

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Case No. 1:23-cv-00878-TDS-JEP**

DEMOCRACY NORTH CAROLINA; NORTH
CAROLINA BLACK ALLIANCE; LEAGUE OF
WOMEN VOTERS OF NORTH CAROLINA,

Plaintiffs,

v.

ALAN HIRSCH, in his official capacity as
CHAIR OF THE STATE BOARD OF
ELECTIONS; JEFF CARMON III, in his official
capacity as SECRETARY OF THE STATE
BOARD OF ELECTIONS; STACY EGGERS IV,
in his official capacity as MEMBER OF THE
STATE BOARD OF ELECTIONS; KEVIN
LEWIS, in his official capacity as MEMBER OF
THE STATE BOARD OF ELECTIONS;
SIOBHAN O'DUFFY MILLEN, in her official
capacity as MEMBER OF THE STATE BOARD
OF ELECTIONS; KAREN BRINSON BELL, in
her official capacity as EXECUTIVE DIRECTOR
OF THE STATE BOARD OF ELECTIONS;
NORTH CAROLINA STATE BOARD OF
ELECTIONS,

Defendants,

and

PHILIP E. BERGER, in his official capacity as
PRESIDENT *PRO TEMPORE* OF THE NORTH
CAROLINA SENATE; and TIMOTHY K.
MOORE, in his official capacity as SPEAKER OF
THE NORTH CAROLINA HOUSE OF
REPRESENTATIVES,

Intervenor Defendants.

**PLAINTIFFS' SURREPLY IN
OPPOSITION TO DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT**

Pursuant to Local Rule 7.6, Plaintiffs respectfully submit this surreply in further opposition to Defendants' Motions for Summary Judgment, Dkts. 120, 122, to specifically and solely address the evidentiary objections newly raised on pages 4 n.9 and 12-13 of the Reply Brief, Dkt. 129. A surreply is warranted because Defendants set forth two evidentiary objections based on outdated precedents that are otherwise meritless.

First, Defendants contend that Exhibits HHH-JJJ and LLL¹ are “unsworn” and “cannot be considered on summary judgment” in support of Democracy North Carolina’s standing. Dkt. 129, 4 n.9. Second, Defendants argue that Exhibits LL-MM, RR-UU, and WW cannot support Plaintiffs’ showing of disproportionate impact because they are “unsworn[,]” “were never used in County Board depositions, and may not be considered.” Dkt. 129, 12-13. Both arguments lodge the same complaint: that the contested exhibits are unsworn, unauthenticated documents improper for summary judgment. In support of this proposition, Defendants cite a single authority: *Grey v. Potter*, No.1:00CV00964, 2003 WL 1923733, at *4, 7 (M.D.N.C. Apr. 21, 2003).²

¹ The exhibits supporting Plaintiffs’ summary judgment opposition (Dkt. 124) appear indexed at Dkt. 124-1. For ease of reference, the exhibits at issue correspond to the following docket entries: Ex. HHH (Dkt. 124-61), III (Dkt. 124-62), JJJ (Dkt. 124-63), LLL (Dkt. 124-64), LL (Dkt. 129-39), MM (Dkt. 129-40), RR (Dkt. 124-45), SS (Dkt. 124-46), TT (Dkt. 124-47), UU (Dkt. 124-48), and WW (Dkt. 124-50).

² The State Board Defendants filed a Notice of No Reply (Dkt. 130), that adopted the arguments of Legislative Defendants on summary judgment. After conferral with Plaintiffs on the evidentiary issues, State Board Defendants relayed the following position: “State Board Defendants agree with the positions taken by Legislative Defendants regarding footnote 9 and on pages 12-13. Regarding the latter, after consultation with Plaintiffs, if sufficient explanation is provided to demonstrate that Exhibits LL, MM, RR, SS, TT & UU can be verified as accurately depicting information excerpted from State Board produced documents, then we would not object at that point.”

Defendants' evidentiary concern, however, is premised on outdated precedent. The Fourth Circuit previously held that "unsworn, unauthenticated documents cannot be considered on a motion for summary judgment," *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993). But this objection ceased to carry weight by operation of the 2010 amendments to Federal Rule of Civil Procedure 56. *See, e.g., Deakins v. Pack*, 957 F. Supp. 2d 703, 752 (S.D.W. Va. 2013) ("The 2010 amendments to Rule 56(c)(2) eliminated the unequivocal requirement that documents submitted in support of a summary judgment motion must be authenticated.") (quotation and citation omitted).

Rule 56 now states that a party may "object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2); *see also Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 538 (4th Cir. 2015) ("The court may consider...the content or substance of otherwise inadmissible materials where 'the party submitting the evidence show[s] that it will be possible to put the information...into an admissible form.'" (quoting 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.91[2] (3d ed. 2015))). The Committee notes specify that the objection should state that a fact "*cannot be presented in a form that would be admissible in evidence.*" Fed. R. Civ. P. 56 advisory committee's note (2010) (emphases added).

Courts in this circuit routinely note that the *Orsi* rule on what evidence may be considered on motions for summary judgment no longer controls because it was superseded by amendment. *See, e.g., Jones v. Tidewater Reg'l Jail*, 187 F. Supp. 3d 648, 653 (E.D. Va. 2016) ("*Orsi* was 'superseded by an amendment to Rule 56' in 2010.") (quoting

Williams v. Silver Spring Volunteer Fire Dep't, 86 F. Supp. 3d 398, 407 (D. Md. 2015)); *Pronin v. Vining*, 2016 WL 1253182, at *4 (D.S.C. Mar. 31, 2016) (“*Orsi* was abrogated by the 2010 amendments to Federal Rule of Civil Procedure 56, which no longer requires evidence to be presented in admissible form to be considered on summary judgment.”). Likewise, the Middle District has reached the same conclusion. *See, e.g. Aikens v. Herbalife Int’l of Am., Inc.*, 2025 WL 589251, at *1 n.1 (M.D.N.C. Feb. 24, 2025) (“Under the new rule, if the opposing party believes that [the cited] materials cannot be presented in a form that would be admissible in evidence, that party must file an objection.”).

Grey v. Potter, cited by Defendants, relies expressly on *Orsi* and predates the 2010 amendments to Federal Rule of Civil Procedure 56. 2003 WL 1923733, at *4. Because the objections raised are not proper, the Court can reject them and allow Plaintiffs’ summary judgment response and all supporting evidence to be considered in full. *See Aikens*, 2025 WL 589251, at *1 n.1 (noting that absent objections, “this court will consider all evidence submitted”).

But even if the Court excuses Defendants’ improper objections, Plaintiffs can easily satisfy the applicable standard of “explain[ing] the admissible form that is anticipated.” Fed. R. Civ. P. 56 advisory committee’s note (2010); *Humphreys & Partners*, 790 F.3d at 538 (same). As described below, each exhibit at issue can be authenticated “as a matter of routine trial practice.” *United States ex rel. Adams Steel, LLC v. Elkins Contractors, Inc.*, 225 F. Supp. 3d 351, 358 (D.S.C. 2016) (citing Fed. R. Evid. 901(b)).

- Exhibits HHH-JJJ are Democracy North Carolina’s end-of year “Impact Reports” for 2022, 2023, and 2024. These reports summarize the organization’s programming

and achievements for a given calendar year. Exhibit LLL is Democracy North Carolina’s “toolkit” for its volunteer canvass monitoring program, which includes instruction on same-day registration. These documents were produced in the discovery period in response to written requests from Defendants. Each exhibit could be discussed and authenticated by an organizational witness for Democracy North Carolina at trial.

- Exhibits LL, RR, and TT contain election data for New Hanover, Forsyth, and Cumberland counties derived from a spreadsheet created and produced in discovery by the State Board entitled “NCSBE_003097 - 2025-02-06 litigation_ticket_124972_SDR_Undeliverable_Info_2024_Elections,” which reflects statewide election data pertaining to failed mail verification during same-day registration. The full statewide spreadsheet, which includes the same data for the named counties above, was submitted with the summary judgment opposition as Ex. AAA (Dkt. 124-54) to no objection.³ The statewide spreadsheet was also authenticated in the State Board 30(b)(6) Deposition of Paul Cox, *see, e.g.*, Cox 51:24-63:25 (**Surreply Exhibit A**), and identified as material considered in preparation by *both* parties’ experts—Kevin Quinn (Dkt. 124-51 at 77) and Paul White (**Surreply Exhibit B**⁴). If needed, the county-specific excerpts of the

³ Both the statewide and county-specific exhibits anonymize in part the individual voter records by excerpting out the column containing voter names.

⁴ The Rebuttal Report of Dr. Paul White is excerpted to show the cover page and listed “Sources of Information.”

statewide file can be authenticated by a State Board 30(b)(6) witness at trial. Alternatively, the statewide spreadsheet can be utilized to show the same data. Finally, each of these exhibits could also be submitted under the public records or residual hearsay exceptions under Federal Rules of Evidence 803(8) and 807.

- Exhibits MM, SS, and UU contain election data for New Hanover, Forsyth, and Cumberland counties derived from a spreadsheet created and produced in discovery by the State Board entitled “NCSBE_003098 - 2025-02-06 litigation_ticket_124972_SDR_Undeliverable_Verification_History_2024,” which reflects statewide election data pertaining to the verification processing steps for failed mail verification during same-day registration. The statewide verification spreadsheet was authenticated in the State Board 30(b)(6) Deposition of Parker Holland, see, e.g., Holland 162:3-168:8 (**Surreply Exhibit C**) and identified as material considered in preparation by *both* parties’ experts—Kevin Quinn (Dkt. 124-51 at 77) and Paul White (**Surreply Exhibit B**). If needed, the county-specific excerpts of the statewide file can be authenticated by a State Board 30(b)(6) witness at trial. Alternatively, the statewide spreadsheet can be utilized to show the same data. Moreover, these too could be submitted under the public records or residual hearsay exceptions under Federal Rules of Evidence 803(8) and 807.
- Finally, Exhibit WW is a memorandum issued by the U.S. Election Assistance Commission (“EAC”), regarding “Election Mail for the 2024 Presidential Election.” The document is addressed to “State and Local Election Officials,” from “U.S. Election Assistance Commission.” It describes challenges with election mail,

outlines some election mail best practices, and provides USPS and other resources for election officials. Again, this could be submitted under the public records or residual hearsay exceptions under Federal Rules of Evidence 803(8) and 807 or could be submitted as an official publication that is self-authenticating under Federal Rule of Evidence 902(5). *See Williams v. Long*, 585 F. Supp. 2d 679, 686-90 (D. Mar. 2008).

Thus, Plaintiffs have satisfied the demand of Rule 56(c)(2), even assuming an objection was properly raised.

CONCLUSION

Defendants' objections are outdated and unwarranted and should not impede the Court's consideration of all exhibits. Plaintiffs respectfully request that the Court deny Defendants' Motions for Summary Judgment.

Dated: May 23, 2025

Respectfully Submitted,

/s/ Jeffrey Loperfido

Jeffrey Loperfido (State Bar #52939)
Christopher Shenton (State Bar #60442)
Hilary H. Klein (State Bar #53711)
Mitchell D. Brown (State Bar #56122)
Lily A. Talerman (State Bar #61131)
Helena C. Abbott (State Bar #62225)
Adrianne M. Spoto
SOUTHERN COALITION FOR SOCIAL
JUSTICE
PO Box 51280
Durham, NC 27717
Telephone: 919-794-4213
Facsimile: 919-908-1525
jeffloperfido@scsj.org

chrisshenton@scsj.org
hilaryhklein@scsj.org
mitchellbrown@scsj.org
lily@scsj.org
helena@scsj.org
adrienne@scsj.org

Michael Dockterman
Laurel C. Taylor
Kristin Hendriksen
Wesley B. Ward
STEPTOE LLP
227 West Monroe Street, Suite 4700
Chicago, IL 60606
Telephone: (312) 577-1300
mdockterman@steptoe.com
lataylor@steptoe.com
khendriksen@steptoe.com

Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d), I hereby certify that this brief contains 1,494 words as counted by the word count feature of Microsoft Word.

/s/ Jeffrey Loperfido

Jeffrey Loperfido (State Bar #52939)

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to all parties of record.

/s/ Jeffrey Loperfido

Jeffrey Loperfido (State Bar #52939)

RETRIEVED FROM DEMOCRACYDOCKET.COM