KEITH BRADFORD, *et al*.,	*	IN THE
	*	
Plaintiffs,	*	CIRCUIT COURT
v.	*	
	*	FOR
MARYLAND STATE BOARD OF EDUCATION,	*	
	*	BALTIMORE CITY
	*	
Defendant.	*	Case No.: 24C94340058
	*	

* *

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR OBJECTION TO INADMISSIBLE EVIDENCE AND MOTION TO STRIKE SUCH EVIDENCE IN DEFENDANT'S MEMORANDA OF LAW IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND TO PRECLUDE EXPERTS

Plaintiffs, by their undersigned counsel, respectfully submit this Reply in Further Support of their Objection to Inadmissible Evidence and Motion to Strike Certain Portions of Defendant's Memoranda of Law ("Objection and Motion"), filed October 4, 2022 (Dkt. 259/0).

The Objection and Motion present three issues: (1) the Maryland State Board of Education ("MSBE" or "Defendant") relies on matter that is inadmissible in evidence and therefore may not be considered by the Court on summary judgment; (2) MSBE presents arguments in its Motion to Exclude Plaintiffs' Experts (Dkt. 247/0) (the "Expert Motion") that belong in its Motion for Summary Judgment and has thereby exceeded the page limits imposed by the Court; and, (3) MSBE raises arguments that have been conclusively determined, are law of the case, and that it has waived.

I. MSBE's Opposition Does Not Attempt to Prove Admissibility of its Charts

MSBE does not present a substantive argument for admission of the "evidence" to which Plaintiffs object, namely: (a) Exhibit N concerning funding levels; and, (b) the alleged BCPSS budget surpluses described in MSBE's memorandum in support of its Expert Motion, and again, in its Opposition to Summary Judgment. MSBE Opp. to Pls.' Mot. for Summ. J. at 19-20. Rather,

MSBE relies on the procedural argument that the Court cannot strike exhibits to, or charts included in, motions. This argument is incorrect (*see* Section II, *infra*), but it also makes no difference. MSBE did not attempt to make a good-faith affirmative argument for the admissibility of these charts, and therefore the Plaintiffs' objection should be sustained.

MSBE's opposition also ignores that the Objection and Motion contained an *objection* to inadmissible evidence. Objections to inadmissible evidence are governed by Maryland Rule 2-517 and are properly raised against "the admission of evidence." Courts do not consider inadmissible evidence in resolving motions for summary judgment. *See George v. Balt. Cnty.*, 463 Md. 263, 273-74 (2019); *Zilchikhis v. Montgomery Cnty.*, 223 Md. App. 158, 177-86 (2015); *Shapiro v. Hyperheal Hyperbarics, Inc.*, No. 1257, 2022 WL 2800976, at **2-4, 5 (Md. Ct. Spec. App. July 18, 2022). Even if it does not strike the evidence, the Court should disregard it as inadmissible.

a. Both Charts Are Inadmissible Under Rule 2-311(d)

Neither Exhibit N nor the "surplus" chart are admissible under Maryland Rule 2-311(d), which provides that a "motion or a response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based." Neither is supported by an affidavit based on personal knowledge. The affidavit purporting to support Exhibit N is not based on personal knowledge and states only that it was prepared by "MSDE," and the Exhibit cites to no supporting material at all, prejudicing Plaintiffs, as discussed below, by making it difficult for them to test the accuracy of the numbers MSBE sponsors. The surplus chart does cite to exhibits, but neither the chart itself or exhibits are authenticated by an affidavit as required by Rule 2-311(d). More fundamentally, as discussed below, the "surplus" conclusions are based solely on summary pages from very long and complex budget documents

that MSBE presents, incompletely and inaccurately, to contend that BCPSS has accumulated $800 million in cash to spend that it does not, in fact, have.

b. Exhibit N Is Devoid of Information Necessary for Plaintiffs and the Court to Assess It

Exhibit N is further inadmissible because it contains nothing to permit Plaintiffs or the Court to analyze the conclusions it contains. Exhibit N presents two tables that purport to compare total funding per pupil received from all sources by the Baltimore City Public School System ("BCPSS") during FY2007-FY2021 to the amounts set forth in the Court's June 2000 Order and in the Metis Report. It purports to adjust those amounts for inflation, and then to show how, for each FY, the dollar amount and percentage by which BCPSS's total funding from all sources (also adjusted for inflation), exceeded the top of the range of overall resources per pupil declared necessary in the Court's June 2000 Order. MSBE, however, neither cites to nor attaches any exhibit establishing, for any FY listed in Exhibit N, the total per pupil funding it asserts BCPSS received. It thus proffers two tables of its own creation in which it claims that BCPSS received funding in certain amounts without stating where in the record this information may be substantiated. Then, it offers calculations adjusting those amounts for inflation.

Plaintiffs' Objection and Motion demonstrates that MSBE has not put forward any basis for the admission into evidence of Exhibit N; MSBE's Opposition points to none. and makes no effort to cure the deficiency. Exhibit N is not supported by any statement, either in the exhibit itself or in an affidavit on personal knowledge, identifying any source in the record for the amounts claimed in the exhibit to be the total per pupil funding received by BCPSS in the years listed in the exhibit. Nor does MSBE proffer a sworn statement by the creator of Exhibit N explaining exactly how the calculations in the tables were performed. Thus, neither Plaintiffs – nor the Court – can verify the presentation set forth in Exhibit N.

c. The "Surplus" Chart is Based on Exhibits that are Inadmissible Excerpts

MSBE's "surplus" chart presents two unsupported and inaccurate conclusions: first, that in years when BCPSS's "revenues exceeded expenses," those revenues were constituted by funds that BCPSS could have used to pay for programs or facilities; and, second, that BCPSS's excess annual "revenues" were cumulative, resulting in more than $800 million in excess cash on hand for BCPSS to spend on education or facilities. Not true. As BCPSS' Chief of Staff, Alison Perkins-Cohen explained in an affidavit submitted with Plaintiffs' opposition, there is no "surplus;" rather, accounting principles require things like new and more valuable buildings paid for by the Maryland Stadium Authority to be recognized by BCPSS as "revenue" in the year they are completed (and depreciated in subsequent years). Such "revenues" do not represent additional cash in hand that BCPSS can spend. *See* Perkins-Cohen Aff. ¶¶ 52-54.

In its most recent filings, MSBE doubles down on its claim that the numbers listed in the chart are surpluses. Notably, MSBE makes no attempt to respond to the facts set forth by Ms. Perkins-Cohen in her Affidavit, but claims only that she cannot testify about the issue because she is not an expert. *See* MSBE Reply in Supp. of Mot. in Limine at 10-11. MSBE also does not proffer anything like the expert opinion it claims is needed to assess the existence of a surplus, relying entirely instead on the Merriam-Webster definition of "surplus." *See id.*

To clarify and more fully explain Ms. Perkins-Cohen's sworn statements, Plaintiffs now submit a Supplemental Affidavit by BCPSS' Chief Financial Officer, Christopher Doherty, a Notice to Supplement and Correct the Record, and additional exhibits. As these documents explain, MSBE included 3- and 4-page excerpts of BCPSS' CAFRs, not the entire set of financial statements for each year. *See* Not. to Supp. ¶ 2. Reliance on such small excerpts leads MSBE to "erroneous assertions" regarding BCPSS' fiscal condition. *See* Doherty Aff. ¶ 6.

As the Supplemental Affidavit states, the "vast majority" of the alleged $800 million cumulative "surplus" is ***not*** "available for capital or operating budget expenditures under any understanding, formal or informal, of the term 'surplus.'" *Id.* ¶¶ 11-12. Rather, under "established accounting principles,"[1] the top-line numbers included in the surplus chart are "change[s] in net position." *See id.* ¶ 9. Positive net changes in position are typically the result of (1) capital expenditures that exceed the costs of depreciation (*i.e.*, new or improved buildings); and (2) repayment of bond principal and capital leases, which reduce long-term liabilities. *See id.* ¶¶ 10-11. Neither of these situations result in a "surplus" of funds available for expenditure. *See id.* ¶ 12. As the Affidavit explains,

> [U]nder accrual-based accounting, income and expenses are recorded as they are incurred, whether or not money changes hands at that point. Accrual-based accounting requires the recognition of these long-term transactions as an increase in assets whose ultimate impact is a positive change in net position, such as a facility renovated by the Maryland Stadium Authority rather than BCPSS, in the year in which the facility is ready for use. Accrual-based accounting also requires the recording as liabilities of known future obligations, such as debts and the interest on debts, values attributable to leases, or other long-term obligations. Accordingly, if a debt is paid, or a lease is retired, the reduction of these future liabilities are long term transactions, which also contribute to a positive change in net position.

Id. ¶ 10.

At best, characterizing such accounting treatment as a cash surplus available for spending and accumulating from year to year is an "unintentional misreading" of BCPSS' accounting statements. *See id.* ¶ 13. In reality, no proper reading of BCPSS' financial statements would allow the aggregation of these net changes in position over several years for the assertion of a cumulative surplus. *See id.* ¶¶ 22-23.

[1] As the Supplemental Affidavit explains, BCPSS' financial statements are both reviewed by MSDE and audited every year. *Id.* ¶ 7.

Additionally, government or grant funds committed to BCPSS for specified purposes must be recognized as revenue in the fiscal year they are committed, even if they are not entirely exhausted in that fiscal year, because, for example, they are earmarked for a multi-year project. Such funds contribute to a net positive change in position, and are recognized as "revenue," but cannot be called a "surplus" because they are restricted and may not be spent for other purposes. *See id.* ¶ 15. "Unassigned" fund balance reflects BCPSS' provisioning of funds consistent with Government Accounting Standards Board Statement 54, which recommends establishment of 3-5% of annual General Fund expenditures for responsible fiscal planning; BCPSS complies with this recommendation by provisioning approximately 4%. *See id.* ¶¶ 16-17.

As the Supplemental Affidavit establishes, the "highlights" section of BCPSS' CAFRs must be read in conjunction with the entirety of the financial statements, which dispel the notion that a positive net change in position is a cash "surplus" available for expenditure on operations or facilities. *See id.* ¶ 23. It is disheartening that MSBE would advance an argument before this Court that no accounting expert would endorse.

MSBE's improper reliance on snippets taken out-of-context from the CAFRs, and the inaccurate conclusions to which that reliance leads, further render the surplus chart inadmissible under Maryland Rule 5-403, because prejudice and danger of confusion substantially outweigh any probative value the chart could have. Further, MSBE's failure to submit any expert support, although it contends expert support is required, also supports this Court's striking or disregarding the surplus chart.

II. The Objection and Motion to Strike are Procedurally Proper

An objection is procedurally proper at this juncture. "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for

objection become apparent." Md. R. 2-517(1). MSBE included its inadmissible charts in its motion for summary judgment and its Expert Motion. Plaintiffs objected concurrently with their oppositions. The timing of Plaintiffs' objection is clearly proper.

Plaintiffs' motion to strike pursuant to Rule 2-322(e) is also proper. It is within the Court's discretion to grant or deny a motion to strike. *See Lancaster v. Gardiner*, 225 Md. 260, 270-71 (1961); *Bacon v. Arey*, 203 Md. App. 606, 667 (2012); *First Wholesale Cleaners, Inc. v. Donegal Mut. Ins. Co.*, 143 Md. App. 24, 41 (2002); *Patapsco Assocs. Ltd. P'ship v. Gurany*, 80 Md. App. 200, 204 (1989). Contrary to MSBE's assertions, Maryland courts are not rigid in limiting motions to strike to "pleadings." *See Unnamed Attorney v. Attorney Grievance Comm'n*, 313 Md. 357, 363 (1988) (leaving undisturbed the trial court's decision to strike a motion for reconsideration); *McDermott v. BB&T Bankcard Corp.*, 185 Md. App. 156, 160-62 (2009) (affirming the trial court's grant of motion to strike a motion to correct deficiencies and a jury demand); *Khan v. Ward*, No. 782, 2021 WL 5088396, at *2 (Md. Ct. Spec. App. Nov. 2, 2021) (affirming trial court's decision to strike "amended exceptions" to a foreclosure sale); *Agbara v. Okoji*, No. 613, 2020 WL 4515784, at **1-2 (Md. Ct. Spec. App. Aug. 5, 2020) (affirming trial court's decision to strike photographs appended to "multiple filings").

III. MSBE Does Not Rebut That it Included Additional Summary Judgment Arguments in its Expert Motion

By including material in its Expert Motion that plainly pertains not to the admissibility of expert reports, but instead to summary judgment arguments, MSBE has prejudiced Plaintiffs by utilizing more pages for summary judgment briefing than the Court allowed. In contrast, Plaintiffs tailored and limited their arguments to comply with the Court-ordered page limit.

Plaintiffs object to two lengthy discussions in MSBE's Expert Motion that are irrelevant to whether Plaintiffs' experts' testimony would be helpful to the Court: (1) the pages in MSBE's

Expert Motion at 33-38 including the "surplus" chart, in which MSBE contends, inaccurately, that BCPSS has accumulated a "surplus" of $800 million and therefore cannot need additional funding; and (2) MSBE's claims, *see* MSBE's Expert Motion at 6-16, that Plaintiffs are "satisfied" with the education their children are receiving in BCPSS.

MSBE addresses the over-length issue in a single footnote. *See* MSBE Opp. to Obj. & Mot. at 2 n.1. That footnote does not explain how its discussion of BCPSS' alleged "surpluses" could properly be included in the Expert Motion rather than in MSBE's Motion for Summary Judgment. Clearly, MSBE's purpose in proffering its inadmissible "surplus" chart in its Expert Motion is to advance additional arguments in support of its own motion for summary judgment. This is made plain by the fact that MSBE includes the chart again in its opposition to Plaintiffs' summary judgment motion, to support its summary judgment arguments that this Court lacks jurisdiction based on increased State funding to BCPSS (Opp. at 3) and that increased funding won't help the students of BCPSS because scores have gone down while the system had a "surplus" (*id.* at 6, 20).

MSBE's sole response to Plaintiffs' objection to the pages in its Expert Motion attacking Plaintiffs' standing is to refer the Court to pages in its Reply in Further Support of its Expert Motion that make no mention of its standing argument, but focus solely on facilities issues. *Compare* Opp. at 2 n.1 *with* Reply on Expert Mot at 3.

Because MSBE fails to make a substantive response to Plaintiffs' objections to the extra pages of summary judgment arguments included in the Expert Motion, the Court should grant Plaintiffs' motion to strike.[2]

[2] MSBE also makes an important admission in the section of its reply on the Expert Motion: that it does not seek summary judgment on the basis that the facilities issue exceeds the scope of the Consent Decree. *See* MSBE Reply in Supp. of Expert Mot. (Dkt. 247/2) at 3 ("MSBE did not use this argument in support of summary judgment, neither explicitly nor by incorporation[.]").

IV. MSBE Reargues Positions It Previously Lost and/or Waived, and Seeks to Reopen Matters that are Law of the Case

In their Objection and Motion, Plaintiffs provided a timeline showing that MSBE has repeatedly raised the same arguments, and this Court has repeatedly rejected them. *See* Obj. & Mot. ¶¶ 27-37.

Defendant has waived many of its current arguments by dismissing the appeal that it based on those arguments in 2001. The trial court's 2000 decision rejecting those arguments is thus law of the case. Early in the litigation, MSBE made near-identical arguments regarding justiciability and the scope of the Consent Decree, among others, before Judge Kaplan, which he rejected. *See* Obj. & Mot. ¶ 27. Those arguments included: whether the Court retains jurisdiction to make findings of fact and conclusions of law pursuant to the Consent Decree, MSBE 2000 Brief of Appellants at 12-13; whether the only justiciable relief available under the Consent Decree must be brought pursuant to ¶ 53 of the Consent Decree, *id.* at 18-20; whether ¶ 53 of the Consent Decree merely conferred a two-year period of Court supervision, or a means of seeking further relief as needed, *id.*; whether ordering the Governor and General Assembly to adequately fund BCPSS constitutes a nonjusticiable political question, *id.* at 20-24; and whether it was proper for the Court to order BCPSS funding beyond what it would have otherwise received, *id.* at 15.

MSBE appealed. *See* Obj. & Mot. ¶ 28. MSBE and BCPSS, but not the Private Plaintiffs, jointly moved to stay the appeal. *See* Ex. A, Joint Mot. to Stay Appeal (Jan. 26, 2001). The Court of Appeals denied the motion. *See* Ex. B, Order (Jan. 26, 2001). In response to the denial, on the eve of oral argument, MSBE filed a notice of dismissal of its appeal. *See* Ex. C, Notice of Dismissal (Jan. 30, 2001). The next day, the Court of Appeals dismissed the appeal. *See* Ex. D, Mandate (Jan. 31, 2001). Nancy Grasmick, the former Superintendent of MSBE, would later

testify that MSBE's decision to abandon the appeal was an agreement to be bound by the Court's 2000 order.[3]

Since MSBE unequivocally expressed its agreement to be bound by the 2000 order, and chose to voluntarily dismiss its appeal from that order, these arguments are waived, and are not properly before the Court in 2022. Under "well-settled" Maryland law, a party waives an argument when it acquiesces in an adverse judgment of a court. *See Osztreicher v. Juanteguy*, 338 Md. 528, 534-35 (1995). Maryland law is clear that "[t]he right to appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal." *Rocks v. Brosius*, 241 Md. 612, 30, 217 A.2d 531 (1966)). There was no position MSBE could take that was more inconsistent with its right tof appeal than its voluntary withdrawal of its appeal. A party may either expressly or impliedly waive a right, or advantage, which he might have enforced in proper time and manner. *Belt, Adm'r v. Blackburn, Adm'r*, 28 Md. 227 (1868).

Federal precedent on voluntary dismissal of an appeal and waiver is also instructive on this point. *See United States v. Brown*, 142 Fed. Appx. 737, 738-39 (4th Cir. 2005) (holding that the court lacked jurisdiction of an untimely appeal filed after a previous voluntary dismissal of appeal pursuant to Federal Rule of Appellate Procedure 42(a)); *Futernick v. Sumpter Twp.*, 207 F.3d 305, 311-12 (6th Cir. 2000) (holding that, if a party could voluntarily dismiss its appeal then raise the same argument at an indefinite future date, it would undermine the purpose of statutes limiting the time to appeal); *Kay v. Angelone*, No. 00-7313, 2000 WL 1772878, at *1 (4th Cir. Dec. 4, 2000) (dismissing a second appeal as untimely following voluntary dismissal of the first appeal).

[3] *See* Grasmick Tr. at 1563:5-7 ("[Q:] By dismissing the appeal, the State agreed to be bound by Judge Kaplan's order, correct? A: Correct.").

Maryland law also provides that when an appeal could have been taken but was not – as here, where MSBE first appealed but then dismissed its appeal – a trial court decision is law of the case. *Ralkey v. Minn. Min. & Mfg. Co,* 63 Md. App. 515,520 (1985) (quoting 21 C.I.S. § 195 at 330 (1940)); *Wheeler v. Wheeler,* 636 A.2d 888 (Del. 1993) (voluntary dismissal of appeal made underlying decision law of the case).

In its denials of MSBE's motions to dismiss in 2019 and 2021, this Court has also rejected these same arguments, aa well as MSBE's additional arguments. 1/16/2020 Mem. Op. & Order, Dkt. 105/8; 3/8/2022 Order, Dkt. 183/3. Such additional arguments include (1) that Plaintiffs' claim has been mooted and this Court's jurisdiction terminated based on the influx of funding under the Kirwan and Built to Learn Acts and (2) that Plaintiffs' responses to interrogatories require termination of this Court's jurisdiction. MSBE Mot. to Dismiss and Dissolve Consent Decree, Dkt. 183/0 at 22-27, 31-36.

Accordingly, the Court should strike these repetitive, failed, and long-ago waived arguments, in their entirety, or, in the alternative, disregard them.

MSBE's argument that the Court should consider its arguments now based on changing burdens of proof and the benefit of now having a full factual record is also meritless. MSBE filed its second motion to dismiss (Dtk. 183/0) raising these arguments on November 10, 2021, ***after*** the Court-ordered close of fact discovery on November 1, 2021. Case Management Order No. 5 (Dkt. 177/0). That motion repeated the same arguments and relied on the same evidence included in the summary judgment motion, including the Consent Decree and the Order language MSBE now cites, precisely the same Exhibit N on funding MSBE includes again now, and exactly the same responses to the same interrogatories. After full briefing, the Court denied the motion (Dkt.

183/3) on March 8, 2022. That occurred, as noted, after fact discovery was substantially completed.

Of the very limited fact discovery that occurred after the motion to dismiss was filed,[4] MSBE cited only the Neal deposition, and only as cumulative evidence in string cites to support its arguments that Plaintiffs lack standing. *See* MSBE's Mot. for Summ. J. at n.25, 26, 28, 29. The factual record did not change in any way that relates to the justiciability, mootness, compliance/scope of the Consent Decree, or interrogatory arguments between the second motion to dismiss and the motion for summary judgment.

Accordingly, it is almost entirely incorrect for MSBE to claim that it benefits from a more-complete factual record today than it did when the second motion to dismiss was filed in late 2021. Moreover, MSBE appealed the denial of its second motion to dismiss to the Court of Special Appeals and to the Court of Appeals, each time advancing the same compliance and justiciability arguments, and both appellate courts declined to take the appeal. *See* MSBE Opp. to Pls.' Mot. to Dismiss Appeal (May 3, 2022) (noting that MSBE advances the same justiciability arguments); Order (May 11, 2022) (dismissing appeal); MSBE Pet. for Writ of Cert. (June 9, 2022) (making the same justiciability arguments); Order (July 8, 2022) (denying petition).

Nor is MSBE correct that the supposedly differing burden of proof on summary judgment helps it here. In its opposition to the Objection and Motion, MSBE reiterates its argument that summary judgment is "different," so that reiterated arguments, dependent on the same facts, may

[4] Three items of fact discovery were completed after the deadline:
1. MSBE deposed Representative Plaintiff Ayanna Neal on November 11, 2021;
2. MSBE provided answers to third-party defendant's Interrogatories on November 22, 2021; and
3. Private Plaintiffs supplemented their Interrogatory responses on June 1, 2022, to provide additional disclosures concerning their expert witnesses.

be properly raised again. *See* MSBE Opp. to Obj. & Mot. (Dkt. 259/1) at 5-6. This is not correct, for reasons also discussed in Plaintiffs' opposition to MSBE's motion for summary judgment. Pls.' Opp. to MSBE's Mot. for Summ. J. (Dkt. 249/2) at 30-31. *First*, as discussed above the facts MSBE relies on have not changed. The second motion to dismiss used the same evidence to make the same arguments. *Second*, MSBE's arguments in any event depend largely on written materials (the Consent Decree, the Court's orders, and Plaintiffs' responses to interrogatories) as to which additional discovery and factual development are not helpful in any event. These materials have not changed between this Court's earlier decisions and this one. *Third*, MSBE's suggestion that the Court's orders on the motions to dismiss do not control on summary judgment because those orders were based solely on allegations in pleadings is not accurate. The motions to dismiss were based on ***facts and evidence***, not just allegations in pleadings – and, consistent with the law governing the resolution of motions to dismiss on jurisdictional grounds, the Court considered the facts and evidence and rejected the motions. *See Evans v. Cnty. Council of Prince George's,* 969 A.2d 1024 (Md. 2009).

V. Plaintiffs Are Plainly Prejudiced

Finally, MSBE argues that Plaintiffs' motion should be denied because they have not demonstrated prejudice. But the prejudice to Plaintiffs is plain.

MSBE's inadmissible charts are a primary basis for its argument that this Court no longer has jurisdiction because the State has complied with its obligations under the Consent Decree. *See, e.g.*, MSBE Mot. for Summ. J. at 35-36 (relying on Exhibit N to claim that compliance with the Court's 2000 order is undisputed); MSBE Opp. to Pls.' Mot. for Summ. J. at 3, 22 (relying on Exhibit N to assert that state funding of BCPSS has exceeded the upper range of the Metis recommendation every year since 2007); *id.* at 19 (relying on Exhibit N to claim that BCPSS received "substantial" increases in funding over the previous 15 years); *id.* at 19-20 (including the

"surplus" chart to claim that annual BCPSS "surpluses" are an undisputed fact); *id.* at 30 (relying on the "surplus" chart to claim that there were surpluses in specific years); MSBE Reply in Supp. of Summ. J. at 8 (relying on Exhibit N to assert that BCPSS has been funded "well in excess" of the Metis Report recommendations); *id.* at 17 (relying on Exhibit N to claim that MSBE has exceeded the upper bound of the Metis recommendations "continuously" since 2007); MSBE Reply in Supp. of Expert Mot. (Dkt. 247/2) at 10-11 (relying on the surpluses chart to assert a "history of budget surpluses").

Plaintiffs would be prejudiced by admission of Exhibit N because, as noted above, MSBE's failure to support it makes it difficult for Plaintiffs to address it or counter its allegations. Similarly, they would be prejudiced by admission of the surplus chart because its foundation on small and out-of-context portions of larger materials makes it materially inaccurate. And were the Court to base a decision on either of these charts, the prejudice to Plaintiffs would be compounded. Similarly, if the Court allows MSBE to circumvent page limits (with which Plaintiffs have complied) to incorporate additional arguments, Plaintiffs would be prejudiced because they tailored and limited their arguments to ensure their compliance with the Court's Orders, while MSBE would be permitted to make its arguments at substantially greater length. MSBE should not be rewarded for its failure to follow Court rules.

Finally, if the Court revisits arguments it has already rejected, or that MSBE has waived, Plaintiffs are prejudiced because they must continually re-formulate and press anew the rebuttals that this Court has accepted as meritorious.

CONCLUSION

For the foregoing reasons, and the reasons articulated in the Objection and Motion, Plaintiffs respectfully request that the Court exclude the inadmissible items identified and strike the impermissible portions of MSBE's memoranda of law.

Dated: December 8, 2022

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CERTIFICATE OF SERVICE

I, Jeffrey E. Liskov, certify that I have this day caused to be served a copy of this PRIVATE PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR OBJECTION TO INADMISSIBLE EVIDENCE AND MOTION TO STRIKE SUCH EVIDENCE IN DEFENDANT'S MEMORANDA OF LAW IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND TO PRECLUDE EXPERTS on the following counsel and parties by electronic mail and by U.S. mail with postage prepaid on December 8, 2022:

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