UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

10 Civ. 8435 (BSJ) (JCF)
ECF Case

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE DOCUMENTS REFERENCED BY DEFENDANT-INTERVENOR IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Edith Schlain Windsor respectfully submits this memorandum of law in support of her motion to strike references to inadmissible documents improperly cited by Defendant-Intervenor the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") in its Local Rule 56.1 statement dated ("56.1 Statement") and in its brief, dated August 1, 2011, as well as in the affidavit of Conor B. Dugan, executed on August 1, 2011, submitted in opposition to Plaintiff's motion for summary judgment.[1]

PRELIMINARY STATEMENT

In her motion for summary judgment, Plaintiff argues that the statute at issue in this case, Section 3 of the so-called Defense of Marriage Act ("DOMA"), which discriminates against her because she is a lesbian, should be subject to heightened scrutiny and is unconstitutional. In support of that argument, Plaintiff, in accordance with the scheduling order issued by this Court, marshaled an extensive and compelling record of expert testimony. That record included affidavits from prominent academics at the University of California and Cambridge University, who provided the Court with their expert opinion on topics such as the psychological well-being of gay men and lesbians, their ability (or, more accurately, their inability) to "change" their sexual orientation, and their capability to serve as competent and loving parents for their children.

Although this Court's scheduling order gave BLAG a full and fair opportunity to submit testimony or other competent evidence contradicting these assertions, which Plaintiff submitted by means of admissible expert affidavits, it instead elected not to do so. Rather, in contravention of both the Federal Rules of Evidence and

[1] Citations herein to BLAG's memorandum of law in opposition to Plaintiff's summary judgment motion shall be styled as "(BLAG SJ Br. at __)"

the Federal Rules of Civil Procedure, BLAG, in opposing Plaintiff's motion for summary judgment, simply referenced a dozen assorted books and articles about technical matters of psychology and sociology. The documents relied upon by BLAG related to matters about which it is clearly only appropriate for competent experts, not counsel for BLAG, to testify since counsel, with all due respect, simply do not have the requisite qualifications (*see* Fed. R. Evid. 702) to testify about such topics in a federal district court. To give just one example, one of the documents cited by BLAG in opposition to Plaintiff's motion for summary judgment is an article written by a law professor who teaches classes on Mergers & Acquisitions opining about the supposed weaknesses in the methodology of the many psychological studies showing that gay men and lesbians make just as capable parents as straight parents.

It is black-letter law, however, that a party contesting summary judgment cannot rely on hearsay materials like these materials that are not otherwise admissible under the Federal Rules of Evidence. More specifically, Federal Rule of Civil Procedure 56, which governs the procedures for motions for summary judgment, provides in pertinent part that a "party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). That is the basis for Plaintiff's motion here.

BLAG's hearsay statements of opinion should also be stricken on the ground that they flout the requirement of Federal Rule of Civil Procedure 26 as well as both the letter and spirit of the scheduling order in this case that all intended expert or opinion testimony be properly disclosed in writing, with notice to the other side, and subject to cross-examination. It goes without saying, given the way that these documents

were referenced for the first time in BLAG's opposition papers, that no such notice was given to Plaintiff, and that Plaintiff had no opportunity to depose the authors of any of these books or articles to challenge their qualifications, expertise, methodologies, or conclusions. Accordingly, because none of the materials at issue on this motion have any proper evidentiary foundation or context, none of these materials are admissible on this record and they should now be stricken by the Court.[2]

RELEVANT BACKGROUND

Plaintiff describes below the procedural and other background relevant to the Court's resolution of the instant motion to strike.

The May 11 Scheduling Order

After two meet and confer sessions between the parties (one on April 25, 2011 and one on May 5, 2011) and a preliminary conference with the Court on May 9, 2011, during which the parties and the Court engaged in discussions regarding the intended process for fact and expert discovery, Judge James C. Francis entered a revised scheduling order, dated May 11, 2011 (the "Scheduling Order"), providing dates by which Plaintiff and BLAG were required to request and provide discovery, identify their experts and serve expert reports.

More specifically, the Scheduling Order required that the parties exchange initial disclosures on or before May 13, 2011, and that Plaintiff serve her expert reports and provide dates for the depositions of her experts on or before May 20, 2011. Pursuant to the Scheduling Order, BLAG was permitted to begin deposing Plaintiff's experts on May 23, 2011, and had until June 7, 2011, to identify its own experts. If BLAG had

[2] Attached to this memorandum as an Appendix is a chart of the specific documents that Plaintiff seeks to strike pursuant to the instant motion.

identified any expert witnesses, it was to serve its expert reports by June 17, 2011, and Plaintiff would have been entitled to begin deposing BLAG's experts beginning on June 20, 2011.

In addition, the Scheduling Order outlined two alternative sets of deadlines for subsequent briefing in connection with Plaintiff's expected motion for summary judgment and BLAG's expected motion to dismiss. The choice between those alternatives turned entirely on whether BLAG identified any of its own experts. Thus, in other words, if BLAG had identified experts, the briefing would have been delayed several weeks to permit additional depositions of BLAG's experts to take place before the commencement of briefing on summary judgment.

On the evening of June 7, 2011, the last day on which the Scheduling Order permitted BLAG to identify its experts, BLAG notified Plaintiff by email that it had "decided to proceed without identifying expert witnesses." As such, the Scheduling Order required Plaintiff to file her summary judgment motion on or before June 24, 2011, and required BLAG to file its opposition and motion to dismiss on or before August 1, 2011. Under that timeline, Plaintiff is required to serve her opposition to BLAG's motion to dismiss and her reply in support of her summary judgment motion by August 19, 2011, and BLAG's deadline for filing its reply in support of its motion to dismiss is September 9, 2011.

The Parties Engage in Discovery

In accordance with the Scheduling Order, Plaintiff and BLAG each served document requests for written discovery. Both Plaintiff and BLAG provided documents, and responses to written discovery requests were ultimately served.[3]

In connection with expert discovery, Plaintiff served BLAG with affidavits from five experts: Professor George Chauncey on May 16, 2011 (four days early), and Professors Nancy Cott, Michael Lamb, Letitia Anne Peplau, and Gary Segura on May 20, 2011. Each of Plaintiff's experts offered competent expert testimony concerning the factors that courts evaluate in applying heightened judicial scrutiny under equal protection analysis or whether the discrimination at issue in this case passes constitutional muster; their academic disciplines ranged from adult and child psychology and social psychology to history and political science.[4]

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[3] Because BLAG failed to respond meaningfully to the majority of Plaintiff's interrogatories and requests for admission by the Court-ordered deadline, Plaintiff filed a motion to compel on July 18, 2011. On July 28, the Court ordered BLAG to respond to certain of Plaintiff's discovery requests, and BLAG filed amended responses on August 1.

[4] Of twelve documents that Plaintiff seeks to strike on the instant motion, only four were mentioned in Plaintiff's experts' reports. Those documents are listed as entries 4, 5, 6, and 11 on the Appendix to this motion. Three of these documents were cited by Michael E. Lamb in the bibliography appendix to his affidavit (and were not cited anywhere else in his or any other affidavit). Other than including them as general sources in the bibliography (*see* Kaplan Aff. Ex. B), Professor Lamb gives no indication that he relied on these documents. Even if he had, BLAG has not provided any foundation that the Court could use to make a determination about their authoritativeness. The fourth document is a study by Gregory M. Herek et al., cited by Letitia Anne Peplau in her affidavit in support of the propositions that "[t]he specific category name that an individual prefers (e.g., homosexual, gay, queer) may vary" (Peplau Aff. ¶ 15 n.3, Kaplan Aff. Ex. B), and that "95% of the gay men and 83% of the lesbians reported that they experienced 'no choice at all' or 'very little choice' about their sexual orientation," (*id.* ¶ 25 n.2, Kaplan Aff. Ex. B).

In his affidavit, for example, Professor Lamb, Professor of Psychology in the Social Sciences and the Head of the Department of Social and Developmental Psychology at Cambridge University, testified to the scientific consensus that children raised by same-sex parents are just as likely to be well-adjusted as children raised by heterosexual parents, including "biological" parents, and that the factors that best account for the adjustment of children do not include the parents' sex or sexual orientation. Professor Peplau, Distinguished Professor of Psychology at the University of California at Los Angeles, testified that sexual orientation is a normal expression of human sexuality that has no bearing on one's ability to lead a fulfilled and productive life or to contribute to society, and that like heterosexual couples, many lesbian, gay, and bisexual individuals form loving, long-lasting relationships, including marriage, with a partner of the same sex. She also explained that the vast majority of gay men and lesbians, like heterosexuals, exhibit a consistent and enduring sexual orientation that is highly resistant to change through external interventions.

Similarly, Professor Cott, the Jonathan Trumbull Professor of American History at Harvard University, testified in her affidavit concerning the history of marriage and its regulation in the United States. Professor Segura, Professor of Political Science at Stanford University, testified that gay men and lesbians do not possess a meaningful degree of political power and suffer political disabilities greater than other groups that have received suspect class protection from the courts. Professor Chauncey, Professor of History and American Studies at Yale University, surveyed the long history of discrimination that gay men and lesbians have faced in the United States.

After receiving their reports, BLAG, as was its right under the rules and the Scheduling Order, elected to depose each of Plaintiff's experts. It deposed Professor Peplau on June 17, 2011 for approximately four hours; Professor Lamb on June 24, 2011 for approximately three hours; Professor Cott on July 6, 2011 for approximately two hours; Professor Segura on July 8, 2011 for approximately four and a half hours; and Professor Chauncey on July 12, 2011 for approximately four hours. While none of the depositions were particularly lengthy, that too was BLAG's choice—each expert was of course available to sit for a full day, as prescribed by Rule 30 of the Federal Rules of Civil Procedure.

At each deposition, counsel for BLAG methodically proceeded through each expert's respective affidavit. But, despite having had ample opportunity to do so, counsel did not bring to the experts' attention the vast majority of the materials that BLAG now seeks to use to bolster its case and to impugn Plaintiff's experts' credibility.[5]

More importantly, rather than taking the opportunity to identify its own experts and permitting Plaintiff to cross-examine them regarding the bases of their

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[5] Of the documents that Plaintiff seeks to strike on this motion, only the same four documents discussed in footnote 4 above were mentioned at any of the expert depositions. Counsel asked Professor Peplau about a study by Gregory M. Herek et al., listed as entry 11 on the Appendix to this motion. In particular, counsel asked Professor Peplau to confirm various numerical figures in the article, and did not ask any other questions. At the deposition of Professor Lamb, BLAG's counsel asked about a book chapter written by Susan Golombok and Fiona Tasker, an article by Jennifer L. Wainwright and Charlotte J. Patterson, and an article by Lawrence A. Kurdek, listed as entries 4, 5, 6 on the Appendix to this motion. In its very brief line of questioning, counsel inquired about the number of studies available that are focused on children raised by gay fathers and adolescent children raised by gay and lesbian parents of either gender. During none of this questioning did counsel for BLAG establish any proper evidentiary foundation for the admissibility of these documents. The relevant excerpts from those depositions are attached to the Affidavit of Roberta Kaplan, submitted herewith, as Exhibit A.

opinions, BLAG instead chose to forgo any attempt to offer evidence (or what purports to be evidence) until it filed its opposition to Plaintiff's summary judgment motion. In its motion papers, BLAG extensively cites to and relies upon clearly inadmissible hearsay statements of opinion, most of which could have been properly offered only by a properly noticed and qualified expert.

As set forth below, BLAG's attempt to use such materials, the vast majority of which were never even mentioned in Plaintiff's experts' reports or depositions, would circumvent the Court's scheduling order and is impermissible under the Federal Rules of Evidence, Rules 26, 37 and 56 of the Federal Rules of Civil Procedure, as well as Local Civil Rule 56.1.

ARGUMENT

Rule 56.1 of the Local Civil Rules of the Southern and Eastern Districts of New York "requires a party moving for summary judgment to submit 'a separate, short and concise statement' setting forth material facts as to which there is no genuine issue to be tried." *Holtz* v. *Rockefeller & Co.*, 258 F.3d 62, 72 (2d Cir. 2001) (citing Local Rule 56.1). It further requires that "[e]ach statement of material fact by a movant or opponent must be followed by citation to evidence which would be admissible." *Id.* at 73.

This Court has explained that "[t]he purpose of [Local Rule 56.1] is to enhance the Court's efficiency in reviewing motions for summary judgment by freeing the Court from hunting through a voluminous record without guidance from the parties." *Watt* v. *N.Y. Botanical Garden*, No. 98 Civ. 1095, 2000 WL 193626, at *1 n.1 (S.D.N.Y. Feb. 16, 2000) (Jones, J.). Moreover, "[w]hen ruling on summary judgment, courts need only consider admissible evidence," *U.S. Info. Sys., Inc.* v. *Int'l Bhd. of Elec. Workers Local Union No. 3*, No. 00 Civ. 4763, 2006 WL 2136249, at *5 (S.D.N.Y. Aug. 1, 2006)

(Francis, J.). Thus, "a motion to strike is appropriate if documents submitted in support of a motion for summary judgment contain inadmissible hearsay or conclusory statements, are incomplete, or have not been properly authenticated." *Henderson* v. *Gen. Elec. Co.*, 469 F. Supp. 2d 2, 10 (D. Conn. 2006) (quoting *Merry Charters, LLC* v. *Town of Stonington*, 342 F. Supp. 2d 69, 75 (D. Conn. 2004)).

A. The Articles and Books Cited by BLAG Are Hearsay and Not Admissible Under Any Hearsay Exception

1. The Articles and Books Constitute Inadmissible Hearsay

Published materials offered for the truth of the matters asserted are paradigmatic examples of inadmissible hearsay that may not be considered by the Court. *See Odom* v. *Matteo*, 772 F. Supp. 2d 377, 404 (D. Conn. 2011) (collecting cases); *Holman* v. *AT&T*, No. 3:94-CV-809 (AWT), 1997 WL 33811332, at *1 (D. Conn. Mar. 21, 1997) ("[P]ublished articles are inadmissible hearsay because there is no indication that any of the plaintiff's experts relied on them as required by the learned treatise exception to the hearsay rule."). The reason for this rule is well-established: "[t]he primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence." *Anderson* v. *United States*, 417 U.S. 211, 220 (1974).

This principle is as true in the context of a summary judgment motion as it is at trial. *See Burlington Coat Factory Warehouse Corp.* v. *Esprit De Corp.*, 769 F.2d 919, 924 (2d Cir. 1985) ("We need not consider such evidence because Burlington cannot rely on inadmissible hearsay in opposing a motion for summary judgment."); *Jackson* v. *Jimino*, 506 F. Supp. 2d 105, 113 (N.D.N.Y. 2007) ("The body of law on the exclusion of

hearsay in summary judgment motions is rather copious and consistent.") (collecting cases).

Moreover, while an expert can rely on inadmissible hearsay in forming an opinion, such facts or data are not rendered admissible merely by virtue of the fact that the expert relied upon them. Fed. R. Evid. 703. *See also United States* v. *Lombardozzi*, 491 F.3d 61, 72 (2d Cir. 2007); *United States* v. *Dukagjini*, 326 F.3d 45, 57–58 (2d Cir. 2003). As one court has explained, "if any of [the experts'] facts or data has no independent basis for being admitted into evidence, it will not be received as substantive evidence in the case." *Zerega Ave. Realty Corp.* v. *Hornbeck Offshore Transp., LLC*, No. 04 Civ. 9651 (KNF), 2010 WL 2365866, at *2 (S.D.N.Y. June 2, 2010). Thus, even if BLAG had put forth expert witnesses who had analyzed and relied upon the articles and books that it now cites in opposition to Plaintiff's motion for summary judgment, such articles and books would generally not be admissible in their own right. *Jung* v. *Neschis*, No. 01 Civ. 6993 (RMB) (THK), 2007 WL 5256966, at *16 (S.D.N.Y. Oct. 23, 2007) (holding that "to allow substitute experts to rely upon [other people's o]pinions would prejudice Defendants by, in essence, once again subjecting them to the testimony of an expert witness they cannot cross-examine").

Applying these black-letter principles to the materials referenced in BLAG's Rule 56.1 statement, there can be no question that the vast majority of the extrinsic material cited by BLAG in opposition to Plaintiff's motion for summary judgment constitutes inadmissible hearsay. To give one example, in an attempt to establish that it is better for children to have both male and female parents in the home

who assume traditional gender roles, BLAG cites to a book written by David Popenoe.[6] BLAG clearly seeks to rely on this book for the truth of propositions contained therein. However, although Professor Lamb of Cambridge came to New York from England so that BLAG could take his deposition, Plaintiff was not given any opportunity to cross-examine Professor Popenoe to test his conclusions. This is precisely why the courts have long forbidden parties from using hearsay in the first place. BLAG should not be given the unfair advantage of submitting testimony from witnesses that Plaintiff cannot cross-examine. In this context, Professor Popenoe's book is clearly nothing more than inadmissible hearsay, and all references to it should therefore be stricken from the record.

2. The Learned Treatise Exception Does Not Apply Here

The only way that the articles and book excerpts cited by BLAG in its opposition to Plaintiff's motion for summary judgment conceivably might be admissible would be under Federal Rule of Evidence 803(18), entitled "Learned Treatises." Rule 803(18) provides that the following types of hearsay documents may be used for the following limited purpose:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

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[6] David Popenoe, *Life Without Father: Compelling New Evidence That Fatherhood and Marriage Are Indispensible for the Good of Children and Society* (1996). (Appendix Entry 9.) According to a web search, David Popenoe is a professor of sociology at Rutgers University. Presumably BLAG could have submitted his testimony in an admissible format, as opposed to simply referencing his book, as it did here.

> If admitted, the statements may be read into evidence but may not be received as exhibits.

BLAG, however, did not cite Rule 803(18) as the purported basis for its use of the articles and book excerpts at issue. In any event, BLAG cannot establish admissibility with respect to any of articles because it cannot meet Rule 803's two requirements.

First, BLAG cannot show "a proper foundation as to the authoritativeness of the text . . . laid by an expert witness." *Schneider* v. *Revici*, 817 F.2d 987, 991 (2d Cir. 1987); *see also Tart* v. *McGann,* 697 F.2d 75, 78 (2d Cir. 1982); *United States* v. *Mangan,* 575 F.2d 32, 48 (2d Cir. 1978). "Such foundation is necessary to establish the trustworthiness of the treatise as viewed by professionals in that field." *Schneider*, 817 F.2d at 991. As noted above, BLAG did not identify any experts in this case to provide such foundation, and, with the exception of the four articles discussed above,[7] Plaintiff's experts did not even mention in their affidavits and depositions any of the articles and books that BLAG cites and relies upon. BLAG's failure to "lay a foundation as to the authoritative nature of a treatise requires its exclusion from evidence because the court has no basis on which to view it as trustworthy." *Id.*

Second, BLAG has not established that Plaintiff's experts relied on each of the documents at issue. *Bryan* v. *John Bean Div. of FMC Corp.*, 566 F. 2d 541, 544–47 (5th Cir. 1978) (excluding cross-examination on two hearsay opinions because expert witness had not relied on those opinions). Again, of the dozen articles and books BLAG improperly cites, only four were mentioned in the affidavits or depositions of Plaintiff's

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[7] Even with respect to these articles, BLAG did not lay a sufficient foundation. *See supra* notes 3 and 4.

experts.[8] As to all of the other improperly cited articles, there is absolutely no colorable argument that any of Plaintiff's experts established these materials as reliable authorities or relied upon them in any way.

Third and most importantly, even if BLAG were able to satisfy the two prongs above, it would then only be able to use the source for impeachment purposes. In other words, the document would not be independently admissible in any event. *See Master-Halco, Inc.* v. *Scillia, Dowling & Natarelli, LLC*, No. 3:09-cv-1546 (MRK), 2010 WL 1553784, at *3 (D. Conn. Apr. 19, 2010) ("Rule 703 permits an expert to base his or her opinion on inadmissible evidence. However, this does not constitute a license for the expert to usher hearsay into evidence to prove the truth of the matter contained in the hearsay statement.")

In other words, if, at the depositions of Professors Lamb and Peplau, counsel for BLAG had asked the proper questions using these documents, BLAG might have been able to use those questions and answers as impeachment testimony in connection with Professors Lamb and Peplau's testimony. BLAG then could have appended the relevant excerpts from those depositions to its opposition papers in connection with Plaintiff's motion for summary judgment. But counsel for BLAG failed to do so. As a result, the books and articles remain hearsay and cannot be used on their own, as BLAG has sought to do so here, to support a Rule 56.1 factual assertion.

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[8] These four articles are attached to the August 1, 2011 declaration of Conor B. Dugan as part of Exhibits B and E. They are listed as entries 4, 5, 6, and 11 on the Appendix to this motion. *See also supra* note 4.

3. The Additional Article Cited in BLAG's Brief Is Also inadmissible

In addition to the articles and books referenced in its Rule 56.1 statement, in opposing Plaintiff's motion for summary judgment, BLAG also improperly cites to a forthcoming law review article in the *Ave Maria Law Review* purportedly criticizing the methodology of the social science studies that have been done on gay and lesbian parents. While legal briefs often cite to law review articles as authority for legal propositions, here, BLAG relies on a law review article to question the validity of social science research. The article, moreover, was written by a law professor at Case Western Law School who, according to the law school's website, teaches classes at the law school on Business Associations, Mergers & Acquisitions and Business Planning. (Appendix Entry 12.)[9] Obviously, this article is nothing other than hearsay since it is being offered as evidence of supposed methodological flaws in the social science research. Plaintiff was given no opportunity to depose this law professor, test his conclusions or, perhaps most importantly, challenge his expertise and competence concerning matters of child psychology, testing methodologies, and statistics. As a result, the reference to this article should be stricken.[10]

B. BLAG's Purported Use of the Articles and Books Also Violates the Federal Rules of Civil Procedure

In addition to violating the Federal Rules of Evidence, BLAG's attempt to use articles and book excerpts in opposition to Plaintiff's motion for summary judgment

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[9] George W. Dent, Jr., *No Difference?: An Analysis of Same-Sex Parenting*, ___ Ave Maria L. Rev. ___ (forthcoming 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1848184. (Appendix Entry 10.)

[10] The same is true of the other article by this same law professor cited by BLAG, which should also be stricken. George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581 (1999). (Appendix Entry 10.)

constitutes an impermissible attempt to circumvent the Federal Rules of Civil Procedure. As described above, the parties in this case discussed and the Court ordered a schedule that called for the designation of experts, as well as expert depositions and expert discovery in accordance with Federal Rule of Civil Procedure 26.

BLAG, however, represented by counsel, and on notice that Plaintiff intended to move for summary judgment, made the decision to forgo retaining its own experts and submitting their testimony. As a result, BLAG lacks any admissible evidence that a person can "change" one's sexual orientation, that parental sexual orientation adversely affects children's and adolescents' adjustment, that a child's development is impaired by the absence of a male or female parent in the home, that children are harmed when parents do not assume traditional gender roles with respect to parenting styles, or that enduring intimate relationships are not an essential part of an individual's personal identity.

Faced with a dearth of competent evidence in support of its positions, what BLAG has done is attempt an end-run around the procedure set forth by the Court by submitting a series of articles and book excerpts without any appropriate foundation or context from a competent expert. For example, BLAG cites a journal article about which no expert in the case has testified as purported support for its assertions that "'[e]nduring' is not an accurate description of everyone's experience of sexual orientation" and that there is "currently no scientific or popular consensus on the exact constellation of experiences that definitively 'qualify' an individual as lesbian, gay, or bisexual."[11]

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[11] Lisa M. Diamond, *New Paradigms for Research on Heterosexual and Sexual Minority Development*, 32 J. Clinical Child & Adolescent Psychol. 492 (2003). (Appendix Entry 1.) Both the article cited by BLAG and the current university

(BLAG 56.1 ¶ 33; BLAG SJ Br. at 10–11.) Articles such as those cited by BLAG constitute a transparent attempt to offer expert or opinion testimony without any actual expert disclosures in a manner that is clearly prohibited by the Federal Rules.

More specifically, Federal Rule of Civil Procedure 26(a)(2) requires that a party disclose the identity of any witness it may use to present expert or opinion testimony. The Rule further requires that such disclosure be accompanied by a written report that includes, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the data or other information considered by the witness in forming them." Fed. R. Civ. P. 26(a)(2)(A), 26(a)(2)(B)(i) & (ii). BLAG made no disclosure of its intention to rely on any of these materials at any previous time in this case.

Rule 37(c)(1) states that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion . . . unless the failure was substantially justified or is harmless." The courts in the Southern District have repeatedly emphasized that this was not intended to be an empty requirement. As one court has explained:

> Rule 26 requires, not just that expert testimony be on notice, but that that notice be given in the form of a *written* report which "*shall* contain a *complete* statement of *all* opinions to be expressed and the *basis* and *reasons* therefor." Fed. R. Civ. P. 26(a)(2)(B). The 1993 amendment to the Federal Rules was intended to "impose an additional duty to disclose information concerning

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website indicate that Lisa Diamond is a professor in the Department of Psychology at the University of Utah. As a result, again, had BLAG chosen to do so, it could have submitted an affidavit from Professor Diamond and Plaintiff could have deposed her in accordance with the rules and the Scheduling Order.

> expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." Fed. R. Civ. P. 26(a)(2), 1993 advisory committee's note.

Ferriso v. *Conway Organization*, No. 93 CIV. 7962 (KMW), 1995 WL 580197, at *2 (S.D.N.Y. Oct. 3, 1995) (emphasis in original). The court further explained that the "precise requirements of this rule cannot be mooted" easily. *Id.*

The articles and books relied upon by BLAG are plainly within the realm of expert opinion testimony. For example, BLAG relies on citations to books and articles for the truth of the matters asserted as evidence that a marriage between a male and a female provides a stable and nourishing framework for child-rearing.[12] (BLAG 56.1 ¶ 47.) The co-author of one of those books, Maggie Gallagher, has achieved some notoriety in the media as the President of the Institute for Marriage and Public Policy, one of the most prominent lobbying groups against equal marriage rights for same-sex couples. However, Plaintiff was given no opportunity to cross examine Gallagher by using her own statements from her many public statements and appearances on these issues. At other points, BLAG references a 2004 article from the website Slate.com to support its contention that the consensus opinion seven years ago, among both those who supported marriage equality and those who opposed it, was that the "existing science is

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[12] Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People are Happier, Healthier, and Better Off Financially* (2000); David Popenoe, *Life without Father: Compelling New Evidence That Fatherhood and Marriage Are Indispensable for the Good of Children and Society* (1996); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581 (1999). (Appendix Entries 8, 9, and 10.)

methodologically flawed and ideologically skewed."[13] (BLAG SJ Br. at 24; BLAG 56.1 ¶ 40.) The author of this article on Slate.com, Ann Hulbert—although she is a successful contributor to publications such as *The New Republic* and *The New York Review of Books*—likely does not have the requisite scientific background and training to be qualified as an expert under Federal Rule of Evidence 702 to testify about such matters.[14] Plaintiff, on the other hand, has submitted competent and admissible expert testimony from a widely respected authority in the field of child development who directly addresses the methodological issues and whom BLAG deposed.

Some of the articles and books BLAG cites even contain detailed scientific or psychological analyses in various fields. In several instances, for example, BLAG brazenly quotes articles for purported statistical evidence of the propositions it seeks to support. For example, it cites one article's assertion that "50% of [a] study's respondents had changed their identity label more than once since first relinquishing their heterosexual identity,"[15] and another article's contention that "at age 21 ten percent of men and nearly a quarter of the women in the study group reported same-sex attraction at

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[13] Ann Hulbert, *The Gay Science: What Do We Know About the Effects of Same-Sex Parenting?*, Slate (Mar. 12, 2004), http://www.slate.com/id/2097048/. (Appendix Entry 7.)

[14] Since BLAG does not attach this article to its papers, it also fails to mention the fact that the article (written in 2004) concludes as follows: "[w]hat will help clarify [the studies] are experiences like mine, watching my sister and her partner sharing the hard work and the happiness of raising their daughter. I can't think of a better argument for gay marriage than that." (Kaplan Aff. Ex. C.)

[15] Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. Soc. Issues 301 (2000). (Appendix Entry 1.)

any time, but this nearly halved for current attraction at age 26."[16] (BLAG SJ Br. at 11; BLAG 56.1 ¶¶ 33, 50.) So far as we are aware, the attorneys representing BLAG in this case do not have sufficient competence in psychology or sociology to interpret or explain these academic studies on their own, and they are not offering themselves as experts. Again, counsel for Plaintiff has been given no opportunity to examine the authors of these studies as to what they meant or how they arrived at their conclusions. Moreover, Plaintiff's expert Professor Peplau, who actually *is* competent to interpret and testify about these studies, and whom BLAG deposed, has offered an opinion in this case that "the significant majority of adults exhibit a consistent and enduring sexual orientation." (*See* Aff. of Letitia Anne Peplau ¶ 23, Kaplan Aff. Ex. B.)

BLAG has offered no justification for its failure to identify experts for the information on which it now relies. Nor is such failure either harmless or substantially justified. First, to the extent that the materials are being offered merely to impeach Plaintiff's witnesses, those witnesses were denied a right to respond to the materials. For this reason, if the Court were to deny the instant motion, Plaintiff would ask that she be given an opportunity to submit supplemental affidavits or reports with respect to these materials.

But even if Plaintiff's experts were given an opportunity to respond, admission of these materials would be harmful because Plaintiff has had no opportunity to cross-examine the declarants about these articles and books as to flaws in their research or methodology, potential biases, and other plainly relevant information. Again,

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[16] Nigel Dickson, et al., *Same Sex Attracting in a Birth Cohort: Prevalence and Persistence in Early Adulthood*, 56 Soc. Sci. & Med. 1607, 1612–13 (2003). (Appendix Entry 3.)

this has long been the reason why hearsay testimony has been barred in our court system for centuries.

In this regard, the case of *Ebron* v. *United States* is particularly instructive. No. 08 Civ. 0144 (AJP), 2008 WL 4298515, at *3 (S.D.N.Y. Sept. 17, 2008). In that case, the court excluded expert testimony as to material that was not disclosed in the expert's report or in the expert's testimony. The court held that the failure to disclose was "neither substantially justified nor harmless." *Id.* at *4. The court rejected the argument that the omission was harmless because the defendant was on notice, through plaintiff's pleadings, that the argument would be made, because to so hold would "gut Rule 26's expert disclosure requirement." *Id.* Accordingly, the only proper relief was to strike all references to such materials from the record. *See also DVL, Inc.* v. *Gen. Elec. Co.*, No. 1:07-cv-1075 (LEK) (DRH), 2010 WL 5067620, at *9 (N.D.N.Y. Dec. 10, 2010). Like the plaintiff in *DVL*, BLAG was on notice "of the need for expert support and knowing of an available source for that support," but BLAG nonetheless "failed to meet the minimum requirements of Rule 26(a)(2)(A)." *Id.* Plaintiff respectfully submits that BLAG's references to improper expert and opinion testimony should similarly be stricken from the record here.

CONCLUSION

For all the foregoing reasons, the Court should grant Plaintiff's motion to strike. In the alternative, should the Court decline to grant Plaintiff's motion in whole or in part, Plaintiff respectfully requests that she be given an opportunity to respond to the materials BLAG has submitted.

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Appendix

References to Documents in BLAG's 56.1 Statement and Opposition to Plaintiff's Motion for Summary Judgment That Plaintiff Seeks to Strike

Entry	Location of Citation	Material Cited	Proposition BLAG Attempts to Support	References in Plaintiff's Expert Reports	References at Depositions
1	BLAG 56.1 ¶¶ 33, 39, 50, 51, 54, 55, 57; SJ Br. at 10	Lisa M. Diamond, *New Paradigms for Research on Heterosexual and Sexual Minority Development*, 32 J. Clinical Child and Adolescent Psychol. 492 (2003).	Sexual orientation is not immutable; change in sexual orientation occurs "with some frequency"	None	None
2	BLAG 56.1 ¶¶ 33, 39, 50, 51, 54, 55, 57; SJ Br. at 11–12	Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. Soc. Issues 297, 301 (2000).	Sexual orientation is not immutable; change in sexual orientation occurs "with some frequency"	None	None
3	BLAG 56.1 ¶¶ 33, 39, 50, 51, 54, 55, 57; SJ Br. at 12	Nigel Dickson, et al., *Same Sex Attracting in a Birth Cohort: Prevalence and Persistence in Early Adulthood*, 56 Soc. Sci. & Med. 1607, 1612–13 (2003).	Sexual orientation is not immutable; change in sexual orientation occurs "with some frequency"	None	None
4	BLAG 56.1 ¶¶ 40, 41, 42, 43, 44, 45, 46, 48; SJ Br. at 23	Susan Golombok and Fiona Tasker, "Gay Fathers," *The Role of The Father in Child Development* (2010).	"Homosexual" parenting studies are "flawed"; cited to dispute Plaintiff's assertions that same-sex parents are not as effective as straight	Lamb Aff. at Ex. B.	Lamb Dep. 75:9–78:24.

			parents		
5	BLAG 56.1 ¶¶ 40, 41, 42, 43, 44, 45, 46, 48; SJ Br. at 23	Jennifer L. Wainright and Charlotte J. Patterson, *Delinquency, Victimization, And Substance Use Among Adolescents With Female Same-Sex Parents*, 20 J. Family Psych. 526 (2006).	"Homosexual" parenting studies are "flawed"; cited to dispute Plaintiff's assertions that same-sex parents are not as effective as straight parents	Lamb Aff. at Ex. B.	Lamb Dep. 81:12–83:21.
6	BLAG 56.1 ¶¶ 40, 41, 42, 43, 44, 45, 46, 48; SJ Br. at 23–24	Lawrence A. Kurdek, "What Do We Know About Gay And Lesbian Couples?" *Current Directions in Psychological Science* (2005).	"Homosexual" parenting studies are "flawed"; cited to dispute Plaintiff's assertions that same-sex parents are not as effective as straight parents	Lamb Aff. at Ex. B.	Lamb Dep. 83:22–86:7.
7	BLAG 56.1 ¶¶ 40, 41, 42, 43, 44, 45, 46, 48; SJ Br. at 24	Ann Hulbert, *The Gay Science: What Do We Know About the Effects of Same-Sex Parenting?*, Slate.com, March 12, 2004, http://www.slate.com/id/2097048/.	"Homosexual" parenting studies are "flawed"; cited to dispute Plaintiff's assertions that same-sex parents are not as effective as straight parents	None	None
8	BLAG 56.1 ¶¶ 47, 48	Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* (2000).	It is better for children to have both male and female parents in the home who assume traditional gender roles	None	None
9	BLAG 56.1 ¶¶ 47, 48	David Popenoe, *Life without Father: Compelling New Evidence That Fatherhood and Marriage Are Indispensable for the Good of Children*	It is better for children to have both male and female parents in the home who assume traditional gender	None	None

		and Society (1996).	roles		
10	BLAG 56.1 ¶¶ 47, 48	George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581 (1999).	It is better for children to have both male and female parents in the home who assume traditional gender roles	None	None
11	BLAG 56.1 ¶¶ 50, 51; SJ Br. at 11	Gregory M. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 Sex. Res. Soc. Pol'y 176 (2010).	"Immutable" is not an accurate descriptor for sexual orientation	Peplau Aff. at Ex. B.	Peplau Dep. 35:13–38:20, 100:4–101:18.
12	SJ Br. at 24	George W. Dent, Jr., *No Difference?: An Analysis of Same-Sex Parenting*, ___ Ave Maria L. Rev. ___ (forthcoming 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1848184.	Research into gay and lesbian parents has limitations	None	None