IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
FIFTH DIVISION

ROSEY PERKINS and RHONDA COPPAK,
Individually and as Co-Administratrixes
And Personal Representatives of the
Estate of Martha Bull, Deceased **PLAINTIFFS**

vs. **Case No. 23CV-14-862**

MICHAEL MAGGIO, Individually and
In His Official Capacity; MICHAEL MORTON;
GILBERT BAKER; And JOHN DOES 1-5 **DEFENDANTS**

MICHAEL MORTON'S REPLY TO PLAINTIFFS' SUR-RESPONSE AND HEARING BRIEF REGARDING MICHAEL MORTON'S REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

Comes now separate defendant, Michael Morton ("Morton"), and respectfully submits his Reply to Plaintiffs' Sur-Response and Hearing Brief Regarding Michael Morton's Reply in Support of his Motion for Summary Judgment (the "Sur-Response").

INTRODUCTION

Plaintiffs assert in their Sur-Response that "[h]idden within Defendant Morton's Reply is a motion *in limine* requesting that this Court exclude from its consideration certain evidence submitted by Plaintiffs supporting their opposition to Morton's motion for summary judgment." Morton's request that the Court exclude certain evidence was neither hidden nor improperly raised in his Reply.

In responding to a properly supported motion for summary judgment, like Morton's motion, Plaintiffs were required to meet proof with proof by submitting only admissible evidence in the form of pleadings, depositions, answers to interrogatories, admissions on file and affidavits. *See Hadder v. Heritage Hill Manor, Inc.*, --- S.W.3d --- at *12, 2016 Ark. App. 303 (2016). "A statement that is based on inadmissible hearsay will not be accepted as the basis for finding a

material issue of fact to deny entry of summary judgment." *Hadder*, at *12. Thus, while Plaintiffs can submit affidavits in opposition to summary judgment, the statements contained in those affidavits must contain statements that would be admissible at trial. *See id.* "Where hearsay is offered and would not be admissible at trial, the hearsay is not considered in the summary-judgment analysis. Stated differently, all evidence submitted in the course of summary-judgment proceedings must be under oath." *Id.* at *13-14.

Plaintiffs did not meet their burden of proof and, instead, submitted inadmissible hearsay evidence, like Maggio's entire plea agreement, the Arkansas Ethics Commission report and the newspaper articles. The Court should not consider Plaintiff's inadmissible evidence in ruling on Morton's motion. After considering only the admissible evidence, the Court should find that Plaintiffs failed to meet proof with proof and the Court should enter summary judgment in Morton's favor. *See Hadder, supra* (affirming grant of summary judgment where party opposed summary judgment with inadmissible evidence, which the court did not consider, and, thus, found the party failed to meet proof with proof).

LEGAL ARGUMENT

1. Maggio's plea agreement and the statements made at his plea hearing are not admissible.

Plaintiffs assert that Maggio's plea agreement and the statements he made at his plea hearing are admissible pursuant to several rules of evidence, each of which are addressed below.

(a) Judicial notice (Ark. R. Evid. 201(b)).

Plaintiffs assert that that the Court can consider Maggio's plea agreement, the statements Maggio made at his plea hearing and his judgment of conviction because the Court can take judicial notice of those statements and documents under Rule 201 of the Arkansas Rules of

Evidence. "A judicially noted fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ark. R. Evid. 201(b).

While Morton does not dispute that Maggio pled guilty pursuant to a plea agreement offered in his criminal case, Morton does dispute the factual statements Maggio made in such plea agreement as they pertain to Morton. Further, such statements are contradicted by Maggio's sworn testimony before the Arkansas Ethics Commission during which he stated that he never solicited any money for his campaign, he never talked to Baker about receiving any money from any PACs, he never discussed the *Bull* verdict with Baker and he never met with or talked to Morton. (*See* Maggio Sworn Stmt. at 9-18) (attached as Exhibit "F" to Morton's Motion for Summary Judgment). Thus, the factual statements contained within Maggio's plea agreement and made at his plea hearing are subject to dispute and cannot be judicially noticed by this Court.

Further, the Arkansas Supreme Court "has clearly stated that judicial notice may not be taken of the record in a separate case." *Throneberry v. State*, 102 Ark. App. 17, 22, 279 S.W.3d 489, 493 (2008) (*citing Smith v. State*, 307 Ark. 223, 818 S.W.2d 945 (1991); *Leach v. State*, 303 Ark. 309, 796 S.W.2d 837 (1990)); *see also Baxter v. State*, 324 Ark. 440, 446, 922 S.W.2d 68, 685 (1996). As the authors of the Trial Handbook for Arkansas Lawyers note, "[u]nless the proceedings are put into evidence, courts will not travel outside a record in order to notice proceedings in another case, even between the same parties in the same court." 3 *Trial Handbook for Arkansas Lawyers* § 46.11 (2015-016 ed.).

Further, a court ordinarily "will not, either upon its own motion or upon suggestion of counsel, take judicial notice of records, judgments, and orders in other and different cases or proceedings, even though such cases may be between the same parties and in relation to the same subject matter." 3 *Trial Handbook for Arkansas Lawyers* § 46.11 (2015-016 ed.) (*citing Parker v. Sims*, 185 Ark. 1111, 51 S.W.2d 517 (1932); *Hurst v. Hurst*, 255 Ark. 936, 504 S.W.2d 360 (1974)). Simply stated, "[c]ourts do not take judicial notice of prior litigation of other cases." *Id.* (*citing Leach, supra; Smith, supra*).

Thus, the Court cannot take judicial notice of Maggio's plea agreement, the statements made by Maggio at his plea hearing or his judgment of conviction.

(b) Former testimony (Ark. R. Evid. 804(b)(1)).

Plaintiffs assert that that the Court can consider the statements Maggio made at his plea hearing under Rule 804(b)(1) of the Arkansas Rules of Evidence as former testimony. Rule 804(b)(1) provides that when a witness is unavailable "[t]estimony given as a witness at another hearing of the same or different proceeding" is admissible "if the party against whom the testimony is now offered, or in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Ark. R. Evid. 804(b)(1).

Morton does not dispute that Maggio is unavailable for purposes of Rule 804, but Morton asserts that Maggio's testimony at his plea hearing is not admissible as former testimony because Morton was not a party to Maggio's criminal case and did not have an opportunity to cross-examine Maggio. Plaintiffs assert that a predecessor in interest, the United States Government, had an opportunity *and similar motive* to develop Maggio's testimony by direct,

cross, or redirect examination, but such assertion is clearly untrue. Morton and the United States Government obviously have different, indeed contradictory, motives. Thus, Maggio's testimony at his plea hearing is not admissible as former testimony under Rule 804(b)(1).

(c) Statement against interest (Ark. R. Evid. 804(b)(3)).

Plaintiffs argue that Maggio's plea agreement and the statements that he made at his plea hearing are statements against interest admissible under Rule 804(b)(3). For Maggio's statements to be admissible under this exception, Plaintiffs must show that Maggio made a statement that was so contrary to his interest or tended to subject him to criminal or civil liability that a reasonable man in his position would not have made the statement unless he believed it was true. *See* Ark. R. Evid. Rule 804(b)(3).

While some of Maggio's statements in his plea agreement and at the plea hearing would qualify as statements against interest under Rule 804(b)(3), not all of the statements made within his plea agreement or at his plea hearing are statements against interest. Only the portions of Maggio's statements "that genuinely inculpate [him] are admissible." *U.S. v. Chase*, 451 F.3d 474, 480 (8th Cir. 2006) (*citing Williamson v. United States*, 512 U.S. 594, 600-01, 114 S. Ct. 2431, 129 L.Ed 2d 476 (1994) (holding that Federal Rule 804(b)(3), which is similar to Arkansas Rule 804(b)(3), "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.").

Further, there is no question that Maggio's statements in his plea agreement and at his plea hearing directly conflict with his previous, more specific, sworn statements made before the Arkansas Ethics Commission in which Maggio stated that he never solicited any money for his campaign, he never talked to Baker about receiving any money from any PACs, he never discussed

the *Bull* verdict with Baker and he never met with or talked to Morton. (*See* Maggio Sworn Stmt. at 9-18). Further, Maggio has attempted to withdraw his plea agreement, which was rejected by the district court and the matter is on appeal to the Eighth Circuit Court of Appeals. If the district court is reversed on appeal, and Maggio is permitted to withdraw his guilty plea, then his plea and conviction will not be admissible at trial. *See, e.g., Baker v. Elmendorf*, 271 Va. 474, 479, 628 S.E.2d 358 (Va. 2006) (holding that since a reversal on appeal "wipes out" a guilty plea there no longer exists a guilty plea that otherwise would be admissible in a subsequent civil proceeding).

Thus, because Maggio's statements in his plea agreement and at his plea hearing conflict with his prior statements and Maggio is still seeking to withdraw his guilty plea and overturn his subsequent conviction, the Court should not admit his statements in his plea agreement or at his plea hearing as such statements are too prejudicial to Morton. Specifically, even if Maggio's statements in his plea agreement and at his plea hearing are admissible under Rule 804(b)(3) as statements against interest, the Court should exclude them as their probative value is outweighed by the danger of unfair prejudice to Morton, confusion of the issues and/or misleading the jury under Rule 403 of the Arkansas Rules of Evidence.

(d) Judgment of previous conviction (Ark. R. Evid. 803(22)).

Plaintiffs assert that the judgment entered in Maggio's criminal case is admissible under the exception found in Rule 803(22) of the Arkansas Rules of Evidence for a judgment of a previous conviction. That exception allows a judgment for a felony conviction to be admitted "to prove any fact essential to sustain the judgment." Maggio's judgment does not, however, establish any fact necessary to prove the claims asserted against Morton in this case. Thus, Maggio's judgment is not admissible under Rule 803(22).

Further, as set forth above, Maggio has appealed his conviction and continues to seek to withdraw his plea agreement. If the court of appeals reverses the district court and allows Maggio to withdraw his plea agreement, then there will be no conviction to admit under Rule 803(22).

(e) Residual hearsay exception (Ark. R. Evid. 803(24); 804(b)(5)).

If all the above arguments fail, Plaintiffs argue that the plea agreement and statements at the plea hearing should be admitted pursuant to one of the residual hearsay exceptions. The Arkansas Supreme Court has stated that the residual hearsay exception "was intended to be used very rarely, and only in exceptional circumstances." *Martin v. State*, 346 Ark. 198, 206, 57 S.W.3d 136 (2001) (internal citation omitted). If a statement is to be admitted under this exception, "it must have circumstantial guarantees of trustworthiness equivalent to those supporting the common-law exceptions." *Id.* (internal citation omitted). Specifically, in determining whether such trustworthiness exists, the court must determine that

> (1) the statement is offered as evidence of a material fact, (2) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts, and (3) the general purposes of these rules and the interests of justice will best be served by admission of the statements into evidence.

Id. (internal citation omitted).

Because Maggio has attempted to withdraw his plea agreement and has made contradictory statements under oath denying any bribery or communication regarding the *Bull* judgment, the statements Maggio made in his plea agreement and at his plea hearing lack trustworthiness. The Court should not use an exception to the hearsay rule, which should be "rarely used, and only in exceptional circumstances" to admit evidence of statements made that the person has since attempted to withdraw and that conflict with other statements also made under oath.

(f) Admission by party opponent (Ark. R. Evid. 801(d)(2)(v)).

Finally, Plaintiffs assert that certain statements within the plea agreement refer to text messages allegedly between Baker and Morton and such text messages would be non-hearsay under Ark. R. Evid. Rule 801(d)(2) as statements by co-conspirators. This exception to the hearsay rule is clearly inapplicable, however, because the statements Maggio made in the plea agreement and at the plea hearing were not made "during the course and in furtherance of the [alleged] conspiracy," which is required for admissibility under Rule 801(d)(2).

2. The Arkansas Ethics Commission report is inadmissible.

Plaintiffs assert that the Arkansas Ethics Commission's report on its investigation into whether Maggio committed ethical violations is admissible as a public record or report under Rule 803(8) of the Arkansas Rules of Evidence. The report contains the Commission's factual and legal findings, which are based in large part on statements made by others during the Commission's investigation. The report unquestionably contains hearsay.

"Hearsay is not admissible except as provided by law or by [the Arkansas Rules of Evidence]." Ark. R. Evid. 802. Thus, unless the Commission's report is non-hearsay or falls within an exception to the hearsay rule, the report is inadmissible.

(a) Public Records and Reports (Ark. R. Evid. 803(8)).

The first exception Plaintiffs attempt to use is the "Public Records and Reports" exception, which provides that the following records are admissible:

> records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

Ark. R. Evid. 803(8).

The Rule specifically excludes from this rule any "factual findings resulting from special investigation of a particular complaint, case, or incident. . . ." Ark. R. Evid. 803(8)(iv). In other words, factual findings resulting from a special investigation of a particular complaint, case, or incident are hearsay and, therefore, inadmissible.

The Commission's report contains findings that resulted from a special investigation of a particular complaint. Indeed, the opening paragraph of the report begins by noting that "the Ethics Commission has received a citizen complaint from Thomas G. Buchanan of Little Rock, Arkansas." The report goes on to provide an account of the Commission's investigation and allegedly repeats statements made by others to the Commission's investigators. Therefore, the Commission's report clearly is not a report of its "regularly conducted and regularly recorded activities" and, therefore, does not fall within the public records exception under Rule 803(8).

The cases that Plaintiffs rely upon for the admissibility of the Commission's report are either inapplicable or support exclusion of the report. In the first case relied upon by Plaintiffs, *Bishop v. Linkway*, 280 Ark. 106, 655 S.W.2d 426 (1983), the Arkansas Supreme Court did not mention the public records exception of Rule 803(8) at all. The dissent merely noted that "testimony of legislators recorded in the minutes of the committee meetings and other legislative sessions are entitled to consideration, as they are statements of public events." *Id.* at 431. Thus, *Bishop* is completely inapplicable.

The second case that Plaintiffs rely upon, *Ortho-McNeil-Janssen Pharma, Inc. v. State*, 2014 Ark. 124, 432 S.W.2d 563 (2014), actually supports the exclusion of the report. In *Ortho-McNeil*, the court noted that reports resulting from special investigations of a particular

complaint are not excepted from the hearsay rule. *Id.* at 577-59 (holding that the investigation was not part of routine record keeping but was part of a special investigation and therefore not admissible under Rule 803(8)).

Thus, because the Commission's report was created as part of a special investigation into Maggio as a result of a particular complaint made by Mr. Buchanan, the report does not fall within the public records exception of Rule 803(8).

(b) Admissions by a party opponent (Ark. R. Evid. 801(d)(2)).

Plaintiffs assert that the Commission's report contains statements made by Morton and Baker and such statements are non-hearsay and, therefore, admissible under Rule 801(d)(2). The Commission's report is not a statement made by either Morton or Baker. The Commission's report is the Commission's account or summary of those statements and, therefore, is inadmissible hearsay.

As the Arkansas Supreme Court has recognized, "[d]ouble hearsay is not permitted under Ark. R. Evid. 805." *Cook v State*, 350 Ark. 398, 412, 86 S.W.3d 916, 925 (2002). "To be admissible, each level of hearsay must conform to an exception of the hearsay rule." *Id.* (*citing Marrow v. State*, 264 Ark. 227, 570 S.W.2d 607 (1978); *United States v. Ortiz*, 125 F.3d 630 (8th Cir. 1997)); *see also* Ark. R. Evid. 805. Jill Barham's[1] unsworn report that Morton and/or Baker made certain statements to her (or to another Commission investigator) is hearsay that does not fall within any exception of the hearsay rule.

(c) Prior statement of a witness (Ark. R. Evid. 801(d)(1)).

Plaintiffs assert that the Commission's report is admissible as a prior statement of a witness

[1] Jill Rogers Barham is an Attorney Specialist at the Arkansas Ethics Commission and the author if the Commission's report at issue in this case.

and, therefore, admissible under Rule 801(d)(1). First, this rule is only applicable once a declarant testifies at trial and is presented with his or her prior statement. Second, the Commission's report is not a "prior statement by a witness," but is a summary of many prior witness statements. If the declarants who provided statements to the Commission testify at trial, then their actual statements may be introduced for the purposes set out in Rule 801(d)(1), but the Commission's report is not, on its own, admissible as a prior statement of a witness.

(d) Former testimony (Ark. R. Evid. 804(b)(1)).

Plaintiffs assert that Maggio's statements to the Commission are admissible under Rule 804(b)(1) as former testimony. Morton does not dispute that Maggio's actual sworn testimony before the Commission is admissible as former testimony under Rule 804(b)(1).[2] The Commission was investigating a complaint lodged by Mr. Buchanan, Plaintiffs' counsel, and, as such, the Commission had the opportunity and a similar motive to develop Maggio's testimony as Plaintiffs would have done. Therefore, Maggio's sworn testimony before the Commission is admissible under Rule 804(b)(1).

Maggio's testimony before the Commission supports Morton's motion for summary judgment as Maggio testified he never solicited any money for his campaign, he never talked to Baker about receiving any money from any PACs, he never discussed the *Bull* verdict with Baker and he never met with or talked to Morton. (*See* Maggio's sworn statement at 9-18).

(e) Residual hearsay exception (Ark. R. Evid. 803(24); 804(b)(5)).

Finally, Plaintiffs assert that the Commission's report is admissible under the residual hearsay exceptions. As set for the above, a residual hearsay exception is only to be used in rare,

2 In fact, all of the sworn testimony made by witnesses before the Commission may be admissible as former testimony under Rule 804(b)(1) if the witnesses who made such statements are unavailable at the time of trial.

extraordinary circumstances. Further, Plaintiffs could have introduced the transcripts of the witnesses who provided sworn testimony before the Commission as such evidence is admissible as former testimony under Rule 804(b)(1). The sworn testimony of the witnesses is more probative than the Commission's report of such statements and, thus, the Court should not use the residual hearsay exception to find the Commission's report to be admissible. Thus, for purposes of the Court's summary-judgment analyses, the Court should not consider the Commission's report because it is an unsworn statement that contains inadmissible hearsay.

3. The newspaper articles are "rank hearsay" and, therefore, inadmissible.

Plaintiffs have submitted certain newspaper articles with their opposition to Morton's summary judgment motion. Plaintiffs assert that the newspaper articles contain statements made by Morton and, thus, are non-hearsay and are admissible under Rule 801(d)(2) of the Arkansas Rules of Evidence.

Newspaper articles are "rank hearsay." *Nooner v. Norris*, 594 F.3d 592, 603 (8th Cir. 2010) (internal citation omitted); *see also Poole v Poole*, 2009 Ark. 860, 372 S.W.3d 420 (2009) (holding newspaper article reporting about an arrest was hearsay); *Chappell Chevrolet, Inc. v. Strickland*, 4 Ark. App. 108, 628 S.W.2d 25 (1982) (holding that newspaper advertisements were "unquestionably hearsay"). Newspaper articles are inadmissible evidence and, thus, cannot be considered by the Court at the summary judgment stage. *See Crews v. Monarch Fire Protection Dist.*, 771 F.3d 1085, 1092 (8th Cir. 2014) (holding that while certain statements may not be hearsay the newspaper article purporting to quote such statements is inadmissible hearsay that cannot be considered at the summary judgment stage).

Indeed, the newspaper articles that Plaintiffs have submitted are double hearsay. First, there is the alleged statement that Morton and/or his agents made to the reporter. Second, there is the newspaper article reporting the alleged statement. Thus, even if Morton's statement is non-hearsay, "the newspaper article reporting the statement is offered to prove the truth of the matter asserted and is not covered by any hearsay exception." *Nooner*, 594 F.3d at 603. Therefore, the newspaper articles cannot be admitted for their truth. *See id.*

As the Arkansas Supreme Court has recognized, "[d]ouble hearsay is not permitted under Ark. R. Evid. 805." *Cook v State*, 350 Ark. 398, 412, 86 S.W.3d 916, 925 (2002). "To be admissible, each level of hearsay must conform to an exception of the hearsay rule." *Id.* (*citing Marrow v. State*, 264 Ark. 227, 570 S.W.2d 607 (1978); *United States v. Ortiz*, 125 F.3d 630 (8th Cir. 1997)).

Because the newspaper articles that Plaintiffs included with their opposition to summary judgment contain double hearsay, they are inadmissible and cannot be considered by the Court in its summary-judgment analyses. *See Jones v. Abraham*, 58 Ark. App. 17, 23, 946 S.W.2d 711, 714 (1997) (holding that a line of Arkansas cases has established that hearsay statements do not meet the requirements of Rule 56 that a party opposing summary judgment set forth facts "as would be admissible in evidence").

CONCLUSION

The foundation for Plaintiffs' claims against Morton in this case is that Morton bribed Maggio to remit the *Bull* verdict. The only admissible evidence that Plaintiffs have submitted to prove their claim are certain statements that Maggio made in his plea agreement and at his plea hearing, which he has since attempted to withdraw. Those statements are further discredited by

Maggio's own sworn testimony before the Arkansas Ethics Commission where he stated that he never solicited any money for his campaign, he never talked to Baker about receiving any money from any PACs, he never discussed the *Bull* verdict with Baker and he never met with or talked to Morton. Plaintiffs' case is built on a weak foundation that is made up of contradictory statements, speculation and conjecture. Surely such evidence is not sufficient to withstand a properly-supported summary judgment motion. Morton respectfully requests that the Court grant his motion for summary judgment and dismiss Plaintiffs' claims as asserted against him.

RESPECTFULLY SUBMITTED BY:

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CERTIFICATE OF SERVICE

I, John C. Everett, do hereby certify that on this 7th day of October, 2016, the foregoing pleading was sent via electronic mail and U.S. Mail, postage prepaid and properly addressed to the following:

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