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

* *

PRIVATE PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO EXCLUDE DEFENDANT'S PROFFERED EXPERT WITNESSES

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PRELIMINARY STATEMENT

Private Plaintiffs respectfully submit this Reply Memorandum of Law in further support of their motion to exclude MSBE's proffered expert witnesses ("Motion").

MSBE's Opposition confirms that its three proposed experts will present only generic opinions about school funding and facilities conditions that parrot MSBE's litigation positions without accounting for facts specific to BCPSS or analyzing whether their opinions apply to BCPSS. This absence of expert analysis is fatal to their proposed testimony, given both this Court's findings that BCPSS is different and requires more funding than other school districts and BCPSS's many distinctive characteristics, such as its majority of low-income, students of color in a city with persisting structural racial discrimination. As a result, MSBE has not established that its experts offer opinions based on reliable methodologies for this case, nor that their generic opinions would assist the Court to resolve issues specific to BCPSS, as is necessary for their opinions to be admissible under Maryland Rule 5-702 and *Daubert*.

BACKGROUND

Consistent with its past submissions, MSBE's protracted "Background" consists mostly of assertions not relevant to the Motion, mischaracterizations of Private Plaintiffs' claims and experts, and omissions of material facts. (Oppo. 2-12.) Private Plaintiffs will not burden the Court with correcting and completing MSBE's "Background," and will address it below to extent relevant.

ARGUMENT

Private Plaintiffs showed that MSBE's proposed expert testimony fails to satisfy either Maryland Rule 5-702 or *Daubert* requirements and should be precluded from trial as inadmissible. (Mot. 5-21.) MSBE's Opposition largely ignores the substance of Plaintiffs' showing and fails to provide the Court the necessary grounds to admit MSBE's proposed expert testimony consistent with law.

I. MSBE FAILS TO SHOW THAT HANUSHEK'S GENERIC, UNRELIABLE, AND UNFITTED OPINION WOULD ASSIST THE COURT TO RESOLVE BCPSS-SPECIFIC ISSUES

Private Plaintiffs presented three reasons that Hanushek's proposed testimony is not admissible. (*Id*. 5-11.) MSBE did not respond substantively to any of them; therefore, Hanushek's proposed testimony should be excluded for the unrebutted reasons established by Plaintiffs.

A. MSBE Fails to Show that Hanushek's Proposed Generic Opinion Would Help the Court

The parties agree that Hanushek's core opinion is simply that additional school funding, if not spent effectively, might not be effective in improving student outcomes. (*Compare* Mot. 7-8 *with* Oppo. 5-7.) The Motion shows that this opinion is no more than a tautology that requires no expert for the Court to understand. (Mot. 6-7.) Indeed, in his deposition, Hanushek agreed that one could *always* say that money spent effectively could be more effective than money spent ineffectively. (*Id*., Ex. A, Hanushek Dep. 41:5-7 ("the tautology holds for every—every subject you want to put in the question").) In response, MSBE ignores Private Plaintiffs' argument, focusing instead on Hanushek's purported credentials (Oppo. 16-17), failing to give the Court any grounds to conclude that Hanushek's self-evident statements would assist the Court. *See* Md. Rule 5-702 (providing that expert opinion may be admitted if it "will assist the trier of fact").

The Motion also establishes that Hanushek made no effort to render his opinion potentially helpful, such as analyzing whether BCPSS spends funds effectively or whether the additional funding amounts sought by Private Plaintiffs would be effective in improving BCPSS student outcomes. (Mot. 7.) Without any analysis specific to BCPSS, Hanushek's proposed opinions amount to generic observations that cannot help the Court resolve Plaintiffs' claims or evaluate Plaintiffs' experts' specific opinions about BCPSS. MSBE ignores the substance of this argument

too (Oppo. 17 (asserting without explanation that Hanushek's opinions help rebut Plaintiffs' experts)), leaving the Court with no ground for finding his testimony helpful and admissible.

Private Plaintiffs cite multiple decisions of other courts in which Hanushek's same opinion was criticized as defective and unhelpful. *See, e.g., Lobato v. Ortega*, 2011 WL 10960207, at *141 (D. Colo. Dec. 9, 2011) (explaining that courts disagreed with Hanushek "in many of the cases" in which he was allowed to testify); *Tex. Taxpayer & Student Fairness Coal. v. Williams*, 2014 WL 4254969 at **131-32 (Tex. 200th Dist. Ct. Aug. 28, 2014) (identifying numerous flaws in Hanushek's opinion). MSBE's only response—that some courts permitted Hanushek to testify before finding his opinion unhelpful—provides no reason for this Court to admit the very same testimony that other courts have repeatedly found to be unhelpful.

B. MSBE Fails to Show that Hanushek's Proposed Opinion is Based on a Reliable Methodology

The Motion also showed that Hanushek's proposed opinion is predicated on an array of methodological flaws (Mot. 7-10), including his reliance on a 1997 "meta-analysis" of decades-older data that he does not have and cannot replicate, so that there is no way to test or validate his opinion. (*Id*. at 8 (citing Hanushek testimony).) His attempt to support his opinion with historical NAEP test results and data from Tennessee's "Project Star" is flawed in additional, obvious respects. Another court, in considering the same support that Hanushek proffers here, faulted his reliance on NAEP data for, among other things, not accounting for cost increases since the 1970s, failing to control for changes in ethnic or economic composition of students over time, and biasing results by considering data for 17-year-olds only. *See Tex. Taxpayer*, 2014 WL 4254969, at *131-32; *see also Matthews v. State*, 246 A.3d 644, 663 (Md. Ct. Spec. App. 2021) (Rule 5-702(3) requires experts to have both an "adequate supply of data" and a "reliable methodology").

MSBE's *only* response is that consideration of the reliability of Hanushek's opinion can be deferred until cross examination. (Oppo. 19-21.) Cross examination, however, is applicable to testimony that has been ruled admissible, while Hanushek's testimony is not admissible for the reasons established by Plaintiffs and not rebutted by MSBE. *See Rochkind v. Stevenson*, 471 Md. 1, 38 (2020) (explaining cross examination may attack "shaky ***but admissible*** evidence") (citing *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 596 (1993) (emphasis added). In short, the fact that cross examination is available for every witness who may properly testify does not mean that Hanushek's patently unreliable opinions should be held admissible.

MSBE also advances the bizarre argument that Hanushek has no obligation to disclose the facts on which is opinions are based, and therefore cannot be faulted for his inability to specify the data on which he relied in forming his opinion. (Oppo. 19-20.) MSBE supports this argument with a case that pre-dates *Daubert's* holding that opinions must be testable to validate their reliability. (Oppo. 19 (citing *U.S. Gypsum Co. v. Mayor & City Council of Balt.*, 336 Md. 145, 172 (1994)).) MSBE's one other citation is to a case concerning an expert who, unlike Hanushek, could describe the factual basis for his opinions, even though some data had been destroyed. (*Id*. (citing *Santiago v. State*, 458 Md. 140, 157 (2018)).) MSBE cites no support for a conclusion that Hanushek's opinion is admissible, even though it was reached through a "black box": He cannot identify the data on which his opinion rests.

C. MSBE Fails to Show that the Generic Opinion Proffered by Hanushek Fits the BCPSS-Specific Issues in this Case

The Motion further shows that Hanushek's proposed opinion does not "fit" Baltimore City schools and students in a way that would assist the Court to decide any issue. *See Rochkind*, 471 Md. at 31, 36 (adopting *Daubert* and its "critical" guidance that includes whether there is sufficient connection between the evidence and opinion proffered).

This lack of fit results from Hanushek's decision not to analyze any facts specific to BCPSS. MSBE does not dispute the BCPSS students are mostly low-income, the majority are persons of color, and that they have distinctive needs in a city with persisting structural racial discrimination. (Mot, 10.) This Court has already determined that Baltimore City's students who live in poverty and face other disadvantages "cost more to educate." 8/20/04 Mem. Op. (Dkt. 50) at 12. Yet, contrary to this Court's finding, Hanushek admitted in deposition that he did not consider *any* BCPSS-specific facts when rendering his generic opinion, including:

- BCPSS funding and spending levels;
- BSPSS student test results;
- BCPSS student programs;
- The prevalence of at-risk or low-income students in BCPSS;
- The circumstances of students of color in BCPSS;
- BCPSS teachers or administrators;
- Conditions of school facilities in Baltimore City.

(Motion 10 (citing Hanushek testimony).) Hanushek's generic views on school funding, formed decades ago without any consideration of BCPSS's distinctive facts, and without any adjustments to account for BCPSS's funding or spending levels or racial- and socio-economic conditions, simply would not help the Court resolve the BCPSS-specific issues in this case. Because his proffered testimony is not tailored to the facts of this case, it is not helpful for this case, and should not be admitted. *See, e.g., Matthews*, 246 A.3d at 662 (explaining that opinions are not admissible when there is an "analytical gap" between the evidence and the opinions).

MSBE's substantive response amounts to a *single* sentence: It asserts Hanushek's opinions are "directly applicable" to Plaintiffs' claims and, therefore, they should not be excluded. (Oppo.

22.) MSBE's conclusory, counsel-made assertion is contrary to Hanushek's deposition admission that he considered nothing and analyzed nothing about BCPSS. Tellingly, MSBE cites nothing for its bare claim that Hanushek's generic opinion applies to BCPSS.[1]

MSBE tries to avoid the consequences of Hanushek's failures by arguing that *Rochkind's* reference to "fit" is only *dicta*. (Oppo. 21-22.) But the requirement that MSBE seeks to belittle and avoid—because Hanushek cannot satisfy it—is well-established.[2] Its roots are in *Daubert*'s consideration of "fit," *i.e.*, whether the proffered expert opinion is sufficiently tied to the facts of the case so that it will aid in resolving it. 509 U.S. at 591. A few years after *Daubert*, the Supreme Court explained that expert testimony is inadmissible when there is a gap between proffered opinions and underlying facts. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 145-46 (1997). Maryland formally adopted this review for admissibility of expert opinions in 2009. *See Blackwell v. Wyeth*, 408 Md. 575 (2009) (affirming exclusion of expert who did not sufficiently consider facts in record). And if there were any doubt, *Rochkind* expressly adopted all *Daubert* requirements for admissibility of expert testimony in 2020. *See* 471 Md. at 26. MSBE's suggestion that there is no authority requiring that Hanushek's opinion "fit" this case (Oppo. 21) is easily disproved by Rule 5-702's requirement that testimony must "assist the trier of fact" and

[1] MSBE continues its pattern of deflection by falsely claiming Plaintiffs' experts did not consider facts about BCPSS. (Oppo. 11, n.2.) MSBE is not in position to make such claims because it strategically chose not to depose Plaintiffs' experts to confirm what they considered. MSBE's claim also is disproven by Prof. Baker, for instance, who analyzed BCPSS funding, spending, and student outcomes in his report. (*E.g.*, Mot., Ex. H at 13-64.)

[2] MSBE's claimed ignorance of this requirement is belied by its past filings. (*See*, *e.g.*, MSBE's Motion *in Limine* to Preclude Plaintiffs' Expert Testimony at 29, Dkt. 247/0 ("Maryland Courts have consistently excluded expert testimony that was not grounded in facts specific to the plaintiffs' case.").)

by legal research.[3] Whether the problem is characterized as lack of "fit," as an "analytical gap," or as a lack of "helpfulness," Hanushek's outdated generic opinion, which provides no accounting for BCPSS's distinctive facts, is insufficiently tailored to the BCPSS issues in this case to assist the Court with resolving them. Such unfitted testimony is inadmissible. *See Daubert*, 509 U.S. at 591, 595-97 (unhelpful expert testimony is irrelevant and the trial court's gatekeeper role includes ensuring that expert testimony "is relevant to the task at hand").

MSBE's fallback argument, that questions concerning Hanushek's unfitted opinion can be raised on cross examination (Oppo. 22), again confuses admissibility with weight, and wrongly presumes that unhelpful opinions should be admitted and cross-examined.[4]

II. MSBE FAILS TO REBUT PRIVATE PLAINTIFFS' SHOWING CONCERNING THE DEFECTS THAT MAKE LEVENSON'S PROFFERED TESTIMONY INADMISSIBLE

Instead of addressing the defects in Levenson's proffered testimony, MSBE doubles down on its previously articulated bases for employing him as an expert. The Opposition does not refute the reasons shown in the Motion for precluding his testimony as inadmissible; rather, it underscores the deficiencies Private Plaintiffs identified.

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[3] *See, e.g., Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) (*Daubert* requires trial courts to consider "fit"); *United States v. Dorsey*, 45 F.3d 809 (4th Cir. 1995) (excluding testimony and explaining it must assist trier of fact); *Casey v. Geek Squad Subsidiary Best Buy Stores, L.P.*, 823 F. Supp. 2d 334 (D. Md. 2011) (citing *Daubert*, excluding testimony, and confirming it "must be 'sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute'"); *Samuel v. Ford Motor Co*., 96 F. Supp. 2d 491 (D. Md. 2000) (same); *ePlus, Inc. v. Lawson Software, Inc*., 764 F. Supp. 2d 807 (E.D. Va. 2011) (citing *Daubert* and excluding expert for, *inter alia*, lack of "fit").

[4] The single case cited by MSBE concerns Rule 403 and the admission of medical reports, not the cross examination of experts. (Oppo. 22 (*citing Bendi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1386 (4th Cir. 1995).) The case is entirely beside the point.

A. MSBE Fails to Demonstrate that Levenson is an Expert on Facilities Conditions

The Motion shows that Levenson is not an expert on school facilities conditions. (Mot. 12-13.) Indeed, Levenson admitted his lack of experience under oath. (Mot., Ex. C, Levenson Dep. 60:5-6 ("Facilities would not be one of my areas of expertise").) Rather than address this glaring deficiency, the Opposition simply restates Levenson's experience as a superintendent and education consultant. (Oppo. 24). But having been a school superintendent, even one who worked for some time "in an old, rundown building" (*id*. at 25), does not qualify him as an expert on every subject related to schools, including assessing their physical condition and determining their level of adequacy. (*Id*.) Even MSBE's generous summary of Levenson's background fails to identify any experience in assessing conditions or adequacies in educational facilities.

MSBE's observation that experts may opine on matters that they did not personally perceive (*id*.) does not also mean that a person may testify as an expert about matters on which he has no expertise. Levenson is not qualified to give opinions on school facility conditions because he has no expertise on the subject—as he admitted—and the fact that he never visited any BCPSS facilities (Mot. 15) strengthens the conclusion that he has no expertise relevant to this case.

Levenson's admitted lack of expertise on school facility conditions is not, as MSBE argues, a matter deferred for cross examination. (Oppo. 26.) MSBE first must overcome Levenson's admitted lack of expertise, *see* Md. Rule 5-702(2), and MSBE has not established his expertise on school facility conditions, a prerequisite for his testimony to be admitted.

Having failed to establish Levenson's expertise on school facility conditions, MSBE should be precluded from presenting his testimony on the subject, including his opinions concerning: (1) the merits of an engineering report prepared by a multi-national engineering firm; (2) his unsupported ideas of "cleanliness" issues versus facilities defects, and (3) the adequacy of

funding to address facilities defects. (Mot., Ex. D, Levenson Report 48-51.) These opinions cannot possibly flow from Levenson's experience, education, or training, and therefore are impermissible as expert opinion. *See Rochkind*, 471 Md. at 35-36.

B. MSBE Fails to Establish that Levenson's Opinion has Enough Support and Analysis to be Helpful and Reliable

The Opposition notes that Levenson's "central conclusion" is that the "Blueprint Act" legislation resolves any funding issues for BCPSS. (Oppo. 8.) MSBE would have Levenson testify that the Blueprint Act will give BCPSS "sufficient funds to provide a great education." (Mot., Ex. C, Levenson Dep. 119:2-4.) These are the same lawyer-created arguments repeated in MSBE's filings. The Motion shows, however, that Levenson lacks both a factual basis and a reliable methodology on which to base such opinion. He admitted in his deposition that he has not actually calculated any funding amounts for BCPSS. (*Id*. 13.) Nor has he analyzed the funding levels BCPSS would receive under the Blueprint Act. (*Id*.) He does not even know whether BCPSS received any such funds, when they would be provided, or whether the amounts were subject to decreases. (*Id*. 13-14.) Overall, his "analysis" appears to have consisted of reading Blueprint Act-related documents, concluding that they align with "principles" of his own creation, and then, without accounting for any of the distinctive facts and characteristics of BCPSS, pronouncing that the Blueprint Act is the cure-all for BCPSS (*id*. 13-15), just as counsel for MSBE counsel have argued in this litigation. The absence of independent analysis specific to BCPSS is patent.

The Opposition also fails to prove that Levenson's opinion "fits" enough with BCPSS to be helpful in this case. (Mot. 14-15.) Indeed, MSBE's argument for admitting Levenson's opinion mentions nothing about BCPSS, and instead refers to his reading of documents about education funding in Maryland overall, and his experience in other states and districts that are not comparable

to BCPSS. His deposition testimony is that he did not analyze education costs for BCPSS, speak with BCPSS students or teachers, or visit any BCPSS facilities. (*Id*. 15.) For the same reasons set forth above concerning Hanushek, *see* § I.C., *supra*, Levenson's failure to consider BCPSS-specific facts makes his opinion unhelpful.

Reading documents and agreeing with them is not, moreover, an appropriate exercise for an expert witness. The Court is entirely capable of reading and understanding the documents in question, and Levenson cannot add to the Court's understanding of them because he admittedly applied no expert analysis to them. *See, e.g., In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 551 (S.D.N.Y. 2004) (excluding expert who proposed to summarize regulation-related documents because such information could be "properly presented through percipient witnesses and documentary evidence").

The fact that Levenson purports to articulate universal "principles" does nothing to make his opinion reliable and helpful. Levenson has no experience with BCPSS, and he did nothing to confirm that his "principles" are, in fact, applicable to BCPSS. (Mot., Ex. C, Levenson Dep. 189:9-190:1 (confirming that he presumes that his "best practices" are the same for all school districts).) Whether Levenson's "principles" might apply to BCPSS is a matter of "mere speculation or conjecture," and not reliable and admissible. *Rochkind*, 471 Md. at 8.

C. Levenson is an Improper "Mouthpiece" Who Repeats MSBE's Litigation Position Without Sufficient Support and Analysis

Levenson's testimony would do no more than repeat and amplify MSBE's litigation position that the Blueprint Act is excellent and will provide BCPSS with sufficient funds, without any independent analysis of MSBE's arguments. (Mot. 16). MSBE does not contest that Levenson would act as its mouthpiece; rather, MSBE quibbles about the irrelevant details of a case that Plaintiffs cited. (Oppo. 28.) In so doing, MSBE seeks to evade the case's basic teaching: expert

testimony may not be used as a means of evading the rules of evidence. *See Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794 (N.D. Ill. 2005). Levenson's opinion, if admitted, would violate Rule 5-702 because it would not help the Court understand or resolve the BCPSS issues in this case. The Court can read the same documents that Levenson has read; his commentary, which does not include any expert analysis of his own, would not provide meaningful expert help to resolve any issue. *See, e.g., In re Viagra Prods. Liab. Litig*., 658 F. Supp. 2d 950, 967 (D. Minn. 2009) (excluding expert testimony that proposed to summarize case facts, without application of expert analysis).

III. MSBE FAILS TO ESTABLISH THAT MUNTER MAY CREATE HIS FACTUAL RECORD, GIVE RELIABLE TESTIMONY, OR SERVE AS MSBE'S MOUTHPIECE

MSBE proposes to use the testimony of Munter, an employee of a contractor for the State, to supplement and change MSBE's discovery record, thereby circumventing discovery procedure and the law of evidence with a half-baked, inadmissible opinion.

A. MSBE Should Not be Permitted to use an Expert to Supplement and Change MSBE's Discovery Record

The Opposition does not contest that MSBE intends to use Munter as a purported expert to supplement and change MSBE's discovery record. As explained, Munter's employer, Bureau Veritas ("BV"), is under contract to the State to assess the conditions of school facilities in Maryland (the "SFA"). (Mot. 16.) MSBE seeks to rely on BV's admittedly "preliminary" data,[5] "ongoing" SFA, "not yet finalized MDCI scores," and still unfinished report(s) resulting from the SFA (the "BV Report") to argue that BCPSS facilities are not in comparatively bad condition. (Mot., Ex. F at 4-5.) But having not yet produced the final BV Report to support its desired

[5] Munter also may have "adjusted" the preliminary data, but Private Plaintiffs are not aware of receiving it, despite requesting it from MSBE in April 2022.

argument, MSBE seeks to solve its problem by designating Munter to testify as an "expert" about the ongoing SFA and BV Report. (Mot. 17-18.) In addition, MSBE seeks to use Munter to say that the amount of funding BCPSS needs for facilities repair and renewal is much less than the amount the State's high-ranking officials admitted in deposition testimony. (*Id*. 19.)

MSBE's use of Munter to inject facts would end-run discovery and evidentiary safeguards and, if permitted, prejudice Plaintiffs by foreclosing them from fact discovery about the SFA and BV Report beyond what MSBE/Munter select to disclose. (*Id*. 17.) It would deprive Plaintiffs of the ability to cross examine witnesses with personal knowledge of the underlying facts, inasmuch as Munter himself did not inspect any BCPSS facilities, and it would allow MSBE to rewrite and dispute its own funding admissions in discovery. (*Id*.) It would turn Rule 5-702(3)'s requirement of a factual basis for expert testimony on its head, because Munter would be creating the very factual record on which he would then base his opinion. (*Id*. 18.)

MSBE's only defense for this gamesmanship is to assert there is no prejudice under Rule 5-403 because there will be no jury. (Oppo. 31.) This flippant response avoids responding to the type of prejudice identified in the Motion and summarized above. MSBE cannot justify its use of Munter to supplement and change the discovery record in the guise of an expert and should be precluded from doing so.

B. The Opposition Fails to Establish the Required Basis, Analysis, and Reliability for Munter's Proposed Opinion

Munter's proposed opinion would be inadmissible (assuming he were permitted as an expert) because it lacks the necessary basis, analysis, and reliability. *See* Md. R. 5-702. Once again, MSBE has not responded to most of Plaintiffs' showing and has failed to establish admissibility.

In his deposition, Munter confirmed his intention to rubberstamp the results of the undisclosed, final BV Report (or, worse, a preliminary, unfinished report), and then regurgitate those results as his "opinion," without performing any analysis of his own to confirm or validate them. (Mot. 19.) As Munter is not personally conducting the SFA and plans to do nothing to confirm its results in the BV Report (*id*. 17, 19), he has no basis for adopting and repeating those results as his expert opinion. Nor is there any basis for presuming that those results, or Munter's repeating them as expert opinion, would satisfy the reliability requirements of Rule 5-702. (*Id*. 19-20.) MSBE makes no response to the cases cited by Plaintiffs, which support the exclusion of Munter because he unquestioningly adopts the SFA results and BV Report without any independent analysis. *See Giant Food, Inc. v. Booker*, 152 Md. App. 166, 183 (2003) (opinion, to be admissible, must be "product of reliable principles and methods" so "that it does not amount to 'conjecture, speculation, or incompetent evidence'") (citation omitted).[6]

MSBE asserts that experts may rely on facts not in evidence (Oppo. 31), but this response fails to justify MSBE's use of Munter to *make* the factual record. MSBE also asserts that expert testimony may contradict eyewitnesses (*id*. 31-32), but this response fails to justify MSBE's use of Munter to contradict *its own admissions*. MSBE further asserted that Munter could be cross examined (*id*. 32), assuming, without first establishing, that his opinions are *admissible*. None of MSBE's off-point assertions respond to the Motion or otherwise establish that Munter's proposed opinion is admissible.

[6] The cases cited by MSBE also support the exclusion of Munter. *See, e.g., State Dep't of Health v. Walker*, 238 Md. 512, 515 (1965) (excluding soil expert who did not personally inspect the property at issue, so expert's opinion on the property's soil lacked sufficient basis to be reliable).

C. Munter's Service as MSBE's Mouthpiece Would not Assist the Court and is Improper

MSBE did not contest that Munter's primary trial role will be summing up the facts about the SFA and the BV Report (as well as adding and changing facts, if permitted). (Mot. 20.) This is not an appropriate role for an expert. *See Yancey v. Carson*, Nos. 3:04-CV-556, 3:04-CV-610, 2007 WL 3088232, at *4 (E.D. Tenn. Oct. 19, 2007) (disallowing testimony of expert whose role was "essentially marshal[ling] the facts in the record"). Nor would the Court receive the assistance that expert testimony is meant to provide from Munter's recitation of SFA facts or repetition of the BV Report, when he admittedly has not applied expert analysis to them. *See id*. (excluding as unhelpful expert testimony that would review facts more than apply expert analysis).

MSBE's retort that Plaintiffs merely "disagree" with Munter's opinion misses the point. (Oppo. 32.) Munter should be excluded, not just because his proposed opinion is unsupported and unreliable, but also because MSBE has cast him in the role of its storyteller at trial, taking advantage of an expert's leeway to talk about the SFA and the BV Report, and add and change "facts" about them, without having applied the analysis necessary to act as an expert on these subjects. This use of the State's contractor, Munter, as MSBE's mouthpiece at trial should be rejected. *See, e.g., In re Rezulin Prods.*, 309 F.Supp.2d at 551 (excluding expert who proposed to summarize regulatory facts, when the testimony would consist of recitation of facts designed to "buttress" the party's theory of the case); *Fisher v. Ciba Spec. Chems. Corp*., 238 F.R.D. 273, 281 (S.D. Ala. 2006) (excluding expert testimony that proposed to summarize interpretation of documents in the record); *In re Viagra Prods.*, 658 F. Supp. 2d at 967 (excluding expert testimony that proposed to summarize case facts, without application of expert analysis).

CONCLUSION

Plaintiffs respectfully request that MSBE's proffered expert witnesses be excluded for the foregoing reasons and those stated in the Motion.

Dated: October 28, 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 SUPPORT OF MOTION TO EXCLUDE DEFENDANT'S PROFFERED EXPERT WITNESSES on the following counsel and parties by electronic mail and by U.S. mail with postage prepaid on October 28, 2022:

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