IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, et al.,

Plaintiffs,

v. Case No. 11-CV-1128

GOVERNOR SCOTT WALKER, et al.,

Defendants.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE

INTRODUCTION

Before even the first witness has been called to testify or the first exhibit has been offered into evidence, Plaintiffs lodge several complaints and conspiracy theories concerning the defense of the Voter Photo ID law (or at least Plaintiffs' *speculation* about the defense of the law). Plaintiffs claim that Defendants want to introduce a "back door expert witness" by proffering a witness who may discuss a Milwaukee Police Department report on voter fraud. Plaintiffs speculate that several lay witnesses might possibly talk about "election integrity," and that this too is expert testimony. (Only Harvard University professors are apparently supposed to talk about election integrity and the purpose and effect of Voter Photo ID, according to Plaintiffs. *See* Dkt. #158, Pl. Br. at 11 n.12.) Plaintiffs also raise issue with Defendants' descriptions of certain documents in their pre-trial exhibit list, knowing full-well what the documents are.

These concerns, however, are mollified by a single, yet important, fact: this is a bench trial. There is no need to preliminarily exclude certain evidence based on the mere possibility that it may run afoul of a rule of evidence. The Court is in a unique position to weigh different types of evidence. As the Seventh Circuit has noted, "[m]uch that comes to the attention of a judge in a bench trial would be inadmissible in a jury trial." *United States v. Greathouse*, 484 F.2d 805, 807 (7th Cir. 1973). Furthermore, "a trained, experienced Federal District Court judge, as distinguished from a jury, must be presumed to have exercised the proper discretion in distinguishing between the improper and the proper evidence introduced at trial, and to have based his decision only on the latter, in the absence of a clear showing to the contrary by appellant." *United States v. Menk*, 406 F.2d 124, 127 (7th Cir. 1968), *cert. denied*, 395 U.S. 946 (1969); *see generally U.S. ex rel. Placek v. State of Ill.*, 546 F.2d 1298, 1304-05 (7th Cir. 1976).

At this stage in the pre-trial process, there is no reason to exclude future and potential evidence based on Plaintiffs' mere speculation about how it will be presented to the Court. Plaintiffs' motion should, therefore, be denied in its entirety.

ARGUMENT

I. VOTER FRAUD REPORT IS ADMISSIBLE.

Plaintiffs attach to their Motion in Limine excerpts of the Milwaukee Police Department Special Investigations Unit's "Report of the Investigation into the November 2, 2004 General Election in the City of Milwaukee"

("the Report"), as well as a link to the complete version online. (Dkt. #159, ¶ 5.) The Report categorizes numerous election discrepancies and allegations of fraud resulting from the 2004 Presidential Election, such as double-voting, more votes being counted than being cast, felon voting, fraudulent addresses, improper hand counts, deceased voters, and out-of-state political activists voting in Wisconsin and then returning home after the election.

In attaching the Report, which documents voter-fraud allegations and unexplained irregularities (""The reports of more ballots cast than voters recorded were found to be true[,]" Report at 6), Plaintiffs apparently would like the Court to review the Report now, and consider its merit now, instead of at trial with a live witness who can sponsor the exhibit. Regardless of Plaintiffs' logic in emphasizing the Report by attaching it for the Court's consideration, the Report on its face is admissible under Fed. R. Evid. 803(8). It is a "record or statement of a public office," namely the Special Investigations Unit of the Milwaukee Police Department. The Report "sets out . . . the office's activities," as well as "factual findings from a legally authorized investigation." According to the Report, "the recommendations and findings in this report are those of the Special Investigations Unit of the Milwaukee Police Department." (Report at 2.) The U.S. Supreme Court has taken a broad reading of Fed. R. Evid. 803(8), especially as it pertains to reports detailing "factual findings," "conclusions," and "opinions" in public investigatory reports. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988) ("We hold, therefore, that portions of investigatory reports otherwise admissible under

Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion.")

In support of their motion, Plaintiffs attach partial deposition testimony and ask the Court to pre-judge the Report as hearsay. (Dkt. #159-3.) But this is an objection more appropriate for trial, at which point there may be other objections to the Report. If offered, the sponsoring witness will lay a foundation, authenticate the document, and then Defendants' may move for the exhibit to be introduced into evidence. The sponsoring witness may also be able to lay a foundation explaining why it fits within the hearsay exception. Perhaps Defendants may not move to have it introduced, and perhaps the witness may simply discuss the purpose and the conclusions of the Report? In any event, it is a waste of time to evaluate and scrutinize this Report when it may or may not even be an issue for the Court to consider at trial. Again, this is a bench trial, and the Court need not pre-judge the evidence before even being presented with testimony and a motion to admit the exhibit. *Jordan v. Binns*, 712 F.3d 1123, 1133 (7th Cir. 2013) ("the record will not be excluded merely because its author does not have firsthand knowledge of the reported matters."); *id.* at 1132 (records not excluded merely because they include opinions and conclusions.)

Ironically, Plaintiffs in *Frank v. Walker* are the only parties objecting to the use of the Report at trial as an exhibit. Plaintiffs in *LULAC v. Deininger*, No. 12-CV-185 (E.D. Wis.), have not objected to Defendants' use of the Report and

have not moved to exclude it from trial. Thus, the Report may be submitted in Defendants' defense of that case without objection by the *LULAC* Plaintiffs.

Finally, Plaintiffs raise the possibility that this exhibit and its sponsoring lay and fact witness may attempt to proffer "back door" expert testimony. Defendants do not intend any "back door" expert testimony, and if that testimony is proffered, then Plaintiffs are free to object. But there is no reason to strike an exhibit simply because Plaintiffs are frightened of the possibility that the testimony relating to that exhibit may touch upon matters better left to experts. In such a case, it is the Court's role to weigh, not exclude, witness testimony.

II. ELECTION INTEGRITY, VOTER CONFIDENCE, AND STATE INTERESTS.

Plaintiffs next attack local election officials. (Dkt. #158 at 10-14.) Plaintiffs claim that these public servants (all of whom have *decades* of experience in administering elections) have no business testifying about election integrity, voter confidence, and the State interests in Voter Photo ID. Again, Plaintiffs apparently believe that this is testimony best left to university professors.

But contrary to Plaintiffs' fears, Defendants are not offering these election officials as expert witnesses. These witnesses will discuss *their* experience as election officials and *their* personal knowledge of Voter Photo ID, including the law's purposes and actual effect in their jurisdictions during the various primary, general, and recall elections in 2011 and February 2012. They are indeed the "boots on the ground." From a review of Plaintiffs' witness lists, the *only* witnesses in this case who have personal knowledge of how Voter Photo ID actually worked in

practice will be Defendants' witnesses. Plaintiffs' witnesses, by contrast, are expected to testify about how they *think* the law will work and how difficult it is to get an identification card in Wisconsin (although nearly every single Plaintiff and Plaintiffs' witness already has managed to obtain such an allegedly elusive form of identification). Plaintiffs have not demonstrated any legal basis for excluding local election officials from testifying about Voter Photo ID and depriving the Court of this important first-hand testimony about the very law that is the subject of this litigation.

Like their objection to the Report, the *Frank* Plaintiffs again stand alone in their desire to have local election official testimony excluded. The *LULAC* Plaintiffs have filed no corresponding preliminary motion.

To the extent that local election officials are asked their opinion and do provide an opinion, the Court may simply weigh the evidence as lay opinion under Fed. R. Civ. P. 701. Hearing, considering, and weighing the relevant value of evidence is in the District Court's discretion. *See Tyson v. Jones & Laughlin Steel Corp.*, 958 F.2d 756, 759 (7th Cir. 1992) ("This court has time and again recognized the discretion that a trial judge has in weighing the evidence, and choosing from among conflicting factual inferences and he has the inherent right to disregard the testimony of any witness when he is satisfied that the witness is not telling the truth.") (quotations and omissions omitted). Thus, these witnesses should not be barred from testifying.

III. EXCLUSION OF DOCUMENTS "NOT IDENTIFIED WITH SPECIFICITY."

Plaintiffs argue that the exhibit list provided by Defendants has broad categories. But Plaintiffs employ the exact same tactic. Although the *Frank* Plaintiffs (the Plaintiffs responsible for the instant motion) identify 604 exhibits in their pre-trial report (Dkt. #154-1), they are also guilty of using the "catch-all" category. (*See* Dkt. #154, Plaintiffs' Pre-Trial Report at 5, "Plaintiffs may also rely upon documents relied upon by the plaintiffs in *Bettye Jones, et al. v. Judge David G. Deininger, et al.*, Case No. 12-cv-185-LA.")

With this "catch-all," the *Frank* Plaintiffs inform Defendants and the Court that they may rely upon *any* of the *LULAC* Plaintiffs' exhibits. An examination of the *LULAC* Plaintiffs' 808 exhibits reveals several "catch-all" provisions, including:

- 804. "All exhibits identified in Defendants' Pre-Trial Report in this action."
- 806. "All exhibits identified in any party's Pre-Trial Report[.]"
- 807. "All documents produced at any deposition in this action on or after October 10, 2013." (footnote omitted).
- 808. "All documents produced by Defendants in this action on or after October 9, 2013[.]"

(*LULAC*, Dkt. #91-4 at 51.) It goes without saying that the *LULAC* Plaintiffs—potentially just as "guilty" as Defendants of not being descriptive enough—have not objected to Defendants' identification of exhibits in their October 18, 2013, pre-trial report.

Ignoring the fact that the *Frank* Plaintiffs are using "catch-all" exhibits just like the *LULAC* Plaintiffs and Defendants, the allegedly offending exhibits are, for the most part, not really catch-alls at all. (*See* Dkt. #155.)

- Category 29. This category refers specifically to "Bring It to the Ballot" promotional materials and lists 15 different types of promotional materials, such as the website, print ads, and brochures. Plaintiffs know exactly what "Bring It to the Ballot" materials are, and have copies of them because they were produced in discovery.

- Category 30. This category lists 10 different categories of "election official training materials," including the specific titles of training materials that have been produced to Plaintiffs.

- Category 35. "Uncertified copies of birth certificates[.]" This category is certainly not a catch-all; it is specifically limited to Plaintiffs and witnesses identified by Plaintiffs.

- Category 36. "DOT-DMV driver record abstracts for Plaintiffs and witnesses identified by Plaintiffs[.]" Again, this is not a catch-all but a narrow category of documents.

- Category 37. This category constitutes deposition exhibits. Again, this is a narrow category and there is no need to list out every specific document. This category is nearly identical to Plaintiffs' own designation of deposition exhibits as trial exhibits. (*LULAC*, Dkt. #91-4 at 51, "All documents produced at any deposition in this action on or after October 10, 2013." (footnote omitted).)

- Category 40. This category covers documents that Plaintiffs obtained via subpoena. These are Plaintiffs' documents, not Defendants', and so it is hard to understand how Plaintiffs do not know what these documents are.

- Category 41. Court records of election fraud prosecutions and convictions. Again, these are a relatively narrow group of documents and readily accessible by Plaintiffs.

The one category that is clearly a catch-all is Category 38: "Additional relevant documents produced in discovery by Plaintiffs or Defendants in *Frank* and *LULAC*." Defendants do not intend to rely on this category.

Regardless of whether Plaintiffs or Defendants are using overbroad categories, the remedy for such an issue is simple: the parties should exchange exhibits. And they will. By the time trial starts, both sets of parties will have each others' proposed exhibits. If at that time Plaintiffs still believe that they are prejudiced, then they can object to the admission of specific documents into evidence. But it is premature at this point for entire categories of possible exhibits to be stricken, especially since Plaintiffs and Defendants rely on the very same categories. (*See* Plaintiffs' disclosures, *LULAC*, Dkt. #91-4 at 51, "000804. All exhibits identified in Defendants' Pre-Trial Report in this action.")

IV. UN-PRODUCED DOCUMENTS.

Finally, Plaintiffs seek to exclude exhibits allegedly not produced in discovery.

The first category is "[u]ncertified copies of birth certificates of Plaintiffs and witnesses identified by Plaintiffs[.]" There is only one birth certificate in this category, and it is the birth certificate of lead Plaintiff Ruthelle Frank. Defendants obtained this birth certificate by walking over to the Wisconsin Vital Records Office and purchasing copies. *See http://www.dhs.wisconsin.gov/vitalrecords/birth.htm#B1* (last visited Oct. 28, 2013). Plaintiffs are free to make the same walk or to request copies of the birth certificate by mail or fax. *Id.* It is, however, a *felony* to copy birth certificates in Wisconsin. Wis. Stat. § 69.24(1)(a).

The second category is "DOT-DMV driver record abstracts for Plaintiffs and witnesses identified by Plaintiffs[.]" Defendants requested these abstracts from the Wisconsin Department of Transportation's Division of Motor Vehicles for Plaintiffs and Plaintiffs' witnesses that Plaintiffs identified as testifying at trial, and then provided them to Plaintiffs on October 24, 2013, after Plaintiffs failed to provide complete addresses for their trial witnesses in their pre-trial report on October 18, 2013. *See* Dkt. #154 at 3-4. Defendants were not withholding anything.

The third category is "[c]ourt records of election fraud prosecutions and convictions." Any exhibits that Defendants will use in this category have already been produced or made available to Plaintiffs, either through subpoena or used as an exhibit in a deposition. Every record in this category is already in Plaintiffs' possession.

V. UNAVAILABILITY.

Defendants do not contest the unavailability of Ruthelle Frank, Nancy Lea Wilde, and Ruth Ann Obermeyer for trial. (Dkt. #157 at 2.)

Defendants do, however, oppose the admission into evidence of any deposition testimony for available witnesses, unless a hearsay exception applies. *See* Fed. R. Civ. P. 32(a)(4). Defendants will object to the admission of any deposition testimony at trial as hearsay unless an exception applies.

CONCLUSION

For the reasons set forth above, Plaintiffs' Motion in Limine should be denied.

Dated this 30th day of October, 2013.

Respectfully submitted,

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