UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE BROOKLYN BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff, v. PETER S. KOSINSKI, in his official capacity as Co-Chair of the State Board of Elections, et al. Defendants.	Case No. 1:21-cv-07667-KPF

STATE BOARD OF ELECTIONS DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR *IN LIMINE* RELIEF REGARDING THOMAS CONNOLLY'S TESTIONY AND THE USE OF CERTAIN PROPOSED EXHIBITS

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PRELIMINARY STATEMENT

Defendants Henry T. Berger, Peter S. Kosinski, Andrew Spano, Anthony T. Casale, Kristen Zebrowski Stavisky, and Raymond J. Riley III (the "State BOE Defendants"), as the current Commissioners and Executive Directors of the New York State Board of Elections (the "State Board"), respectfully submit this memorandum of law in opposition to Plaintiff's motion *in limine* to preclude the State BOE Defendants from offering certain testimony of Thomas Connolly, Deputy Executive Director of the New York State Board of Elections, and certain proposed exhibits at trial (the "Motion *in Limine*"). For the reasons stated herein, Plaintiff's Motion *in Limine* should be rejected in its entirety.

I. THE COURT SHOULD NOT EXCLUDE THE TESTIMONY OF THOMAS CONNOLLY.

Plaintiff argues that Thomas Connolly "is not qualified to offer testimony about 'the historical background and legislative history of N.Y. Election Law § 17-140'" because he "has not been disclosed as an expert witness" and such testimony "is based on specialized knowledge." *See* Plaintiff's Motion *in Limine*, at 1-2. However, as is evident from Mr. Connolly's declaration, he is not offering expert opinion; rather, Mr. Connolly's testimony merely states and recites the contents of exhibits pertaining to the historical background and legislative history of Section 17-140. *See* Connolly Decl. ¶¶ 3-16 (describing the content of contemporaneous and retrospective historical materials to provide context for various versions of N.Y. Election Law § 17-140). Furthermore, even if Mr. Connolly were to opine on the content of these exhibits, such opinion testimony is permitted pursuant to the rules of evidence.

Under Federal Rule of Evidence 701, a lay witness not testifying as an expert may provide opinion testimony so long as the testimony is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c)

not based on scientific, technical, or other specialized knowledge. *See United States v. Jenkins*, No. 19-610-cr, 2022 U.S. App. LEXIS 21700, *13 (2d Cir. Aug. 5, 2022). Rule 701 has been interpreted expansively by courts in the Second Circuit, such that "[t]hese courts admit opinion testimony from lay witnesses based not only on their own observations and personal perceptions respecting the incident in question and, perhaps, others like it, but also on the witness's experience and specialized knowledge obtained from his or her vocation or avocation." 4 WEINSTEIN'S FEDERAL EVIDENCE § 701.03 (citing cases); *see, e.g.*, *United States v. Rigas*, 490 F.3d 208, 222-25 (2d Cir. 2007) (in securities and bank fraud prosecution alleging that defendants intentionally misled investors by reclassifying debt, accountant employee of publicly-owned corporation could provide lay opinion testimony explaining how debt was transferred from corporation's books to books of family-owned businesses and how these reclassifications affected corporation's ledger, based on his employment with corporation, during which he was responsible for reviewing its accounting records and correcting its financial statements); *Bank of China, N.Y. Branch v. NBM LLC*, 359 F.3d 171, 181 (2d Cir. 2003) (witness chosen to conduct investigation based on her specialized knowledge could testify within scope of Rule 701(a) about perceptions she formed during her investigation, consisting of "investigatory findings and conclusions"). After all, lay opinion testimony is most helpful when it is drawn not from observed events, but from such factors as the witness's "history or job experience." *United States v. Rea*, 958 F.2d 1206, 1216 (1992). Lay opinion testimony meets the helpfulness requirement of Rule 701 if the witness is in a better position than the jury to form the opinion, and the witness has specialized knowledge that the jury does not have. WEINSTEIN, at § 701.05.

Here, like in *United States v. Rigas* and *Bank of China, N.Y. Branch v. NBM LLC*, the proffered testimony of Mr. Connolly is not based on specialized, expert knowledge, but rather on Mr. Connolly's specialized job experience in his current role as Deputy Executive Director of the New York State Board of Elections ("State Board"), as well as his prior experience as Director of Election Operations at the State Board and Deputy Director of Public Information. Plaintiff had ample opportunity for discovery regarding Mr. Connolly's lay opinions, as Plaintiff questioned Mr. Connolly during his deposition regarding the extent of his knowledge in election law and the State Board's interpretation of Section 17-140. Consequently, Mr. Connolly's declaration does not prejudice Plaintiff.

Moreover, such testimony is helpful to clearly understanding Mr. Connolly's testimony and to determining the meaning of Section 17-140. After all, state agencies, such as the State Board, are generally given deference when construing ambiguous statutory provisions, *see Chevron, U.S.A., Inc. v. Nat. Resources Defense Council, Inc.*, 467 US 837, 842-43 (1984), and the Court has, in fact, requested these materials in its Opinion and Order, wherein your Honor stated that "[t]he Court cannot determine the significance of the nineteenth-century prohibition vis-à-vis the Line Warming Ban without more briefing on the Ban's legislative history." Opinion and Order, at p. 47. As such, Mr. Connolly is permitted to not only provide testimony reciting the historical background and legislative history of Section 17-140, but is also permitted to provide his own opinion on the subject matter. *See Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285 (S.D.N.Y. 2020) (permitting lay opinion testimony from the executive director of the Board of Elections given the executive director's extensive job history and job experience, and finding that such testimony did not qualify as specific scientific or technical knowledge of the kind that would require expert disclosure).

Thus, the Court should not preclude the cited testimony of Thomas Connolly, which describes for the Court the content of important legislative history materials and provides historical context for N.Y. Election Law § 17-140.

II. THE COURT SHOULD NOT EXCLUDE EXHIBITS D-1 THROUGH D-4 AND D-16 THROUGH D-18.

Plaintiff also objects to the admission into evidence of certain news articles, video clips from news and social media, and excerpts from academic sources as evidence in this case on hearsay grounds. However, Plaintiff's argument fails because the proffered exhibits either fall within hearsay exceptions and/or are being offered for purposes other than the truth of the matter asserted.

A. Exhibits D-1 through D-4 and 16-18 are not barred by the rule against hearsay.

1. Exhibits D-1, D-2, D-3, and D-4 fall within the ancient document exception, and their authenticity is automatic and agreed to by Plaintiff.

Pursuant to Federal Rule of Evidence 803(16), "[a] statement in a document that was prepared before January 1, 1998, and whose authenticity is established" is "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness." Fed. R. Evid. 803(16); *see MMA Consultants 1, Inc. v. Republic of Peru*, 719 Fed. Appx. 47, 50 (2d Cir. 2017).

Here, Exhibits D-1, D-2, D-3, and D-4 are ancient documents prepared before January 1, 1998, because D-1 is an excerpt of an academic book published in 1989; D-2 and D-3 are newspaper articles published in 1860 and 1876, respectively; and D-4 is a speech published in an academic journal article in 1906.

Additionally, the second element of this exception is met because Plaintiff does not dispute the authenticity of these exhibits. *See George v. Celotex Corp.*, 914 F.2d 26, 30 (2d Cir. 1990). To the contrary, Plaintiff raised no objection to the authenticity of these documents in the Joint Pretrial

Order ("JPTO"). *See* ECF No. 80. Further, even if Plaintiff had disputed the authenticity of these exhibits, Exhibits D-1, D-2, D-3, and D-4 are self-authenticating because, pursuant to Rule 902(6), "[p]rinted material purporting to be a newspaper or periodical" are self-authenticating, and thereby "require no extrinsic evidence of authenticity in order to be admitted." Fed. R. Evid. 902(6); *see, e.g.*, *MMA Consultants 1, Inc. v. Republic of Peru*, 245 F. Supp. 3d 486, 503 (S.D.N.Y. 2017), *aff'd*, 719 Fed. Appx. 47, 50 (2d Cir. 2017) (holding that certain exhibits were "not barred by . . . the rules of hearsay" because they were "excerpts from newspaper articles, and thus are self-authenticating under Fed. R. Evid. 902(6)"); *In re Davis N.Y. Venture Fund Fee Litig.*, No. 14-CV-4318, 2019 U.S. Dist. LEXIS 111521, *7 n.4 (S.D.N.Y. May 30, 2019) ("The Wall Street Journal article is admissible as an ancient document produced prior to 1998 for which authenticity is established.")).

Thus, Exhibits D-1, D-2, D-3, and D-4 are not barred by the rule against hearsay because they fall within the ancient document exception to the hearsay rule, and their authentication is both automatic and agreed to by Plaintiff in the JPTO.

2. Exhibits D-16 and D-17 are videos that depict conduct in violation of Section 17-140, not statements, and D-18 merely describes this conduct.

Federal Rule of Evidence 801 defines "[h]earsay" as "a statement," and a "[s]tatement" as "a person's oral assertion, written assertion, or nonverbal conduct." However, it is well established that visual images on videotapes are neither oral or written assertions, nor nonverbal conduct of a person intended by the person as an assertion, and as such are not hearsay. *See Hart v. BHH, LLC*, No. 15-cv-4804, 2019 U.S. Dist. LEXIS 58474, *7 (S.D.N.Y. April 4, 2019) (holding that photos and videos that do not contain any written or spoken words are not hearsay) (citations omitted); *United States v. Munoz-Mosquera*, 101 F.3d 683, *2 (2d Cir. 1996) ("The visual images on the videotapes at issue were not 'oral or written assertion[s] or . . . nonverbal conduct of a person . . .

intended by the person as an assertion.'"). Afterall, "news footage . . . is self-authenticating," *United States v. Loera*, No. 09-cr-0466, 2018 U.S. Dist. LEXIS 96132, *11 (E.D.N.Y. June 7, 2018), and courts have recognized that "[i]t would be extremely difficult to forge news videos," *id.* (citing Advisory Committee Notes to Fed. R. Evid. 902(6) ("The likelihood of forgery of newspaper or periodicals is slight indeed. Hence no danger is apparent in receiving them.")).

Here, D-16 and D-17 are not statements, but rather are videotapes that depict persons providing pizza and other food items to voters in New York City, including those in Brooklyn, New York. D-18 merely describes these same acts. The persons depicted in D-16 and D-17 and described in D-18 are clearly acting in technical violation of Section 17-140, thereby giving rise to legal consequences, and making such exhibits not hearsay.

Even if the Court is inclined to find that the D-16 and D-17 videotapes contain hearsay statements, the videotapes could simply be played by the Court without the audio and/or with the volume turned off so that the verbal statements are not considered. With the audio volume turned off, the Court would still be permitted to view the visual images depicted by the video footage, as "the video itself is not hearsay," and Mr. Connolly could "testify as to his observations of the videotape." *See Leclair v. Raymond*, No. 1:19-cv-28, 2022 U.S. Dist. LEXIS 13504, *34 (N.D.N.Y. Jan. 25, 2022).

Thus, Exhibits D-16, D-17, and D-18 are not barred by the rule against hearsay because D-16 and D-17 are videos that depict conduct in violation of Section 17-140, not statements, and D-18 merely describes this same conduct.

3. Exhibits D-1, D-2, D-3, D-4, D-16, D-17, and D-18 fall within the residual exception.

Federal Rule of Evidence 807 "provides an express 'residual' exception to the rule against hearsay" that "permits the introduction of out-of-court statements not specifically covered by

Rules 803 and 804 that would otherwise be precluded by the hearsay rule if they have 'equivalent circumstantial guarantees of trustworthiness.'" *Morales v. Portuondo*, 154 F. Supp. 2d 706, 724 (S.D.N.Y. 2001) (quoting Fed. R. Evid. 807). The residual exception to the hearsay rule provides for the admissibility of such evidence where the evidence is (1) trustworthy, (2) material, (3) of probative importance, and (4) in the interests of justice. *Silverstein v. Smith Barney, Inc.*, No. 96 Civ. 8892, 2002 U.S. Dist. LEXIS 10898, *7 (S.D.N.Y. June 18, 2002).

Here, the exhibits come from reliable sources. Further, the authors of or speakers in such exhibits are not a party to this action, thereby providing further indication that the exhibits are reliable and not the subject of bias. Notably, Plaintiff has not argued that the exhibits are unreliable. In addition, Exhibits D-1, D-2, D-3, and D-4 are material to the case and of probative importance to show the meaning of Section 17-140 by providing information regarding the historical background surrounding various versions of the law. This is the best evidence available of the public discourse that the Legislature considered in drafting Section 17-140. Furthermore, Exhibits D-16, D-17, and D-18 depict examples of conduct that was in technical violation of Section 17-140 (*see* Exhibits D-16, D-17, and D-18). Finally, the contents of the exhibits are self-evident and would be easily understood by your Honor, who in fact requested such materials in her prior Opinion and Order, wherein she stated that "[t]he Court cannot determine the significance of the nineteenth-century prohibition vis-à-vis the Line Warming Ban without more briefing on the Ban's legislative history." Opinion and Order, at p. 47.

Thus, Exhibits D-1, D-2, D-3, D-4, D-16, D-17, and D-18 are not barred by the rule against hearsay because they fall within the residual exception.

B. In any event, these exhibits are advanced for purposes other than the truth of the matter asserted.

"The Federal Rules of Evidence define hearsay as a declarant's out-of-court statement 'offer[ed] in evidence to prove the truth of the matter asserted in the statement.'" *United States v. Dupree*, 706 F.3d 131, 136 (2d Cir. 2013) (quoting Fed. R. Evid. 801(c)). In contrast, "statements not offered for their truth . . . may be introduced as non-hearsay statements." *United States v. Bouterse*, 765 Fed. Appx. 463, 468 (2d Cir. 2019) (citations omitted).[1] Consequently, where "the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." *Dupree*, 706 F.3d at 136 (quotations omitted). Likewise, a statement offered for the following, non-truth purposes is not hearsay:

- "to show the context within which parties were acting, or to show a party's motive or intent for behavior," *Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 398, 420 (S.D.N.Y. 2011) (citations omitted) (emphasis added); or
- "to prove notice or knowledge," *id.* (citations omitted) (emphasis added) (denying motion to exclude evidence of screenshots, statements in newspaper articles, and strategy memos and holding such documents admissible because they were probative of a party's knowledge of infringing activity); and

Here, D-1, D-2, D-3, and D-4 are offered for the purpose of showing the matters of public discourse likely considered by the Legislature in enacting the predecessor to Section 17-140 in

[1] Contrary to Plaintiff's suggestion, the news articles on Plaintiff's exhibit list are, in fact, offered for the truth of the matter asserted. Indeed, Plaintiff seeks to prove that there were long voting lines in New York by using articles purporting to describe voting lines. To attempt to avoid the obvious hearsay issues with using such articles, Plaintiff describes the utility of such articles as only demonstrating that "[l]ocal and national news organizations reported extensively on the issue." *See* Motion *in Limine*, at 6 n.1. However, Plaintiff's Proposed Findings of Fact and Conclusions of Law reveals that Plaintiff, to explain its lack of engagement in conduct covered by Section 17-140, seeks to prove that long lines at the polls caused it to desire to engage in this conduct only recently. *See* ECF No. 86, at ¶¶ 6-8, 11-12, 19, 51. These articles cannot be used to prove that fact.

1906. The public discourse contained within these exhibits likely had an effect on members of the Legislature and informed their drafting of the statute. Further, these exhibits provide historical context to explain the Legislature's motives and intentions in enacting the legislation. For this reason, Courts regularly admit legislative history materials into evidence notwithstanding hearsay objections. Noah Marks & Jessica Ranucci, *The Implied Assertion Doctrine Applied to Legislative History*, 21 LEWIS & CLARK L. REV. 1135, 1148-49 (2017) (explaining that legislative history is used to interpret statutes without violating the rule against hearsay because, "[s]ince the introduction of the Federal Rules of Evidence in 1975, federal courts have treated implied assertions as non-hearsay and have continued to justify admission of these statements.").

D-16, D-17, and D-18 are offered for the purpose of reflecting that local and national news organizations reported extensively regarding conduct in technical violation of Section 17-140, but that no enforcement actions were taken. The exhibits show that certain images and text evidencing conduct in violation of Section 17-140 appeared in news outlets. Further, like in *Arista Records LLC*, the exhibits are probative of the parties' notice of and knowledge of conduct in technical violation of Section 17-140, and that the State BOE Defendants did not seek enforcement against such conduct. The fact of this reporting alone, along with the evidence that no enforcement action has ever been taken in connection with Section 17-140 (*see* Connolly Decl. ¶¶ 42-47, 54-58), has a tendency to show that Section 17-140 is moribund and cannot support a credible fear of prosecution. *See Adam v. Barr*, 792 Fed. Appx. 20, 23 (2d Cir. 2019) (explaining that "the mere existence of a law prohibiting intended conduct does not automatically confer Article III standing" and holding that plaintiff lacked standing because plaintiff could not demonstrate a credible threat of prosecution).

Thus, the exhibits are not hearsay because they are not offered for the truth of the matter asserted.

CONCLUSION

For the foregoing reasons, the Court should reject Plaintiff's Motion *in Limine* in its entirety and grant such other and further relief as the Court may deem just and proper.

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Respectfully submitted,

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