

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

Emily Gallagher, Suraj Patel, Katherin Stabile,
Jillian Santella, Aaron Seabright, James C.
McNamee, Kristin Sage Rockerman, Maria Barva,
Miriam Lazewatsky, Myles Peterson, Samantha
Pinsky, Christian O’Toole, Tess Harkin, Caitlin
Phung, Antonio Pontex-Nunez, *individually, and on
behalf of all others similarly situated,*
Plaintiffs,

Docket No. 20-cv-5504-AT

v.

New York State Board of Elections; Peter S.
Kosinski, Andrew Spano, and Douglas Kellner,
*individually and in their official capacities as
Commissioners of the New York State Board of
Elections;* Todd D. Valentine, Robert A. Brehm,
*individually and in their official capacities as Co-
Executive Directors of the New York State Board of
Elections;* and Andrew Cuomo *as Governor of the
State of New York,*

Defendants.

**HEARING MOTION FOR JUDICIAL
NOTICE UNDER FEDERAL RULE OF
EVIDENCE 201**

Maria D. Kaufer and Ethan Felder,
Plaintiff-Intervenors,

v.

New York State Board of Elections; Peter S.
Kosinski, Andrew Spano, and Douglas Kellner,
*individually and in their official capacities as
Commissioners of the New York State Board of
Elections;* Todd D. Valentine, Robert A. Brehm,
*individually and in their official capacities as Co-
Executive Directors of the New York State Board of
Elections;* and Andrew Cuomo *as Governor of the
State of New York,* New York City Board of
Elections, Patricia Anne Taylor, *individually and as
President of the New York City Board of Elections,*
and Michael J. Ryan, *individually and as the
Executive Director of the New York City Board of
Elections,*

Defendants.

Plaintiffs respectfully request that this Court take judicial notice of the indicated trial exhibits (filed separately), the website and two documents created by the Wisconsin Election Commission, an article in the *Gothamist*, and the transcript of a deposition of City Defendant's executive director, Michael Ryan. Plaintiffs additionally request this Court to take notice of a “generally known” fact about the time it takes for mail to arrive.

Under Federal Rule of Evidence 201(b)(1) the Court “may judicially notice a fact that is not subject to reasonable dispute because it ... is generally known within the trial court’s territorial jurisdiction.” Under Rule 201(b)(2), this Court may notice a fact which “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Ev 201(b)(2).

Point One

THIS COURT CAN TAKE JUDICIAL NOTICE OF THE WEBSITE OF THE WISCONSIN ELECTION COMMISSION

Courts in the Second Circuit now routinely take judicial notice of websites that meet the “accuracy” standard, regardless of whether they are maintained by governments, nonprofits, or commercial entities, *Hotel Emples. & Rest. Emples. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534 (2nd Cir. 2002) (“it may be appropriate to take notice of the fact that the website makes such a designation, as the authenticity of the site has not been questioned”); *23-34 94th St. Grocery Corp. v. New York City Bd. of Health*, 685 F.3d 174 (2nd Cir. 2012) (“We take judicial notice of a poster recently published on TobaccoFreeNYS.org.”) *United States v. Akinrosotu*, 637 F.3d 165 (2nd Cir. 2011) (“According to www.bop.gov, the official website for the Bureau of Prisons..., of which we take judicial notice for the limited purpose of obtaining the BOP's projected date for the defendant's release from prison, see Fed. R. Evid. 201(b)(2), defendant's release is scheduled for November 2, 2019”); *Boarding Sch. Review, LLC v. Delta Career Educ. Corp.*, 2013 U.S. Dist. LEXIS 48513 (SDNY 2013) (“The Court generally has the discretion to take judicial notice of internet material... [T]he authenticity of the websites and the printouts of the websites which Defendants attach to their

Request have not been challenged, and they are "not subject to reasonable dispute." Fed. Rule Evidence 201(b)"). "It is generally proper to take judicial notice of articles and Web sites published on the Internet", *Patsy's Italian Rest., Inc. v. Banas*, 575 F. Supp. 2d 427 (EDNY 2008).

The Wisconsin Election Commission is a state entity residing at a .gov domain which "administers and enforces Wisconsin elections law", <https://elections.wi.gov/index.php/about>

The Court can then further take notice of the Commission's report and memorandum regarding absentee voting and postmarks (Plaintiffs' trial exhibits 7 and 8) because "[o]fficial government reports and other types of government records are appropriate for judicial notice." *Paskar v. City of N.Y.*, 3 F. Supp. 3d 129, 134 (S.D.N.Y. 2014). *See also, Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 435 n.27 (S.D.N.Y. 2014), *citing Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (concluding that a district court may take judicial notice of information on an official government website) *and Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (holding that district courts may take judicial notice of the contents of certain public records); *United States v. Gonzalez*, 442 F.2d 698, 709 (2d Cir. 1970) (taking judicial notice of drug crime statistics from a Department of Narcotics and Dangerous Drugs report)

Point Two

THIS COURT CAN TAKE JUDICIAL NOTICE OF THE *GOTHAMIST* ARTICLE

Similarly, this Court may take judicial notice of the article in the *Gothamist* which provides numerous assertions and statements which provide evidence that the unreliability of Post Office date stamping protocols was well-known and publicly discussed, as well as assertions useful for cross-examining Defendant's witnesses. The Second Circuit has "previously held that it is proper to take judicial notice of the fact that press coverage... contained certain information, without regard to the truth of their contents". *Staeher v. Hartford Fin. Servs. Group*, 547 F.3d 406 (2nd Cir. 2008); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 402(SDNY 2005) ("The Court reviews the newspaper articles submitted by the Defendants, but not cited or referenced in the Complaint, not for the truth of the

matters asserted therein, but rather merely to note and acknowledge that the existence of those documents and what they contain about relevant matters at relevant times may serve other legitimate purposes in the Court's consideration of the motions before it"); *In re Salomon Analyst Winstar Litig.*, 2006 U.S. Dist. LEXIS 8388 (SDNY 2006) (“[T]he Court does not accept the articles as evidence of the truth of the matters therein asserted [but] takes judicial notice only of the fact that the articles were published, and that regardless of whether they were accurate, their evident purpose and immediate effect was to raise questions about objectivity and bias on Wall Street firms generally”); *Patsy's Italian Rest., Inc. v. Banas, supra* (District Court took “judicial notice of a newspaper article describing the fact that Patsy's Italian Restaurant would be opening a new location in Atlantic City, New Jersey....It is generally proper to take judicial notice of articles and Web sites published on the Internet”); *Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio*, 364 F. Supp. 3D 253 (SDNY 2019), affirmed, 788 Fed. Appx. 85 (2nd Cir. 2019) (“The Court takes judicial notice of the fact that Mayor de Blasio's office, Mayor de Blasio, and Chancellor Carranza made the statements attributed to them in the June 3, 2018 DOE press release.... A press release is a source whose accuracy 'cannot reasonably be questioned' as to the fact that the statements contained therein were made”).

Point Three

THIS COURT CAN TAKE JUDICIAL NOTICE OF THE RYAN DEPOSITION TRANSCRIPT

Plaintiffs submit as an exhibit the deposition transcript of Michael Ryan, Executive Director of Defendant New York City Board of Elections, from the recent case of *Common Cause/New York v. Brehm*, 432 F. Supp. 3D 285 (SDNY 2020), in which the Court held that the Defendants' rules on “inactive voters” violated Constitutional rights.

The deposition transcript is admissible pursuant to Rule 201(b)(2). *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328 (2nd Cir. 2006) (reviewing filings in several related litigations); *Rivera-Powell v. N.Y. City Bd. of Elections*, 470 F.3d 458 (2nd Cir. 2006) (“the court may

take judicial notice of court documents”), citing *Rothman v. Gregor*, 220 F.3d 81 (2nd Cir. 2000) (“Pursuant to Fed. R. Evid. 201(b), we take judicial notice of the Midway complaint as a public record”); *Pergament v. Faibish (In re PHS Grp., Inc.)*, 2015 Bankr. LEXIS 1834 (EDNY 2015) (“The Court takes judicial notice of a deposition of Richard Cohen taken on October 1, 2014”); *Bloodgood v. Lilco*, 1980 U.S. Dist. LEXIS 16674 (EDNY 1980) (“The pertinent answer appears on page 46, of which judicial notice is taken inasmuch as the entire deposition has been filed”); *Granger v. N.Y. City Transit Auth.*, 2017 U.S. Dist. LEXIS 40596 (EDNY 2017), affirmed, 712 Fed. Appx. 119 (2nd Cir. 2017) (judicial noticed of party's deposition testimony in related matter).

Plaintiffs wish to call this Court's attention to the possibility that they may move this Court to find that certain assertions that Defendants' witnesses make at trial are estopped either by the decision in *Common Cause v. Brehm, supra*, or by statements made under oath in the Ryan deposition. *Russo v. DiMilia*, 894 F. Supp. 2D 391 (SDNY 2012) (court held party was collaterally estopped from relying on testimony inconsistent with prior action); *SEC v. Syndicated Food Serv. Int'l*, 2004 U.S. Dist. LEXIS 31717 (EDNY 2004) (“collateral estoppel would prevent both sides from re-litigating issues adjudicated in” prior matter).

Point Four

THE COURT CAN TAKE JUDICIAL NOTICE THAT U.S. MAIL TAKES ONE TO THREE DAYS TO ARRIVE AT A LOCAL DESTINATION

Under Federal Rule of Evidence 201(b)(1), this Court can take judicial notice of matters “generally known within the trial court’s territorial jurisdiction”. Such general knowledge exists about mailing times within this Court's jurisdiction. “Normally it is assumed that a mailed document is received three days after its mailing.” *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 525 (2d Cir. 1996). The Court can take “[j]udicial notice ... of the fact that a letter delivered to the post office on a given day will not be delivered, and hence not received, until the subsequent day at the earliest.”

Commodari v. Long Island Univ., 89 F. Supp. 2d 353, 379 (E.D.N.Y. 2000). Thus, the Court may take notice of the fact that, in AD50 alone, between about 600 and 800 unambiguously validly mailed ballots will be thrown away. Based on the City Defendants' numbers provided this morning, that number is between 2,469 (just June 24) and 4,367 (through June 26) ballots that were indisputably mailed timely that will be thrown out in Brooklyn .

CONCLUSION

Plaintiffs respectfully request this Court to take judicial notice of the requested facts, under F. R. Ev. 201.