaintiffs' failure to disclose this information or witnesses during the already concluded discovery period is neither "substantially justified" nor "harmless," and, thus, the evidence must be excluded. *See Hoyle v. Freightliner, LLC*, 650 F.3d 321, 329 (4th Cir. 2011) (explaining that "[t]he pertinent Advisory Committee Notes emphasize that the 'automatic sanction' of exclusion 'provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence'" (quoting Fed. R. Civ. P. 37(c) advisory committee note (1993))).

CONCLUSION

For the reasons contained in defendants' opening memorandum and discussed above, 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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SARAH W. RICE (Bar No. 29113)
JENNIFER L. KATZ (Bar No. 28973)
ANDREA W. TRENTO (Bar No. 28816)
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
srice@oag.state.md.us
(410) 576-6847
(410) 576-6955 (facsimile)

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Attorneys for Defendants