IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FAIR FIGHT ACTION, INC., *et al.*, Plaintiffs, v. BRAD RAFFENSPERGER, in his official Capacity as Secretary of State of Georgia; *et al.*, Defendants.	Civil Action File No. 1:18-cv-05391-SCJ

DEFENDANTS' TRIAL BRIEF REGARDING HEARSAY OBJECTIONS

Defendants submit this brief to assist the Court in its consideration of the various hearsay objections it lodged during trial yesterday. During their examination of John Hallman, Plaintiffs sought to introduce numerous exhibits which they claim are admissible either for a non-hearsay purpose or under a hearsay exception. Specifically, Plaintiffs sought to introduce Plaintiffs' Exhibits 275, 421, 581, 621–22, 1705, and 1873. Defendants objected to these exhibits on hearsay grounds. A brief look at the law demonstrates that these exhibits are inadmissible hearsay and should be excluded by the Court.

ARGUMENT

I. Notice

Plaintiffs' first argument is that the email exhibits (Nos. 275, 581, 622, and 1705) are not hearsay because they are only being admitted for the purpose of demonstrating notice to the Secretary of State that counties were making errors when entering data into the voter registration database. But as this Court correctly noted, notice is only relevant to the extent that the "notice" is of *true* facts. Notice of alleged mistakes in county processing of data in the database are only relevant to the extent that the alleged mistakes are truly mistakes. Thus, unless the truth of those facts has been established independently, the "notice" is inadmissible because it is either (1) irrelevant[1] or (2) inadmissible hearsay because it is being offered to demonstrate that the underlying facts were true.

The cases Plaintiffs cited are unpersuasive. In Harden v. Marion County Sheriff's Dept., a police officer—who was fired for allegedly stealing money from an arrestee—claimed that he was fired in retaliation for testifying in a separate race-discrimination investigation. 276 Fed. Appx. 863 (7th Cir. 2007). The district court excluded the arrestee's accusation of a second police officer as hearsay. The

[1] Defendants' relevance objections are covered in a separate brief also being filed today.

Seventh Circuit found that the exclusion was erroneous because the statement was not being offered for the truth of the accusation, but simply to demonstrate that the police department was on notice that another suspect possibly existed.

In contrast to this case, the truth of the arrestee's allegation was not a required element of the claim in Harden. And the notice was relevant because it helped to demonstrate the police department's animus towards the officer—an element completely separate from the substance of the accusation. Here, Plaintiffs claim that they offer this email as evidence that the State was on notice of mistakes made by counties in the database. But that notice is only relevant if there was, in fact, a mistake.

U.S. v. Cancelliere is similarly unavailing—and supports Defendants' objection that the challenged exhibits are inadmissible hearsay. 69 F.3d 1116 (11th Cir. 1995). That case involved a defendant who defrauded multiple banks by falsely representing that he was the beneficiary of a trust account. The charges brought against him required proving both (1) that the trust accounts were depleted and (2) that he *knew* the trust accounts were depleted. Id. at 1122. A major piece of evidence in the case was a series of letters from the defendant's deceased father criticizing his son for his financial profligacy and demonstrating that the trust funds were depleted.

The government argued that they were not hearsay because they were offered to demonstrate the defendant's *knowledge* that the trust fund was depleted. Id. at 1122. The Eleventh Circuit, however, recognized that the defendant's knowledge was relevant only to the extent that the trust fund was, in fact, depleted. Id. at 1123. The court only allowed the letters to come in because there was ample *alternative* evidence establishing that fact. Id. Thus, "*if* the jury was persuaded by other evidence of the truth of the matters asserted in the letters," then the court said it could rely on them for knowledge. Id. (emphasis added).

Plaintiffs' third case, Worsham v. A.H. Robins Co., is also unpersuasive. 734 F.2d 676 (11th Cir. 1984). There, the court allowed in evidence of complaints from consumers to show that a company had received enough notice that it should have acted. But in that case, the state of mind of the defendant company was squarely at issue in the case. As the court put it, "[i]t was not the fact of notice but the *adequacy* of notice that the parties argued over." Id. at 687 (emphasis added). In contrast, Defendants' state of mind is not at issue in this case.

Plaintiffs simply have not done the work necessary to establish the underlying facts in the exhibits, despite ample opportunities to do so through the testimony of voters, discovery on county election officials, or other means. Plaintiffs' Exhibits 275, 587, 622, and 1705 are emails between state and county officials

discussing various data-entry issues with the database. But none of these "notices" are relevant except to the extent that the underlying facts are indeed true, i.e., a different voter *actually* came up on ExpressPoll when Ms. Selby scanned her driver's license in Plaintiffs' Exhibit 275, or that the alleged mistakes by the counties listed in Exhibit 581, are in fact true. Without something more, these emails are nothing more than irrelevant "notices" of unsubstantiated facts and thus inadmissible hearsay.

II. Adoptive admission.

Nor are the exhibits adoptive admissions. To be admissible as an adoptive admission, the statement: (1) "must be such that an innocent defendant would normally be induced to respond," and (2) "there must be sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement." United States v. Santos, 947 F.3d 711, 724 (11th Cir. 2020) (quoting United States v. Joshi, 896 F.2d 1303, 1311-12 (11th Cir. 1990) (quotation marks omitted) (concluding defendant's nod of the head in response to codefendant's statement that the defendant was a partner in a drug importation scheme was an adoptive admission)).

The exhibits at issue here do not meet this standard. Most of them can be dispensed with in short order.

- Plaintiffs' Exhibit 275 is only passing along the alleged information from a voter, which Hallman has not personally verified.

- In Plaintiffs' Exhibit 622, Hallman does not engage with the "Tina Brown" email at the beginning of the thread or other statements. He only engages with Miller's question months later about a possible change in procedure. The mere fact that Hallman engaged in conversations with the sender does not mean that he adopted their statements.

- Plaintiffs' Exhibit 581 is email correspondence between DeKalb and Fulton County that was forwarded to Mr. Hallman, an employee of the Secretary of State.

- Plaintiffs' Exhibit 1705 is an email exchange between Mr. Hallman and a county elections official where the county official offers suggestions to improve ENET.

Nowhere in any of these exhibits does Hallman suggest that he is adopting his interlocutors' factual statements as true. Nor is he in such circumstances that would suggest he has a duty to speak nor that a reasonable person would feel compelled to do so. Accepting Plaintiffs' argument to its conclusion would lead to the absurd result that a Secretary of State employee must either ignore or affirmatively deny the content of every email received lest he or she risk being deemed to have adopted the statements in those emails.

Other courts have rejected claims of adoptive admission under similar circumstances. For example, this Court has said that merely regurgitating information is not enough to constitute an adoption. Rather, one must "digest[ ] and assess[ ]" the information *and* take action on it. Osterneck v. E.T. Barwick

Indus., Inc., 106 F.R.D. 327, 333 (N.D. Ga. 1984).

The Deepwater Horizon litigation also addressed this principle in the context of email. In that case, a party argued that emails forwarded by employees of the other parties were adoptive admissions. No. MDL 2179, 2012 WL 85447, at *4 (E.D. La. Jan. 11, 2012). But the Court rejected this argument because "a forwarded email is only an adoptive admission if it is clear that the forwarder adopted the content or believed in the truth of the content." Id.

Plaintiffs' Exhibits 1873 and 421[2] are also not adoptive admissions. In those exhibits, Mandi Smith, a Forsyth County Elections Supervisor, tells Hallman that she is working on her presentation for an event and asks Hallman for information about his presentation that she might be able to include in her own. Plaintiffs attempt to read several excerpts from Ms. Smith's email out of context to infer that Ms. Smith's presentation was a joint effort between her and Hallman, and thus a statement by the Secretary of State.[3] However, the email cannot be read so

[2] Plaintiffs' Exhibit 421 is supposedly the final version of Ms. Smith's PowerPoint.
[3] Plaintiffs' Exhibit 1873 also does not fall under any of FRE 801(d)(2)'s remaining exceptions. FRE 801(d)(2)(A) excepts statements made by the party opponent and there is no statement by Hallman in the exhibit, there is only Ms. Smith's email to Hallman. FRE 801(d)(2)(C) excepts statements made by a person whom the opposing party authorized to do so, and Ms. Smith was not authorized by Hallman to make any statement. In fact, she is emailing to fact find for her own presentation,

narrowly to obscure its interpretation.

First, there is no corroborating evidence in the email thread itself that supports the Plaintiffs' narrow reading of Ms. Smith's statements to infer that they were working on it *together*. Read in context, the email only refers to Ms. Smith's own presentation among other presentations at the event.

Second, Hallman does not remember the email nor the presentation. When asked in several different ways by the Plaintiffs, and even by the Court, Hallman consistently responded that he did not recall the specific details and circumstances of these exchanges.[4]

Third, given that there is no response to Ms. Smith by Hallman, there is no confirmation or approval of any information in Ms. Smith's presentation to give credence to the Plaintiffs' argument that this training presentation was by, and therefore a statement made by, the Secretary of State.

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not making a presentation on behalf the Secretary of State. FRE 801(d)(2)(D) excepts statements made by the opposing party's agent or employee and Ms. Smith is a Forsyth County employee, not an employee of Hallman or the Secretary of State. FRE 801(d)(2)(E) excepts statements made by the opposing party's coconspirator during and in furtherance of the conspiracy, but there is no conspiracy in this case.

[4] At the time of this filing, Defendants have not yet received a transcript of yesterday's proceedings. These statements are based on Defendants' counsel's best recollection and may be supplemented with specific citations to the record after a transcript is received.

III. Public records.

Although Plaintiffs have not expressly made this argument, the exhibits in question are also not public records because they do not meet the requirements outlined in F.R.E 803(8)(a). A public record is:

> a record or statement of a public office that
>
> (A) sets out:
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> (i) the office's activities,
>
> (ii) a matter observed while under a legal duty to report, or
>
> (iii) in a civil case, factual findings from a legally authorized investigation; and
>
> (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

F.R.E 803(8)(a).

Even assuming the exhibits themselves are public records—they are not—"[a]ny statement contained in [a] report that was made by a non-party witness or bystander is inadmissible as hearsay within hearsay." Gregory v. Wal-Mart Stores E., LP, No. CV212-042, 2013 WL 12180710, at *6 (S.D. Ga. July 23, 2013).

But moreover, none of the exhibits set out the office's activities, none of them involve matters that Hallman himself observed, and none of the exhibits were the result of a legally authorized investigation. Thus, none of the exhibits meet the requirements outlined in F.R.E 803(8)(a).

To the extent Plaintiffs argue that Exhibit 1705 is a public record either because it is a publicly available document or because it purports to contain information obtained from a public record (ENET reports), Plaintiffs' argument fails. *First*, Plaintiffs appear to misconstrue the public availability of government document under the Georgia Open Records Act with the evidentiary definition of a public record found in F.R.E. 803(8). They are not the same. *Second*, Plaintiffs have not established that ENET reports are public records, and even if the county email did include information obtained from a purported public record such as an ENET report, the email itself is not a public record. In other words, a document is not transformed into a public record for purposes of the hearsay exception by simply reflecting information purportedly obtained from a public record. Such a document lacks the indices of reliability possessed by the original public record and constitutes the very type of unreliable testimony the rule against hearsay was intended to prevent.

IV. Residual hearsay.

The residual hearsay exception is also inapplicable to these exhibits. As the Court has already noted, the residual hearsay exception is only to be used in "very rare, exceptional circumstances," in which the statements have "exceptional guarantees of trustworthiness and a high degree of probative value and necessity."

Bratt v. Genovese, 782 F. App'x 959, 965 (11th Cir. 2019); see also United Techs. Corp. v. Mazer, 556 F.3d 1260, 1279 (11th Cir. 2009)).

Courts consider many factors in determining whether sufficient circumstantial guarantees existed, "including the probable motivation of the declarant in making the statement, the circumstances under which [the statement] was made, the knowledge and qualifications of the declarant, and the existence of corroborating evidence." Id. Of all of these, corroborating evidence is the most important. Corroborating evidence must be "extraordinarily strong before it will render the hearsay evidence sufficiently trustworthy to justify its admission." Rivers v. United States, 777 F.3d 1306, 1316 (11th Cir. 2015) (quoting United States v. Lang, 904 F.2d 618, 623 (11th Cir. 1990)).[5]

[5] Although Rule 807 was amended in 2019, Genovese remains good law. At least two district courts in the 11th Circuit have continued to cite to Genovese post-2019 amendments. See Arreola v. Aguilar, No. 4:19-CV-5 (CDL), 2021 WL 2403446, at *2 (M.D. Ga. June 11, 2021); Fed. Trade Comm'n v. On Point Glob. LLC, No. 19-25046-CIV, 2021 WL 4891334, at *3 (S.D. Fla. Sept. 23, 2021). As the D.D.C. recently explained, the 2019 amendments were intended only to "streamline" the Rule. United States v. Smith, No. CR 19-324 (BAH), 2020 WL 5995100, at *5 (D.D.C. Oct. 9, 2020). Courts were having difficulty with what it meant for a guarantee of trustworthiness to be "equivalent" to the other exceptions given that they are substantially difficult. The point of the rule now is the same as it always was: "was the declarant 'highly unlikely to lie' in making their out-of-court statement[?]" Id. (quoting United States v. Slatten, 865 F.3d 767, 806 (D.C. Cir. 2017)).

None of the proffered exhibits demonstrate the "exceptional guarantees of trustworthiness" required to fall under this "very rare" exception. The exhibits consist merely of email threads and PowerPoint presentations. None of them are corroborated by extrinsic evidence, nor were they given in situations that would give the utmost confidence that the declarant was telling the truth. If the residual hearsay exception applies to such commonplace communications, it would swallow the hearsay rule in its entirety.

CONCLUSION

As discussed above, the challenged exhibits are clear examples of inadmissible hearsay. They are not admissible as notice because the underlying facts have not been established. And they do not qualify for the adoptive admission, public record, or residual exceptions to the hearsay rule. For the reasons stated above, the Court should sustain the State's hearsay objections as to Plaintiffs' Exhibits 275, 421, 581, 621–22, 1705, and 1873.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing DEFENDANTS' TRIAL BRIEF REGARDING HEARSAY OBJECTIONS was prepared double-spaced in 13-point Book Antiqua font, approved by the Court in Local Rule 5.1(C).

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