

RECEIVED

KEITH A. BRADFORD, *et al.*,

*Plaintiff,*

v.

MARYLAND STATE BOARD OF  
EDUCATION,

*Defendant.*

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IN THE

CIRCUIT COURT OCT 04 2022

FOR

BALTIMORE CITY

CIRCUIT COURT  
FOR BALTIMORE CITY

Case No.:24C94340058

\* \* \* \* \*

**PLAINTIFFS' 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**

The Private Plaintiffs, by and through their undersigned counsel, hereby object to inadmissible evidence and move to strike certain exhibits and portions of the Maryland State Board of Education's ("MSBE" or "Defendant" or "State") memorandum of law in support of Motion for Summary Judgment ("Summary Judgment Motion") filed on August 12, 2022 (Dkt. 246/0), and certain portions of MSBE's memorandum of law in support of Motion to Preclude Plaintiffs' Experts ("Expert Motion") filed on August 12, 2022 (Dkt. 247/0).

This Objection and Motion is made pursuant to Rules 2-501(c) and 2-322(e) of the Maryland Rules and this Court's inherent discretion to manage its docket. In support of their Objection and Motion to Strike, Plaintiffs state as follow:

1. Plaintiffs and Defendant filed cross motions for summary judgment on August 12, 2022. (Dkts. 250/0, 246/0.)
2. The Summary Judgment Motion makes several arguments based on its Exhibit N, which consists of two tables purporting to show total per-pupil funding and "excess" funding provided to BCPSS in each year from FY2007 through FY2021. A verbatim copy of Exhibit N

was included in MSBE's 2021 Motion to Dismiss, which the Court denied. *See* Mot. to Dismiss Pet. and to Dissolve Consent Decree (Dkt. 183/0) at 32-35.

3. Exhibit N is not supported by any affidavit based on personal knowledge, nor by the testimony of a person who did the underlying calculations or created the tables.<sup>1</sup> The Summary Judgment Motion contains no citation to the sources for the numbers on which the table are based, nor explanation of how the other numbers in the tables were calculated.<sup>2</sup> *See infra*. ¶¶ 13-16.

4. Also on August 12, 2022, Plaintiffs and Defendant filed motions *in limine* seeking to preclude the opinions and testimony of the other parties' experts. (Dkts. 251/0, 247/0.)

5. Defendant's Expert Motion included a table, inserted at pages 35-36, purporting to show more than \$800 million in BCPSS budget surpluses over the span of eleven fiscal years. This table is not supported by any affidavit or testimony, including of a person with personal knowledge who did the underlying calculations or created the chart. There is no explanation of how the numbers in the chart were derived, and underlying calculations are not provided. This table is also misleading for several reasons. *See infra*. ¶¶ 17-18.

6. The Court ordered a 50-page limit for memoranda of law in support of summary judgment. *See* CMO No. 7 (Dkt. 212/0). MSBE's Summary Judgment Motion is precisely 50 pages long.

7. In an apparent effort to circumvent the Court's CMO, MSBE included 16 pages of facts and argument in its Expert Motion that are irrelevant to whether Plaintiffs' expert testimony

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<sup>1</sup> It is "sponsored" by a single statement in an authenticating affidavit from Kimberly Crampton, a paralegal at Defendant's outside law firm, who merely states that the exhibit is "a true and correct copy of tables prepared by MSBE showing certain metrics with respect to BCPSS."

<sup>2</sup> Although MSBE's 2021 Motion to Dismiss provides a cursory description of the numbers in the charts, the charts were not supported by an affidavit based on personal knowledge in conjunction with that filing, and even the cursory description in the 2021 Motion to Dismiss is missing from the Summary Judgment Motion.

will be helpful to the Court, but appear instead to support arguments made in its Summary Judgment Motion.

8. The Court may strike “any improper, immaterial, impertinent, or scandalous matter” in any pleading, “or may order and pleading that is late or otherwise not in compliance with these rules stricken in its entirety.” *See* Md. Rule 2-322(e).

**I. Materials that are not Admissible Under the Rules of Evidence Should be Stricken on Summary Judgment**

9. In evaluating a motion for summary judgment, the Court may not rely on inadmissible evidence – a party’s “mere allegations” are insufficient to establish a fact. *See George v. Balt. Cty.*, 463 Md. 263, 273-74 (2019). *See also Zilchikhis v. Montgomery Cty.*, 223 Md. App. 158, 177-86 (2015) (affirming circuit court’s decision to disregard inadmissible evidence in its adjudication of the motion for summary judgment); *Shapiro v. Hyperheal Hyperbarics, Inc.*, No. 1257, 2022 WL 2800976 at \*\*2-4, 5 (Md. Ct. Spec. App. July 18, 2022) (same).

10. Evidence must be relevant to be admissible. Md. Rule 5-402. Furthermore, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Md. Rule 5-403.

11. Demonstratives or charts are generally admissible to simplify a complex issue for the trier of fact; however, a demonstrative is not admissible into evidence if it risks misleading the trier of fact into conclusions not supported by the evidence. *See Smith v. Kennedy Kreiger Inst., Inc.*, No. 2241, 2017 WL 1076481 at \*\*20-25 (Md. Ct. Spec. App. Mar. 22, 2017).

12. Any materials not otherwise in the record and submitted with a motion must be accompanied by an affidavit affirming that the materials are authentic. *See* Md. Rule 2-311(d); 2-

501(a). A circuit court has “no right to consider any ‘fact’ set forth by [a party] in [its filing] due to [its] failure to comply with Rule 2-311(d).” *Scully v. Tauber*, 183 Md. App. 423, 431 (2001).

13. MSBE’s Exhibit N is not supported by any valid affidavit or testimony from any person with personal knowledge about it, its calculations, its preparation, or its conclusions. There is no source material cited in the Summary Judgment Motion, and the underlying calculations or explanations for how the calculations and conclusions in the Exhibit were reached are only present in the 2021 Motion to Dismiss, which the Court denied. *See* 12/22/2021 Order (Dkt. 183/3). Without a valid affidavit of someone with actual personal knowledge about the chart and its creation, and no documentation of sources and methods for deriving the figures in Exhibit N, Exhibit N cannot be considered evidence. These are unattributed, unverified numbers, arranged into a demonstrative that would be inadmissible and misleading if presented to the trier of fact. Accordingly, the Court should not consider Exhibit N in assessing the pending Summary Judgment Motion, and should strike it from the record.

14. The authenticating affidavit from a paralegal at Defendant’s outside law firm (*see* Crampton Aff. ¶ 17) does not cure this problem. The Crampton Affidavit is deficient for the purposes of Rules 2-311(d) and 2-501(a) because it is not made on personal knowledge. *See Great Atl. & Pac. Tea Co. v. Imbraguglio*, 346 Md. 573, 598 (1997) (“an affiant must attest to personal knowledge of the facts asserted *and a basis for that knowledge.*”) (emphasis added).

15. Specifically, the Crampton Affidavit states only that the tables in Exhibit N are “prepared by MSBE,” but it does not affirm that the figures relied-upon were accurate, nor does it explain who at MSBE or how MSBE derived those figures. *See* Crampton Aff. at ¶ 17. Nor does Ms. Crampton indicate that she has personal knowledge of the accuracy of the calculation or original source(s) of the numbers contained in Exhibit N. Therefore, the only discernable function

of the Crampton Affidavit is to swear to the provenance of Exhibit N itself—that MSBE created it.

16. Although the sources and methods were explained in at least a cursory form in MSBE’s 2021 Motion to Dismiss, the Motion to Dismiss did not back up the Exhibit based on personal knowledge, as required for summary judgment, and the Court denied the motion to dismiss. *See* 12/22/2021 Order (Dkt. 183/3). Nothing in the Motion to Dismiss provides the requisite personal knowledge for the Exhibit to be admissible on summary judgment (*see supra* ¶ 1). Moreover, rejected pleadings are not a substitute for a valid authenticating affidavit. *See e.g. Montgomery Cty. v. Smith*, 144 Md. App. 548, 553-54 (2002) (reversing circuit court’s decision to consider facts pleaded in the motion for summary judgment that were unsupported by an affidavit); *DeGroft v. Lancaster Silo Co.*, 70 Md. App. 154, 166 (1987) (“it was error . . . for the court to base summary judgment in any part on appellee’s averments in unverified pleadings”); *Worsham v. Oriental Trading Co.*, No. 729, 2022 WL 2312224 at \*8 (Md. Ct. Spec. App. June 28, 2022) (holding that an attorney’s unsworn signature does not render a document compliant with the affidavit requirement).

17. The table at pages 35-36 of MSBE’s Expert Motion is similarly deficient. This table is not even included in the purely-authenticating Crampton Affidavit, much less supported by an affidavit or any testimony from any person with personal knowledge about it, its calculations, its preparation, or its conclusions. The underlying calculations of the numbers reported in the table cannot be replicated or verified.

18. The table is based, moreover, on basic misunderstandings of accounting rules. *See Perkins-Cohen Aff.* ¶¶ 54-60:

a. The table cites to BCPSS' budget books for each year from FY2010 – FY2020, and lists BCPSS' revenue, expenses, and the difference between the two figures as a surplus or deficit. MSBE then sums these purported surpluses and deficits to conclude that BCPSS had a net surplus of over \$800 million over the course of eleven fiscal years.

b. This chart is constructed on fundamental misunderstandings of basic accounting principles and BCPSS' financial reports. *See* Affidavit of Alison Perkins-Cohen at ¶¶ 51-52.

c. What MSBE terms as “surpluses” in its chart are properly identified as “net changes in position.” *See id.* at ¶ 52.

d. The net numbers reported in the BCPSS budget books reflect the “roll up” effect of net changes in position, primarily caused by: (1) capital improvements that increase the value of BCPSS facilities beyond the amount of the expenditure, and (2) repayment of bond capital and long-term leases, reducing long-term liabilities. *See id.* at ¶ 53. Neither of these accounting formalities result in BCPSS enjoying a budget surplus. *See id.*

e. Some of the years reflecting larger “surpluses” indicate that BCPSS received a grant or state funding earmarked for specific uses, and any unused funds with use restrictions had to be carried forward to the following fiscal year, to continue or complete the project. *See id.* at ¶ 54.

f. Consistent with the Governing Accounting Standards Board Statement 54, BCPSS strives to place 3-5% of its General Fund expenditures for the upcoming fiscal year in an unassigned fund. *See id.* at ¶ 55. Accordingly, in June 2020, BCPSS carried an unassigned fund balance of \$48.3 million, approximately 4%. *See id.* at ¶ 56.

g. That BCPSS maintains a positive balance in its unassigned fund is not accurately construed as a budget surplus; rather, the fact that BCPSS complies with Statement 54 shows that BCPSS is taking a fiscally responsible approach in planning for funding emergencies. *See id.* at ¶ 57.

**II. Factual Assertions and Legal Argument Pleaded in the Expert Motion that Circumvent the Page Limit for the Summary Judgment Motion Ordered by the Court Should be Stricken**

19. A pleading must be concise and direct; it may not contain “unnecessary recitals of law, evidence, or documents, or any immaterial, impertinent, or scandalous matter.” Md. Rule 2-303(b).

20. The Court may strike factual material that is improperly pled as an end-run around page limits. *See Prince of Peace Lutheran Church v. Linklater*, 421 Md. 664, 668 n.1 (2011) (admonishing the parties for voluminous filings and reminding the Circuit Court that it may exercise its discretion to strike such a pleading).

21. The Expert Motion includes approximately eleven pages of factual material concerning Plaintiffs and their children enrolled in BCPSS. *See Mot.* at 6-16. These facts are listed to illustrate why MSBE believes that Plaintiffs’ children are not at risk of educational failure, and thus cannot serve as representative plaintiffs in this case. *See id.*

22. Those facts are irrelevant to the question raised in the Expert Motion, whether the testimony of Plaintiffs’ experts should be admitted because it is helpful to the Court under Maryland Rule 5-702. Rather, they relate to the argument made by MSBE in support of its Summary Judgment Motion that the named Plaintiffs have no claim that their children are at risk of educational failure and thus have no standing, and further cannot serve as representative Plaintiffs in the case. *See Summ. J. Mot.* at 28-33.

23. The Expert Motion also includes approximately five pages of argument that BCPSS is not only adequately funded, but is in fact over-funded. *See* Expert Mot. at 33-38. This argument is, similarly, entirely irrelevant to whether Plaintiffs' experts can provide evidence helpful to the trier of fact. Instead, the argument attempts to further one of Defendant's bases for seeking summary judgment, that funding provided to the BCPSS is adequate and meets constitutional standards. *See id.*

24. Argument concerning MSBE's jurisdictional contentions has no place in its Expert Motion. Defendant appears to have placed it in the Expert Motion because it had reached the 50-page limit that this Court ordered on its Summary Judgment Motion.

25. Because these approximately sixteen pages of fact and argument have no relevance to whether Plaintiffs' experts should be permitted to testify, and are in fact an attempted end-run around the Court's order setting a 50-page limit on its Summary Judgment Motion, these portions of the Expert Motion should be stricken.

**III. MSBE's Repetitive Arguments, Already Rejected by this Court and Maryland Appellate Courts, Should be Stricken as Duplicative and Wasteful of the Court's Limited Time and Resources**

26. Repetitive, previously rejected arguments may be stricken by the Court. *See Morrison v. Morrison*, No. No. 1364, 2022 WL 152151 at \*\*4-5 (Md. Ct. Spec. App. Jan. 18, 2022) (affirming circuit court's decision to strike a party's revised pleading when "prior motions to revise had already been considered and denied"); *Hudson v. Prime Retail, Inc.*, No. 24-C-03-5806, 2004 WL 1982383 at \*10 (Cir. Ct. Balt. City Apr. 1, 2004) (noting that the Court is empowered under Rule 2-322(e) to strike pleadings that repeat previously rejected arguments).

27. In 2000, in opposition to Plaintiffs' first Petition for Further Relief under the Consent Decree, MSBE argued that it had made serious progress toward funding BCPSS since the



entry of the Consent Decree, and that no additional funding was needed. *See* MSBE Mem. in Opp. to Pls.’ Pet. for Further Relief (Dkt. 3/1) at 4-16, 19-21. The Court rejected this argument and ordered MSBE to increase its funding of BCPSS by \$2,000 to \$2,600 per pupil. *See* 6/30/2000 Mem. Op. (Dkt. 10/0) at 23-26. Defendant also argued that the questions presented were not justiciable based on separation of powers and political question doctrines. MSBE Mem. in Opp. to Pls.’ Pet. for Further Relief (Dkt. 3/1) at 21.

28. The State appealed the 2000 ruling and advanced the same arguments in the Court of Appeals: MSBE argued that this Court had no subject matter jurisdiction to order the relief granted to Plaintiffs, and that this Court’s rulings answered a non-justiciable political question. *See* MSBE Reply Br. at 2-9, 15-22. The State voluntarily abandoned that appeal and acquiesced in the order of this Court, which remains valid and binding on all parties to this litigation. Pls.’ Mem. in Opp. to Def.’s Mot. to Dismiss (Dkt. 105/1) at 12.

29. In 2002, in opposition to Plaintiffs’ motion to extend the term of the Consent Decree, MSBE argued both that it had fulfilled its financial obligations under the Consent Decree, *see* Memorandum in Opposition to Plaintiffs’ Motion for Extension of Judicial Supervision (Dkt. 21/1) at 25-26, and that the Court had no jurisdiction to determine adequacy going forward, *see id.* at 31-33. The Court rejected these contentions, holding that MSBE would not meet its financial obligations until FY2008, at earliest, and that it had never complied with the 2000 order. *See* 6/25/2002 Mem. Op. (Dkt. 25/0) at 5. Accordingly, the Court declined to dissolve the Consent Decree and determined that it would retain jurisdiction “until such time as the State has complied with this Court’s June 2000 Order.” *See id.*

30. The State did not appeal the 2002 order.

31. In 2004, the State again argued that it was exceeding its financial obligations to BCPSS and that new legislation mooted the litigation. *See* MSBE Mem. in Supp. of Mot. for Declaratory Ruling (Dkt. 38/0) at 1-8, 20-23. The Court held that the State was, in fact, not meeting its financial obligations nor complying with the June 2000 Order, and that full Thornton funding, at a minimum, was needed to achieve adequacy. *See* 8/20/2004 Mem. Op. (Dkt. 50/0) at 14-24, 57-58, 64-65. The Court determined it would retain jurisdiction indefinitely, until the State reached compliance with its constitutional obligations and the orders of the Court. *See id.* at 68. Defendant also argued that the questions presented were not justiciable based on separation of powers and political question doctrines. MSBE Mem. in Supp. of Mot. for Declaratory Ruling (Dkt. 38/0) at 7-8.

32. Defendant appealed the 2004 order, but the majority of its appeal was dismissed. Pls.' Mem. in Opp. to Def.'s Mot. to Dismiss (Dkt. 105/1) at 22 n.5.

33. In 2019, after Plaintiffs re-opened this litigation, MSBE argued that the claims at issue were non-justiciable political questions. *See* MSBE Mot. to Dismiss (Dkt. 105/0) at 51-59. It also argued that it had already adequately funded the BCPSS; that projected funding increases would moot the litigation by fulfilling any possible constitutional duty it had to BCPSS students; and that it had long performed under the Consent Decree and its jurisdiction was terminated. *See id.* at 7-10; 12-14; 22; 27-30; 48-50. The Court disagreed and denied the Motion to Dismiss. *See* 1/16/2020 Mem. Op. (Dkt. 105/8) at 10-12.

34. In 2021, Plaintiffs filed a notice that they were substituting additional named representative Plaintiffs, as they are permitted to do under the Stipulated Order (Dkt. 45)<sup>3</sup> entered

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<sup>3</sup> In 1999, the docket in this case was converted to an electronic docket. This is the only pre-1999 docket cite in this Objection and Motion, and this docket number corresponds, best as counsel can discern, to the stipulation and order dated December 14, 1995.

by this Court in 1995. Pls. Notice of Substitution (Dkt. 149/0). Defendant objected and moved to strike, claiming that the substituted Plaintiffs lacked standing. Def's Mot. to Strike Pls.' Notice of Substitution (Dkt 162/0). This Court denied the motion. 9/10/2021 Order (Dkts. 149/1, 162/2).

35. In 2021, MSBE filed a second, repetitive, motion to dismiss. *See* Mot. to Dismiss Pet. and to Dissolve Consent Decree (Dkt. 183/0). Among its arguments for dismissal, the State again raised mootness—due to the enactment of the Blueprint for Maryland's Future and the Built to Learn Act—and lack of subject matter jurisdiction. *See id.* at 20-40. The Court denied the motion. *See* 12/22/2021 Order (Dkt. 183/3). It argued again—now based on charts *identical* to Exhibit N described above—that it had already adequately funded the BCPSS; that projected funding increases would moot the litigation by fulfilling any possible constitutional duty it had to BCPSS students; and that it had long performed under the Consent Decree and the Court's jurisdiction was terminated. Mot. to Dismiss Pet. and to Dissolve Consent Decree (Dkt. 183/0) at 22-27; 38-40.

36. Following the denial of this second motion to dismiss, MSBE appealed to the Court of Special Appeals. In response to Plaintiffs' motion to dismiss the appeal, MSBE reiterated the same arguments: that the Blueprint and Built to Learn Acts moot the instant litigation, that the State has already adequately funded BCPSS in any event, and that the Consent Decree provides no continuing basis for jurisdiction. *See* MSBE Mem. in Opp. to Appellees' Mot. to Dismiss Appeal at 2-6. The Court of Special Appeals dismissed the appeal. *See* 5/11/2022 Ct. of Spec. App. Order.

37. Undeterred, MSBE petitioned the Court of Appeals for a Writ of Certiorari. *See* MSBE Pet. for Writ of Cert. In its petition, the State, *yet again*, advanced the same arguments: it insisted that the Consent Decree fails to provide a basis for continuing jurisdiction, *see id.* at 5-10,

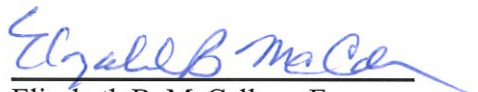
insists that the State already provided adequate funding to the BCPSS, and insists that new legislation moots the litigation, *see id.* at 10-11. The Court of Appeals denied MSBE's Petition for Certiorari. *See* 7/2/2022 Ct. of App. Order.

38. Because the same arguments about standing, mootness, compliance with the Consent Decree and this Court's continuing jurisdiction, and the political question doctrine have been raised by MSBE, and rejected by multiple Maryland courts, including this Court, *multiple times*, the Court should exercise its discretion and strike MSBE's arguments concerning standing, mootness, compliance with the Consent Decree, and justiciability/political question.

### CONCLUSION

39. For the foregoing reasons, Plaintiffs object to Defendant's inadmissible evidence and request that the Court strike the identified portions of the Summary Judgment Motion and the Expert Motion pursuant to Rule 2-322(e). Plaintiffs further request that the Court exercise its discretion to strike the repetitive and already-rejected arguments in the Summary Judgment Motion.

Dated: October 4, 2022



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Case No.:24C94340058

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[PROPOSED] ORDER SUSTANINIG THE OBJECTION AND GRANTING THE  
MOTION TO STRIKE

Upon consideration of the October 4, 2022, Plaintiffs’ Objection to Inadmissible Evidence in Defendant’s Memoranda of Law in Support of Motions for Summary Judgment and to Preclude Experts, and after considering Respondents’ opposition thereto, IT IS HEREBY ORDERED:

1. The Objection is SUSTAINED;
2. The Motion is GRANTED.

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Judge Audrey J. S. Carrion  
Circuit Court for Baltimore City

**CERTIFICATE OF SERVICE**

I, Jeffrey E. Liskov, certify that I have this day caused to be served a copy of this PLAINTIFFS' 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 October 4, 2022:

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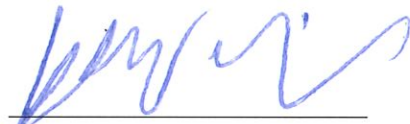
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Dated: October 4, 2022



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