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

Georgia Latino Alliance for Human Rights, *et al.*, Plaintiffs, v. Governor Nathan Deal, *et al.*, Defendants.	Case No. 1:11-cv-1804-TWT

PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTION TO IRRELEVANT AND INADMISSIBLE EVIDENCE

INTRODUCTION

Defendants' Objection to Irrelevant and Inadmissible Evidence ("Objection") should be overruled in its entirety. All of the challenged evidence is relevant and otherwise admissible in support of Plaintiffs' motion for a preliminary injunction.

Defendants fundamentally misconceive the evidentiary standard that applies at a preliminary injunction hearing. At this stage, the Court should consider *all* of Plaintiffs' evidence, even if some of it might not be admissible at trial, at least not in its present form.[1] The Court may consider any infirmities in Plaintiffs' evidence in determining what weight to give it. Viewed against this legal framework, Defendants' Objection offers no cognizable ground for excluding any of Plaintiffs' declarations or documentary evidence.

In addition, much of Defendants' omnibus objection is not well taken because it is too general and not particularized. Neither Plaintiffs nor the Court should be required to pore through dozens of paragraphs from Plaintiffs'

[1] Solely for purposes of responding to Defendant's Objection, Plaintiffs will assume for argument sake that some of their proffered evidence would not be admissible at trial. Defendants have objected in omnibus fashion to so much of Plaintiffs' evidence that it would not be practicable for Plaintiffs to respond on an item-by-item basis. (*See, e.g.*, Objection at 4 n.2 (citing dozens of paragraphs of declaration testimony as being conclusory and unsupported without any specific discussion)).

declarations to figure out which particular statements Defendants' are objecting to and on which particular ground(s) and on what reasoning. *Cf. Duke v. Atria, Inc.*, No. 2:03-CV-00934-DRB, 2005 WL 1514149, *2-3 (M.D. Ala. 2005) (where party cited multiple pages of objectionable document, adding up to practically the entire document, and gave only general descriptions of the evidence contained without pinpointing how the objection applied, the court "decline[d] appropriately to undertake the lawyer's task of specifying disputed evidence and the basis for any objection").

ARGUMENT

I. The Court May Rely on Evidence that Would be Inadmissible at Trial

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

At the preliminary injunction stage, the court may rely on affidavits and other evidence that would not be admissible at trial. *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) ("court may rely on affidavits

and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is 'appropriate given the character and objectives of the injunctive proceeding'") (quoting *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir.1986)); *In re Infolink Group, Inc.,* Bankr. Nos. 10-26423-AJC 10-26436-AJC, 2011 WL 1655882, *2 (S.D. Fla. Bkrtcy. May 2, 2011) ("courts at preliminary injunction stage 'may rely on otherwise inadmissible evidence. . . .'") (quoting *Sierra Club, Lone Star Chapter v. Fed. Dep. Ins. Corp.*, 992 F.2d 545, 551 (5th Cir. 1993)); *Gulf Coast Commercial Corp. v. Gordon River Hotel Assocs.*, No. 2:05-cv-564-FtM-33SPC, 2006 WL 1382072, *2 (M.D. Fla. 2006) (same); *Home Oil Co., Inc. v. Sam's East, Inc.*, 252 F. Supp. 2d 1302, 1307 (M.D. Fla. 2003) (same); 11A Wright & Miller, Fed. Prac. & Proc. Civ. § 2949 (2d ed.) ("affidavits usually are accepted on a preliminary injunction motion without regard to the strict standards of Rule 56(e), . . . and . . . hearsay evidence also may be considered) (footnote omitted).

Many courts hold more broadly that "[t]he Federal Rules of Evidence do not apply to preliminary injunction hearings." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003); *R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F. Supp. 2d 745, 747 n.3 (E.D. Pa. 2010) ("Courts have consistently held that the Federal Rules of Evidence do not apply at preliminary injunction hearings.");

Nilson v. JPMorgan Chase Bank, N.A., 690 F. Supp. 2d 1231, 1238 n.2 (D. Utah 2009) ("[B]ecause this is a preliminary injunction proceeding, the Federal Rules of Evidence do not apply."); *Greenpeace Found. v. Daley*, 122 F. Supp. 2d 1110, 1114 (D. Haw. 2000) ("The Federal Rules of Evidence do not apply to preliminary injunction hearings in general."); *United States v. O'Brien*, 836 F. Supp. 438, 441 (S.D. Ohio 1993) ("The federal rules of evidence do not apply at preliminary injunction hearings generally. . .."); *Bracco v. Lackner*, 462 F. Supp. 436, 442 n.3 (N.D. Cal. 1978) (affidavits submitted in support of or opposition to a preliminary injunction motion "need not meet the standards of . . . [Rule 56] or of the Federal Rules of Evidence").[2]

II. None of Plaintiffs' Declarations Should be Excluded on the Claimed Ground That They Are Conclusory, Speculative, Unsupported, or Not Based on Personal Knowledge

Plaintiffs do not agree that any of the declaration testimony they have proffered is conclusory, speculative, unsupported, or not based on personal

[2] *See Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir. 2004) (approvingly quoting the statement in *Heideman v. South Salt Lake City* that the Federal Rules of Evidence do not apply); *Bank of Am., N.A. v. Lee*, No. CV 08-5546 CAS(JWJx), 2008 WL 4351348, *5 n.3 (C.D. Cal. 2008) (same); *Heritage Community Bank v. Heritage Bank, N.A.*, Civ. No. 08-4322 (JAG), 2008 WL 5170190, *9 n.7 (D.N.J. 2008) (same); *Lockhart v. Home-Grown Indus. of Ga., Inc.*, No. 3:07-CV-297, 2007 WL 2688551, *4 n.7 (W.D.N.C. 2007) (same); *Am. Fed. of Govt. Employees v. Dist. of Columbia*, No. Civ.A. 05-0472(JDB), 2005 WL 1017877, *4 (D.D.C. 2005) (same).

knowledge. But in any event, as discussed above, evidence at the preliminary injunction stage need not satisfy the Rule 56 affidavit standards – e.g., personal knowledge, based on facts that would be admissible in evidence, competence of declarant to testify on matters stated – or the standards of the Federal Rules of Evidence. Defendants' Objection should be denied for this simple reason.

Indeed, Defendants do not cite *any* cases in which courts have excluded declarations at the preliminary injunction stage on the ground that they contained conclusory or speculative allegations or were not based on personal knowledge. This is not surprising, because "in practice affidavits usually are accepted on a preliminary injunction motion without regard to the strict standards of Rule 56(e)." 11A Wright & Miller, Fed. Prac. & Proc. Civ. § 2949 (2d ed.); *see S.E.C. v. Trabulse,* 526 F. Supp. 2d 1008, 1010 n.1 (N.D. Cal. 2007) (accepting declaration over objection that declarant lacked personal knowledge because court has discretion to accept evidence that might be inadmissible at trial).

Rather than being a ground for excluding the evidence, on a motion for preliminary injunction, a declarant's lack of personal knowledge, or the conclusory nature of the declarant's testimony, are factors the Court may consider in determining what weight to accord the declarant's testimony. *Id*.; *see V.L. v. Wagner*, 669 F. Supp.2d 1106, 1115 n.8 (N.D. Cal. 2009) ("[O]n a motion for a

preliminary injunction, the Court may consider inadmissible evidence, giving such evidence appropriate weight depending on the competence, personal knowledge, and credibility of the declarants."); *cf. In re Infolink*, 2011 WL 1655882 at *2 ("The admissibility of hearsay under the Federal Rules of Evidence goes to weight, not preclusion, at the preliminary injunction stage."). If a plaintiff's preliminary injunction declarations are too conclusory or speculative, the Court will consider the declarations but deny the injunctive relief sought, not exclude the declarations. *See* 11A Wright & Miller, Fed. Prac. & Proc. Civ. § 2949 (2d ed.). ("Preliminary injunctions frequently are denied if the affidavits are too vague or conclusory to demonstrate a clear right to relief under Rule 65.").

In sum, even if any of Plaintiffs' declarations were conclusory, speculative, unsupported, or not based on personal knowledge, and Plaintiffs dispute that they are, the Court should overrule Defendants' objections. *See, e.g.*, *Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir. 2004) (district court did not err in admitting declaration over objections that it contained multiple levels of hearsay and was not based solely on personal knowledge).

III. None of Plaintiffs' Declarations Should Be Excluded on the Ground That the Declarants do Not Qualify as Experts[3]

Defendants spill a lot of ink in a misplaced attempt to have a *Daubert* hearing at this early stage of the case. In this regard too, Defendant's Objection should be overruled.

First, Defendants are off base in suggesting that all of the declaration testimony at issue constitutes "expert" opinion within the meaning of Federal Rule of Evidence 702. In fact, the declarations are laden with non-expert and relevant testimony. To give just one example, the declaration of Chief Lewis Smith describes facts relating to the booking process for his department, the amount of time it takes to process someone into the closest county jail (a minimum of two hours and fifteen minutes), and the exposure his town faces every time he has to transport someone to jail (because he is the only member of his department). Smith Decl. (Doc. 29-15) ¶¶ 9-10. These assertions are facts and do not qualify as "expert" opinion.

Defendants do not identify which parts of the declarations they believe offer expert opinions, which parts offer factual information, and which parts may simply be offering non-expert opinions or inferences within the meaning of Federal Rule

[3] Defendants' Objection regarding expert testimony is directed to the Lowenthal, Bridges, Gascon, Gonzalez, Smith, Ayets, Aguilar, Palmatier, Ragsdale, and Steinberg declarations. (Objection at 8.)

of Evidence 701. The Court should not be required to do this work for Defendants. In this vein, and in full compliance with the Federal Rules of Civil Procedure, Plaintiffs have not yet identified any expert witnesses or expert opinions as being such, or made the accompanying disclosures. There is not time now, before the preliminary injunction hearing, for litigation within the litigation about which proffered testimony is expert testimony under Rule 702 and which is not.

Second, as discussed above, preliminary injunctions are "customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), evidence may be considered at the preliminary injunction stage that would not be admissible at trial, and many courts have concluded that the Federal Rules of Evidence do not apply at all at the preliminary injunction stage. *See, e.g.*, *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). Thus, the Court is not required to determine whether or not Plaintiffs' witnesses qualify as Rule 702 experts for purposes of the preliminary injunction hearing.

Here, instead, the Court may consider Defendants' various arguments when deciding what weight it will give to the opinions of the witnesses at issue. *Attorney General of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 779-80 (10th Cir. 2009) (district court did not abuse its discretion in admitting expert testimony in

support of preliminary injunction motion and then applying *Daubert* to decide how much weight to give it); *Greenpeace Found. v. Daley*, 122 F. Supp. 2d 1110, 1114 (D. Haw. 2000) (overruling objection that party was attempting to offer expert opinions at the preliminary judgment stage without first qualifying the witness as an expert; "Even assuming portions of Mr. Karnella's declaration are offered in violation of Rule 702, they need not be stricken. The Court considers the declaration in its entirety, and accords it the weight that is appropriate in light of Plaintiffs' objections.").

IV. The Transcripts, Newspaper Articles, and Declarations From Another Case That Plaintiffs Have Filed Should Not Be Excluded

Defendants assert that Plaintiffs' "attempts to authenticate transcripts, newspaper articles and declarations from another unrelated case are improper and should not be considered as evidence." (Objection at 3.) Defendants offer no argument or authority to support this vague objection, so it is difficult for Plaintiffs to know how to respond. In any event, there is no reason in law or logic why these evidentiary materials should be excluded.

A. Declarations From the Arizona Case

There is no rule of which Plaintiffs are aware – and Defendants have not cited any – that would preclude a court in one case from admitting or considering declarations or other testimony that was submitted or taken in connection with

another case. To the contrary, there are numerous reported cases in which courts have done just that.[4]

[4] *See, e.g.*, *Betancourt v. Ingram Park Mall, L.P.*, 735 F. Supp. 2d 587, 593 n.3 (W.D. Tex. 2010) (taking judicial notice of plaintiff's affidavit filed in another case pending in same court against different defendant); *Nat'l Org. for Marriage v. McKee*, Civ. No. 09-538-B-H, 2010 WL 3364448, *5 (D. Me. 2010) (court considered affidavits from other cases regarding harms to be suffered from unsealing trial record); *Roberson v. Bates*, No. CIV S-04-0772 DFL KJM P., 2006 WL 1629076, *3 (E.D. Cal. 2006) (considering affidavits prepared for another case against different party, noting that nothing in Rule 56 prohibits use of affidavits or discovery materials prepared in connection with another case to support motion for summary judgment, and citing cases to the contrary); *Gulf USA Corp. v. Federal Ins. Co.*, 259 F.3d 1049, 1056 (9th Cir. 2001) (deposition testimony taken in prior, unrelated case, in which neither plaintiff nor defendant had been a party, could be considered by the district court on summary judgment); *United States v. O'Connell*, 890 F.2d 563, 567 (1st Cir. 1989) (district court properly considered testimony from prior trial at summary judgment stage where adverse party had not been a party in the prior case); *see also Braintree Labs., Inc. v. Citigroup Global Markets, Inc.*, 671 F. Supp. 2d 202, 207 (D. Mass. 2009) (at preliminary injunction stage, court considered deposition testimony from another case); *Fed. Trade Comm'n v. Transcontinental Warranty, Inc.*, No. 09 C 2927, 2009 WL 5166216,*1 n.2 (N.D. Ill. 2009) (considering declaration that had been filed in another case); *Mayhew v. T-Mobile USA Inc.*, No. CIV 07-6131-TC, 2009 WL 5125642, *4 (D. Or. 2009) (admitting depositions and affidavits from a prior case on summary judgment); *German Free State of Bavaria v. Toyobo Co., Ltd.*, No. 1:06-CV-407, 2007 WL 851671, *4 (W.D. Mich. 2007) (considering defendant's affidavit from a different case on motion to dismiss for lack of jurisdiction); *Burbank v. Davis*, 227 F. Supp. 2d 176, 178-79 (D. Me. 2002) (finding that deposition testimony from another case was admissible on summary judgment); *United States v. City and County of San Francisco*, 748 F. Supp. 1416, 1430 (N.D. Cal. 1990) (court considered declarations from other cases regarding reasonable hourly attorney rates); *Lockheed Minority Solidarity Com'n v. Lockheed Missiles & Space Co., Inc.*, 406 F. Supp. 828, 833 (N.D. Cal. 1976) (court considered affidavits regarding proper amount of attorney's fees that had not been prepared for the case at bar).

At the preliminary injunction stage, the touchstone should simply be relevance, or how much weight the Court will give the evidence. Here, the evidence is of strong probative value regarding the federal law preemption issues – which relevance Defendants do not appear to specifically dispute – and should be accorded substantial weight. At a minimum, the evidence should be considered.

B. Transcripts

Plaintiffs have proffered certain legislative history in the form of transcripts of congressional debates. Again, Defendants do not dispute their relevance, at least not with any specific discussion. Legislative history materials are considered by courts in all manner of cases and proceedings. They are relevant here, where congressional purposes are highly relevant to the federal law preemption issues. There is no basis for excluding them here.

C. Newspaper Articles

Defendants do not dispute the relevance of the newspaper articles Plaintiffs have submitted. They are relevant for the reasons discussed in Plaintiffs' preliminary injunction brief. There is no ground for excluding them.

D. Authentication

To the extent Defendants are really challenging whether the evidence has been properly authenticated (*see* Objection at 3), Defendants again fail to make any

argument to which Plaintiffs could respond. In fact, Plaintiffs submitted a declaration establishing that the evidentiary materials are what Plaintiffs claim them to be. (Declaration of Molly Lauterback.) And Defendants do not question their authenticity in any way.

Even if the Federal Rules of Evidence were to be construed as requiring a different procedure for authentication at trial, it would not be appropriate to impose such a formal requirement at the preliminary judgment stage, where the Rules are greatly relaxed, if applied at all. Notwithstanding the foregoing, if the Court were to require a different procedure for authenticating any of the evidence, Plaintiffs might need to request leave from the Court for additional time to comply with such a requirement, which would require that the hearing be continued. But of course the need to avoid such delays where expedition is required is precisely why courts do not impose formal requirements regarding the admission of evidence at the preliminary injunction stage.

CONCLUSION

Defendants' objections to Plaintiffs' evidence should be overruled.

Dated: June 17, 2011

Respectfully submitted,[5]

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed this date with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification to the following attorney for Defendants Deal, Olens, Reese, and Beatty:

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I hereby certify that this date the foregoing was placed in the United States Postal Service, first-class postage pre-paid, to the following non-CM/ECF participant:

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This 17th day of June, 2011.

/s/ Michelle R. Lapointe