IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA LATINO ALLIANCE FOR HUMAN RIGHTS, et al.,	*	
Plaintiffs,	*	
V.	*	**1:11-CV-1804-TWT**
NATHAN DEAL, Governor of the State of Georgia, et al.,	*	
Defendants.	*	

DEFENDANTS' OBJECTION TO IRRELEVANT AND INADMISSIBLE EVIDENCE

COME NOW Defendants Deal, Olens, Reese and Beatty, by and through counsel, and pursuant to FED. R. CIV. P. 26 and 56, and FED. R. EVID. 402, 403, 702, and 703, move to exclude evidence and declarations submitted by Plaintiffs in support of their Motion for Preliminary Injunction. Specifically, Defendants move to exclude: all references to generalized fears related to improper or illegal enforcement of HB 87 and any speculation related to the impact of the Bill's enforcement; and the declarations of Abraham Lowenthal (Ex. 2); Paul Bridges (Ex. 5); George Gason (Ex. 11); Eduardo Gonzalez (Ex. 12); Lewis Smith (Ex. 13); Molly Lauterback (Ex. 27); James Steinberg (Ex. G to Ex. 27); Michael Aytes

(Ex. I to Ex. 27); David Aguilar (Ex. J to Ex. 27); David Palmatier (Ex. K to Ex. 27); Daniel Ragsdale (Ex. L to Ex. 27) showing the Court the following:

I. INTRODUCTION

In support of Plaintiffs' motion for preliminary injunction they have tendered numerous declarations of individuals who claim to be concerned about HB 87's impact on them or their organization. In addition to these, Plaintiffs also offer declarations by individuals who offer their opinions regarding the impact of HB 87 on the local, state or federal government. They also offer an omnibus declaration which includes transcripts from legislative hearings related to the Bill, news paper articles and declarations submitted to the Court in a case involving a bill in Arizona. Defendants object to the use of this evidence as it fails to comport with the Federal Rules of Civil Procedure 56(c)(4). Alternatively, Defendants object on the grounds that they represent improper opinion testimony and thus do not meet the standards for expert testimony. Lastly, Defendants object on the basis of relevance, as opinions and speculation related to enforcement of HB 87 or an Arizona bill which bears only a cursory resemblance to HB 87 has no bearing on the issues presented in these proceedings.

Plaintiffs reliance on affidavits from individuals professing fear, speculating upon improper enforcement of HB 87, global impact of the statute and

contemplated but unproven harms and attempts to authenticate transcripts, newspaper articles and declarations from another unrelated case are improper and should not be considered as evidence.

II. ARGUMENT AND CITATIONS TO AUTHORITY

A. THE DECLARATIONS SUBMITTED ARE NOT BASED UPON THE DECLARANTS PERSONAL KNOWLEDGE

Fed. R. Civ. P. 56(c)(4) requires that an affidavit must be "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."

Affidavits must contain supporting facts demonstrating a basis for the affiant's claim that his statements are the product of his personal knowledge. Williams v. Great-West Healthcare, 2007 WL 4564176, *5 (N.D. Ga. 2007). "Rule 56(e)'s personal knowledge requirement prevents statements in affidavits that are based, in part, 'upon information and belief' -- instead of only knowledge -- from raising genuine issues of fact sufficient to defeat summary judgment." Pace v. Capobianco, 283 F.3d 1275, 1278 (11th Cir. 2002).[1] Finally, an affidavit which consists of "conclusory allegations without specific supporting facts [has] no

[1] Defendants recognize that the evidentiary standards regarding hearsay are lessened for these proceedings. Plaintiffs, however are not just relying on hearsay but rather rely on speculative unsupported declarations many of which have no bearing on the statute at issue.

probative value." Leigh v. Warner Brothers, Inc., 212 F.3d 1210, 1217 (11th Cir. 2000).

Plaintiffs' declarations contain conclusory allegations of fact and legal conclusions. It has been consistently held that affidavits that consist of "conclusory allegations without specific supporting facts have no probative value." Evers, 770 F.2d at 986; Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1217 (11th Cir. 2000) (same). Similarly, an affidavitt that contains nothing more than a verified recitation of conclusory and unsupported allegations is insufficient to create a factual question. Broadway v. City of Montgomery, Ala., 530 F.2d 657, 660 (5th Cir. 1976); Fullman v. Graddick, 739 F.2d 553, 557 (11th Cir. 1984). Plaintiffs' declarations are replete with conclusions and unsupported allegations. [2]

[2] See 29-4 Ex. 2, Dec. Lowenthal ¶ 11; Ex. 3, Dec. unidentified ¶ 8, 9-11; Ex. 4, Dec. Kennedy ¶ 9-12; Ex. 5, Dec. Bridges, ¶ 11-20; Ex. 6, Dec. Speight, ¶ 4; Ex. 7, Dec. Howe ¶ 10, 11, 12; Ex. 8, Dec. Edwards, ¶ 7, 9; Ex. 9, Dec. Gruner, ¶ 7; Ex. 10, Dec. unidentified ¶ 3, 4, 5, 6, 7, 8; Ex. 11, Dec. Gascon, ¶ 8, 9, 10, 11, 12, 13, 14, 15 16, 17; Ex. 12, Dec. Gonzalez, ¶ 9, 10, 11, 12, 13, 14, 15, 16, 17, 18; Ex. 13, Dec. Smith, ¶ 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16; Ex. 14, Dec. Pinon, ¶ 5, 6, 7, 8; Ex. 15, Dec. Singh, ¶ 4, 6, 7, 8, 9; Ex. 16, Dec. unidentified, ¶ 3, 4, 5, 6, 8; Ex. 17, Dec. unidentified, ¶ 8, 9, 10, 11, 12, 13; Ex. 18, Dec. S. Gruner, ¶ 8, 9, 10, 11, 12, 13, 14, 15, 16, 17; Ex. 19, Dec. Flores, ¶ 6, 7, 8, 9, 10, 11, 12, 13; Ex. 20, Dec. Nicholls, ¶ 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21; Ex. 21, Dec. Beaty, ¶ 8, 10, 15, 16; Ex. 22, Dec. Ho, ¶ 7; Ex. 23, Dec. Ali-Beik, ¶ 8, 9; Ex. 24, Dec. Medina, ¶ 7, 8, 9, 10, 12; Ex. 25. Dec. Raynor, ¶ 4, 5, 6, 7, 8, 9, 10, 11; Ex. 26, Dec. Gonzalez Lamberson, ¶ 9, 10, 11; Ex. 27.

The claims of the various witnesses, affidavit of Lauterback and the attachments to the affidavit are not based on personal knowledge and are thus improper. This evidence should be excluded in its entirety. Witnesses cannot testify to matters of which they have no personal knowledge. See Fed. R. Civ. P. 56(e)(1). Without first-hand knowledge of the "facts" upon which they rely, the declarations are inadmissible. See Citizens Concerned About Our Children v. Sch. Bd. of Broward County, Fla., 193 F.3d 1285, 1295 n.11 (11th Cir. 1999) (per curiam) reh'g denied 211 F.3d 596 (11th Cir. 2000) ("Even on summary judgment, a court is not obliged to take as true testimony that is not based on personal knowledge."). Howard-Ahman v. Chicago Sch. Reform Bd. of Trs., 161 F. Supp. 2d 857, 864-65 (N.D. Ill. 2001) (conclusory statements addressing the defendant's motives for suspending and retaliating against plaintiff and the knowledge and intent of plaintiff's superiors were stricken). All of the "evidence" relied on by Plaintiffs that fails to meet this basic evidentiary requirement, should be stricken and not considered by the Court.

B. THE DECLARANTS DO NOT PROPERLY QUALIFY AS EXPERTS UNDER FED. EVID. 702

As several of the declarations proffered, are not based upon personal knowledge, Plaintiffs may be attempting to offer it as expert testimony. The

evidence, however, is insufficient to support a finding that it is valid expert testimony and thus must be excluded.

The Federal Rules of Evidence provide:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702.

Rule 702 imposes a "gatekeeper" role upon the trial courts to ensure that speculative, unreliable expert testimony does not reach the jury. Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993). Daubert establishes a two-pronged analysis that requires that the testimony: 1) be reliable, such that it is grounded in methods and procedures of science, and 2) constitute something more than subjective belief or unsupported assumptions. Id. at 590. Analyzing the first prong, the Court set forth a list of four primary inquiries about the expert's theory or techniques that should be considered: 1) testability; 2) error rate; 3) peer reviewed and publication; and 4) general acceptance. Id. at 593-94.

The second prong looks to whether the proposed testimony is relevant. McDowell v. Brown, 392 F.3d 1283, 1298 (11th Cir. 2004). In this respect, scientific testimony is not relevant unless it has a justified scientific relationship to the pertinent facts. Daubert, 509 U.S. at 591. There must be an analytical "fit" between the methodology used and the conclusions drawn. Gen. Elec. v. Joiner, 522 U.S. 136, 146 (1997). An expert's testimony must be supported by "good grounds" based on what is known. Daubert, 509 U.S. at 590.

The Eleventh Circuit has developed a framework to determine if expert testimony meets these Daubert standards that includes: 1) whether the expert is qualified to testify competently regarding the matters he intends to address; 2) whether the methodology by which the expert reaches his conclusions is sufficiently reliable; and 3) whether the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. Cook v. Sheriff of Monroe Cty, Fla., 402 F.3d 1092, 1107 (11th Cir. 2005). The proponent of expert testimony always has the burden of satisfying these requirements. McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1238 & n.2 (11th Cir. 2005); McDowell, 392 F.3d at 1300 (burden of laying the proper foundation for the admission of expert testimony is on the party offering the expert); Maiz v. Virani, 253 F.3d 641, 664 (11th Cir. 2001) (proponent

of expert testimony has burden of proof on expert's opinions, methodology, and the sufficiency of data used to reach the opinions).

Applying this framework, it is clear that the opinion testimony related to generalized concern and impact of HB 87 does not meet the Daubert standards. Specifically, none of the witnesses who express individualized concern for themselves, their organization or its members have a basis to proffer the opinions. *See* Footnote 2 *supra.* While Plaintiffs do not appear to offer these declarations as "expert" testimony as the declarants voice opinions regarding their predictions related the enforcement of HB 87 they must qualify and clearly do not.

Plaintiffs do however attempt to show Lowenthal, Bridges, Gascon, Gonzalez, Smith, Aytes, Aguilar, Palmatier, Ragsdale and Steinberg (collectively as proposed experts) as experts offering opinion evidence related to the impact of HB 87. Under the Daubert standards, None qualify.

Lowenthal, a professor of International Relations, professes to know how HB 87 will impact the United States' foreign relations with Mexico. Paul Bridges the Mayor of Uvalda, Georgia testifies about the human cost associated with the Bill. George Gascon, former police officer and District Attorney in California, Eduardo Gonzalez, retired director of United States Marshalls and former police officer in Florida, along with Lewis Smith the police chief in Uvalda, Georgia offer

unsupported opinions related to the impact HB 87 will have on law enforcement and community relations in Georgia. Lastly Michael Aytes, David Aguilar, David Ragsdale and James Steinberg are offered for support in this case but all address the impact of Arizona's bill. None reference HB 87 or tie it to their opinions.

1. NONE OF PLAINTIFFS' PROPOSED EXPERTS IS QUALIFIED TO OPINE ABOUT THE CLAIMS MADE

The threshold determination of an expert's qualifications is whether the witness qualifies as an expert in the field in which he is offering an opinion. Everett v. Georgia Pac. Corp., 949 F. Supp. 856, 857 (S.D. Ga. 1996). Expertise must be established by knowledge, skill, experience, training, or education. Goforth v. Paris, 2007 U.S. Dist. LEXIS 23366, *8 (M.D. Ga. March 30, 2007). Whether a witness is qualified as an expert can only be determined by comparing the area in which the expert has superior knowledge in the subject matter of his testimony. Jones v. Lincoln Elec. Co., 188 F.3d 709, 723 (7th Cir. 1999).

None of the persons testifying as "proposed experts" actually has expertise in the area for which they are testifying. The closest Plaintiffs have come to this is the testimony of Lowenthal. He, however ,has not demonstrated any expertise in predicting the impact of state's laws on foreign relations. While undoubtedly a scholar, he cannot profess expertise in an area where he has done no specific study, general knowledge of foreign relations with Mexico is insufficient. Similarly,

Bridge, Gascon, Gonzalez and Smith may be experts in law enforcement techniques or on matters related to arrest and confinement in their respective localities, none has proffered evidence that they have studied the impact of immigration law and its enforcement on local governments and thus cannot profess expert opinions related to the subject matter. Similarly, Aytes, Aguilar, Palmatier, Rangsdale and Steinberg show no evidence of applicability to HB 87 and thus should be excluded.

2. THE OPINIONS ARE NOT RELIABLE

Opinions should also be excluded because they are not factually or scientifically reliable. To be reliable, the proffered testimony must constitute something more than subjective beliefs and unsupported assumptions. Daubert, 509 U.S. at 590. Expert testimony must be based on "verifiable propositions of fact." Thomas v. FAG Bearings Corp., 846 F. Supp. 1382, 1394 (W.D. Mo. 1994). Reliability is not present when the opinion is based on a fatally deficient amount of data. Id. Thus, a trial court may exclude expert testimony that is unspecific or that inadequately explains its factual basis. Cook, 402 F.3d at 111. *See also* Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 23 (2d Cir. 1996) (rejecting expert testimony not accompanied by factual foundation). As this Court has stated,

> [A] district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being

> unscientific speculations offered by a genuine scientist. Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318 (7th Cir. 1996) . . . He cannot just make up facts to support his opinions – he cannot offer opinions that are "educated guesses dressed upon in evening clothes." Siharath v. Sandoz Pharms. Corp., 131 F. Supp. 2d 1347, 1373 (N.D. Ga. 2002).

Clarke v. Schofield, 632 F. Supp. 2d 1350, 1363 (M.D. Ga. 2009).

Also missing is any scientific reasoning or methodology. None describe any analysis, data or supporting documentation used to reach their conclusions. Even the most qualified expert cannot offer an opinion unless the opinion is based on some recognized scientific method. McDowell, 392 F.3d at 1298, 1300. No expert can simply "waltz into the courtroom and render opinions unless those opinions are based on some recognized scientific method." Id. at 1298 (*citing* Clark, 192 F.3d at 759 n.5). To be admissible, the reasoning or methodology underlying the testimony must be properly applied to the facts at issue. Frazier, 387 F.3d at 1261-62. "An expert must substantiate his opinion; providing only an ultimate conclusion with no analysis is meaningless." Clark, 192 F.3d at 757. *See also* Huey v. United Parcel Serv., Inc., 165 F.3d 1084, 1087 (7th Cir. 1999) (expert who "supplies nothing but a bottom line supplies nothing of value").

Nothing in Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence "which is connected to existing data only by the *ipse dixit* of the expert." Joiner, 522 U.S. at 146. As the Eleventh Circuit has stated,

> If admissibility could be established merely by the ipse dixit of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong. Thus, it remains a basic foundation for admissibility that proposed expert testimony must be supported by appropriate validation[,] i.e., good grounds, based on what is known.

Frazier, 387 F.3d at 1261.

Conclusions are the quintessential *ipse dixit* of an expert. The proposed experts fail to describe any scientific reasoning or methodology used to reach their conclusions. Speculation and unproven data do not make for reliable methodology. Clarke, 632 F. Supp. 2d at 1363. The proposed expert opinions are unreliable and should not be allowed.

C. THE EVIDENCE IS NOT RELEVANT TO THE PROCEEDINGS IN FRONT OF THIS COURT

Evidence that is not relevant is not admissible. Fed. R. Evid. 402. Here, the unsupported opinions are irrelevant, will not assist the trier of fact, and are thus inadmissible. *See* Clarke, 632 F. Supp. 2d at 1370 ("could, could, could" testimony and "possibility opinions" would not assist the trier of fact). A party proffering expert testimony must show that the opinion would assist the trier of fact in resolving a disputed issue of material fact. McDowell, 392 F.3d at 1298. Expert testimony is not relevant if it does not assist the trier of fact. Id. at 1299.

And testimony does not assist the trier of fact unless it has a justified scientific relationship to the pertinent facts. Id.

These opinions fail every step of the Daubert analysis. There is nothing to show that the theories and conclusions have been tested, that they have an error rate, that they have been subjected to peer review and publication, or that they are widely accepted. Plaintiffs have offered nothing but unsupported conclusions and this testimony will not assist the trier of fact.

Finally, even if the testimony had some minimal relevance, it would be substantially outweighed by a danger of confusion of the issues, and would confuse the record in the case, and is improper under FED. R. EVID. 403. Alleged harm based upon speculation, conjecture or fear mongering combined with evidence related to another statute which varies significantly from HB 87 is irrelevant. Whatever minimal probative value this testimony might have is outweighed by the danger of unfair prejudice and the likelihood of confusing the record.

IV. CONCLUSION

For the foregoing reasons, Defendants request this Honorable Court exclude all improper evidence for all purposes related to this case.

Respectfully submitted,

SAMUEL S. OLENS 551540
Attorney General

KATHLEEN PACIOUS 558555
Deputy Attorney General

/s/ Devon Orland
DEVON ORLAND 554301
Sr. Assistant Attorney General

Please Address All
Communications To:

Devon Orland
40 Capitol Square, S.W.
Atlanta, GA 30334-1300
(404) 463-8850
(404) 651-5304

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the foregoing has been prepared in compliance with Local Rule 5.1(B) in 14-point New Times Roman type face.

This the 17th day of June, 2011.

/s/ Devon Orland
DEVON ORLAND 554301
Sr. Assistant Attorney General

40 Capitol Square, S.W.
Atlanta, GA 30334-1300
(404) 463-8850 (Telephone)
(404) 651-5304 (Fax)
Email: Dorland@law.ga.gov

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing **MOTION TO EXCLUDE INVALID OPINION TESTIMONY** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Andrew H. Turner

Chara Fisher Jackson

Charles H. Kuck

Daniel Werner

Danielle M. Conley

Georgia Brian Spears

Mary C. Bauer

Michelle R. Lapointe

Naomi Ruth Tsu

Robert Keegan Federal, Jr.

Samuel Brooke

I further certify that I have served, by U.S. mail, first class postage prepaid, the following non-CM/ECF participants:

Andre I. Segura
Omar C. Jadwat
American Civil Liberties Union Foundation – NY
125 Broad Street, 18th Floor
New York, NY 10004

Azadeh N. Shahshahani
ACLU of Georgia
Building 400, Suite 425
1900 The Exchange, SE
Atlanta, GA 30339

Cecillia D. Wang
Katherine Desormeau
ACLU Immigrant's Rights Project
39 Drumm Street
San Francisco, CA 94111

Elora Mukherjee
ACLU Racial Justice Program
18th Floor, 125 Broad Street
New York, NY 10004

Jonathan Blazer
Karen C. Tumlin
Linton Joaquin
Melissa S. Keaney
Nora Preciado
Tanya Broder
National Immigration Law Center
3435 Wilshire Blvd, Suite 2850
Los Angles, CA 90010

Sin Yen Ling
Asian Law Caucus
55 Columbus Avenue
San Fancisco, CA 94111

This 17th day of June, 2011.

s/ Devon Orland

State Law Department
40 Capitol Square SW
Atlanta, GA 30334
Tel: (404) 463-8850
Fax: (404) 651-5304
Email: dorland@law.ga.gov