

STATE OF NEW YORK
SUPREME COURT : ERIE COUNTY

KENNETH YOUNG,

Plaintiff,

Index No.: 803989/2024

v.

Hon. Paul Wojtaszek, J.S.C.

TOWN OF CHEEKTOWAGA,

Defendant.

**DEFENDANT'S AMENDED
COUNTERSTATEMENT OF MATERIAL FACTS**

Defendant the Town of Cheektowaga (the "Town") respectfully submits this Counterstatement of Undisputed Material Facts (the "Counterstatement") in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment.¹

In the first section of this Counterstatement, Defendants respond to the Plaintiff's Statement of Undisputed Material Facts ("Plaintiff's Statement"). NYSCEF Doc. No. 31. In the second section of this Counterstatement, Defendants submit undisputed material facts, supported by admissible evidence, in opposition to Plaintiff's partial summary judgment motion and in support of Defendants' cross-motion for summary judgment.

As a threshold matter, Plaintiff's Statement must be rejected by the Court because it merely recycles the allegations in Plaintiff's Complaint and contains a multitude of legal

¹ Defendant notes that Uniform Rule 202.8-g no longer requires Statements of Material Facts for summary judgment motions unless ordered by the Court. 22 NYCRR 202.8-g(a). The Court has not ordered Statements of Material Facts in this case; however, in light of Plaintiff's submission, Defendant submits the instant Counterstatement for the Court's convenience.

arguments and conclusions that Plaintiff attempts to offer as facts. This ploy should not be countenanced by the Court. Additionally, Plaintiff's Statement offers information immaterial to the motion. Notwithstanding Plaintiff's disregard for court rules, Defendant follows form and responds as follows:

**SECTION 1: DEFENDANT'S RESPONSE TO PLAINTIFF'S
STATEMENT OF UNDISPUTED MATERIAL FACTS**

STATEMENT NO. 1: Defendant is a town situated in Western New York bordering on the City of Buffalo with a population of approximately 89,000 residents. NYSCEF Doc No. 1, Verified Complaint ¶ 6.

RESPONSE: Disputed. Defendant is a town in Western New York bordering the City of Buffalo and, as of the 2020 Census, the Town's population was reported to be 89,877.

NYSCEF Doc. No. 25 ¶ 6.

STATEMENT NO. 2: Defendant is a "political subdivision" as defined by Election Law § 17-204(4). *Id.* ¶ 7.

RESPONSE: Disputed. Because this statement seeks to draw a legal conclusion that is not a fact, it is improper under 22 NYCRR § 202.8-g.

STATEMENT NO. 3: Plaintiff is an adult citizen of New York State. *Id.*, ¶ 8.

RESPONSE: Admit.

STATEMENT NO. 4: Plaintiff is a registered voter in New York State and Erie County. *Id.*, ¶ 8

RESPONSE: Admit.

STATEMENT NO. 5: Plaintiff is an owner of residential property in the Town of Cheektowaga, located at 33 Victoria Blvd, Cheektowaga, NY 14225. *Id.*, ¶ 8

RESPONSE: Denies knowledge of information sufficient to form a belief as to Plaintiff's home ownership.

STATEMENT NO. 6: Plaintiff is a member of the minority Black race in the Town of Cheektowaga. *Id.*, ¶ 9.

RESPONSE: Denies knowledge of information sufficient to form a belief as to Plaintiff's race.

STATEMENT NO. 7: Plaintiff is a resident of the northwest section of the Town of Cheektowaga. *Id.*, ¶ 10.

RESPONSE: Denies knowledge of information sufficient to form a belief as to Plaintiff's residency and denies there is a defined section of the Town known as the northwest section.

STATEMENT NO. 8: The majority of the town's Black population lives in the northwest section of the town. *Id.*, ¶ 11.

RESPONSE: Denies knowledge of information sufficient to form a belief as to the demographics of the northwest section of the Town, as there is no defined northwest section of the Town.

STATEMENT NO. 9: The Black residents of the Town of Cheektowaga are a protected class under Article 17 of the Election Law. *Id.*, ¶ 12.

RESPONSE: Disputed. Because this statement seeks to draw a legal conclusion that is not a fact, it is improper under 22 NYVRR § 202.8-g.

STATEMENT NO. 10: The town board members of Defendant Town of Cheektowaga are elected on the at-large basis. *Id.*, ¶ 44

RESPONSE: Undisputed.

STATEMENT NO. 11: In the November 2023 election for Cheektowaga Town Board members, Plaintiff received the fewest votes townwide despite being the candidate of choice of the minority population in the Town of Cheektowaga. NYSCEF Doc No. 02, Exhibit 1 to the Verified Complaint, page 7 of 9.

RESPONSE: Disputed. Defendant admits that, aside from write-in candidates, Plaintiff received the fewest votes in the Town Board member election in November 2023. NYSCEF

Doc. No. 2. Defendant disputes that Plaintiff was the candidate of choice of the minority population. Plaintiff cites no evidence supporting this conclusion. Rather, Dr. Handley reported that Plaintiff was the candidate of choice of Black voters—not the entire minority population. Spitzer Aff. ¶ 20 (Ex. E, p. 4).

STATEMENT NO. 12: Defendant's expert, Dr. Lisa Handley, concluded that:

- a. In the November 2023 election for Cheektowaga Town Board members, Plaintiff was the candidate of choice of the Black voters in the Town of Cheektowaga. NYSCEF Doc No. 8, Exhibit 7 to the Verified Complaint, Handley Expert Report, page 4 of 19, footnote 9.

RESPONSE: Disputed as this is an opinion, not fact, and therefore not appropriate in a Material Statement of Facts.

- b. In the 2022 general election for Town of Cheektowaga Town Justice, voting was racially polarized. NYSCEF Doc No. 8, Exhibit 7 to the Verified Complaint, Handley Expert Report, page 4 of 19 to page 5 of 19.

RESPONSE: Disputed as this is an opinion, not fact, and therefore not appropriate in a Material Statement of Facts.

- c. In the 2022 general election for Town of Cheektowaga Town Justice, the candidate of choice of Black voters lost to the candidate of choice of white voters. Id.

RESPONSE: Disputed as this is an opinion, not fact, and therefore not appropriate in a Material Statement of Facts.

- d. In the 2019 general election for Town of Cheektowaga Town Justice, voting was racially polarized. NYSCEF Doc No. 8, Exhibit 7 to the Verified Complaint, Handley Expert Report, page 5 of 19.

RESPONSE: Disputed as this is an opinion, not fact, and therefore not appropriate in a Material Statement of Facts.

- e. In the 2019 general election for Town of Cheektowaga Town Justice, the candidate of choice of Black voters lost to the candidate of choice of white voters. Id.

RESPONSE: Disputed as this is an opinion, not fact, and therefore not appropriate in a Material Statement of Facts.

- f. In the 2015 Democratic Primary, Plaintiff was the clear first choice of Black voters but the last choice of White voters. NYSCEF Doc No. 8, Exhibit 7 to the Verified Complaint, Handley Expert Report, page 6 of 19.

RESPONSE: Disputed as this is an opinion, not fact, and therefore not appropriate in a Material Statement of Facts.

- g. Plaintiff did not win one of the three positions elected in the 2015 Democratic Primary. NYSCEF Doc No. 8, Exhibit 7 to the Verified Complaint, Handley Expert Report, page 6 of 19.

RESPONSE: Disputed as this is an opinion, not fact, and therefore not appropriate in a Material Statement of Facts.

- h. The 2021 Democratic Primary for Erie County Sheriff was racially polarized with regard to voters in the Town of Cheektowaga. NYSCEF Doc No. 8, Exhibit 7 to the Verified Complaint, Handley Expert Report, page 8 of 19.

RESPONSE: Disputed as this is an opinion, not fact, and therefore not appropriate in a Material Statement of Facts.

- i. In the 2021 Democratic Primary for Erie County Sheriff the candidate favored by White voters in the Town of Cheektowaga defeated the candidate favored by Black voters in the Town of Cheektowaga. *Id.*

RESPONSE: Disputed as this is an opinion, not fact, and therefore not appropriate in a Material Statement of Facts.

- j. The 2018 Democratic Primary for Attorney General was racially polarized with regard to voters in the Town of Cheektowaga. *Id.*

RESPONSE: Disputed as this is an opinion, not fact, and therefore not appropriate in a Material Statement of Facts.

- k. In the 2018 Democratic Primary for Attorney General the candidate favored by White voters in the Town of Cheektowaga defeated the candidate favored by Black voters in the Town of Cheektowaga. *Id.*

RESPONSE: Disputed as this is an opinion, not fact, and therefore not appropriate in a Material Statement of Facts.

STATEMENT NO. 13: A legal consultant retained by Defendant concluded that: “The most recent elections (since 2021) have often been racially polarized. Although minority preferred candidates have prevailed in past years even when voting was polarized, there is an apparent trend against the election of minority preferred candidates beginning in 2022. This indicates a need for the Town to consider an alternative method of electing council members to avoid future liability.” NYSCEF Doc No. 9, Exhibit 8 to the Verified Complaint, Wice Expert Report, page 4 of 5.

RESPONSE: Disputed as this is an opinion, not fact, and therefore not appropriate in a Material Statement of Facts.

STATEMENT NO. 14: Plaintiff mailed an NYVRA Notification Letter to Defendant on December 12, 2023. NYSCEF Doc No. 02, Exhibit 1 to the Verified Complaint.

RESPONSE: Undisputed.

STATEMENT NO. 15: Defendant's opportunity to enact a compliant NYVRA Resolution to take advantage of the Safe Harbor provisions of Election Law § 17-206(7) expired before February 1, 2024. Verified Complaint, ¶¶ 55 and 58.

RESPONSE: Disputed. Because the Town properly enacted a compliant NYVRA Resolution, and this statement seeks to draw a legal conclusion that is not a fact, it is improper under 22 NYVRR § 202.8-g.

STATEMENT NO. 16: On January 9, 2024, Defendant passed Resolution 2024-34 in response to Plaintiff's NYVRA Notification Letter of December 12, 2023. NYSCEF Doc No. 6, Exhibit 5 to the Verified Complaint.

RESPONSE: Undisputed and immaterial to the motion.

STATEMENT NO. 17: Resolution 2024-34 did not contain an intention to enact and implement any specific remedy for a potential violation of Title 2, of Article 17 of the Election Law. *Id* and NYSCEF Doc No. 10, Exhibit 9 to the Verified Complaint, page 1 of 5, Footnote 1.

RESPONSE: Disputed and immaterial to the motion. Because this statement seeks to draw a legal conclusion that is not a fact, it is improper under 22 NYVRR § 202.8-g.

Nevertheless, Resolution 2024-34 repeatedly and specifically stated the Town's intention to implement the appropriate remedy(ies). *See* Spitzer Aff. ¶ 17 (Ex. B, §§ 3-4). Further, the State has implemented a remedy ignored by Plaintiffs—the recent amendment to Town Law § 80. The Resolution also specifies a ward plan as a specific remedy. *See* Spitzer Aff. ¶ 7 (Ex. B, §§ 4).

STATEMENT NO. 18: Resolution 2024-34 did not contain the steps Defendant will undertake to facilitate approval and implementation of any specific remedy. NYSCEF Doc No. 6, Exhibit 5 to the Verified Complaint.

RESPONSE: Disputed and immaterial to the motion. Resolution 2024-34 lists a number of steps the Town would undertake to approve and implement the specific remedy including, but not limited to, engaging expert consultants and holding public hearings to obtain

input from citizens regarding the composition of new election districts. Spitzer Aff. ¶ 7 (Ex. B §§ 1-4). And the Town took those steps.

STATEMENT NO. 19: Resolution 2024-34 did not contain a schedule for enacting and implementing any specified remedy. NYSCEF Doc No. 6, Exhibit 5 to the Verified Complaint. *Id.*

RESPONSE: Disputed and immaterial to the motion. The term “schedule” is vague and ambiguous in this statement. Resolution 2024-34 contains specific time frames within which the steps the Town would take to enact and implement the specific remedy would have to be completed. *See* Spitzer Aff. ¶ 7 (Ex. B § 3) (noting that Mr. Wice and Dr. Handley’s findings must be reported to the Town Board within 30 days); Spitzer Aff. 7 ¶ (Ex. B § 4) (noting that the Town Board shall hold two public hearings within 30 days of the expert reports).

STATEMENT NO. 20: On February 5, 2024, Defendant passed Resolution 2024-50. NYSCEF Doc No. 7, Exhibit 6 to the Verified Complaint.

RESPONSE: Undisputed and immaterial to the motion.

STATEMENT NO. 21: Resolution 2024-50 did not contain an intention to enact and implement any specific remedy for a potential violation of Title 2, of Article 17 of the Election Law. *Id.*

RESPONSE: Disputed and immaterial to the motion. Resolution 2024-50 contains an intention to enact and implement specific remedies—a ward voting system and term limits. *See* Spitzer Aff. ¶ 18 (Ex. C §§ 1-2).

STATEMENT NO. 22: Resolution 2024-50 did not contain the steps Defendant will undertake to facilitate approval and implementation of any specific remedy. *Id.*

RESPONSE: Disputed and immaterial to the motion. Resolution 2024-50 contains the steps the Town would take to facilitate approval and implementation of the specific remedies including, but not limited to, holding two public hearings within thirty days of receipt of the

expert reports to obtain input from the public regarding the remedies. *See* Spitzer Aff. ¶ 18 (Ex. C §§ 1-2).

STATEMENT NO. 33: Resolution 2024-50 did not contain a schedule for enacting and implementing any specified remedy. *Id.*

RESPONSE: Disputed and immaterial to the motion. The term “schedule” is vague and ambiguous in this statement. Resolution 2024-34 contains specific time frames within which the steps the Town would take to enact and implement the specific remedy would have to be completed. *See* Spitzer Aff. ¶ 17 (Ex. B § 2) (noting that the Town Board shall hold two public hearings within 30 days of the expert reports). The schedule is dictated by state law.

STATEMENT NO. 23: On March 8, 2024, Defendant adopted Resolution 2024-138. NYSCEF Doc No. 22, Exhibit 21 to the Verified Complaint.

RESPONSE: Undisputed and immaterial to the motion.

STATEMENT NO. 24: Under recent amendments to Town Law § 80, even-year elections for the Cheektowaga Town Board will not occur until November 2028 for three of the six council seats, and November 2030 for the remaining three seats. NYSCEF Doc No. 1, Verified Complaint, ¶ 81.

RESPONSE: Disputed. Because this statement seeks to draw a legal conclusion that is not a fact, it is improper under 22 NYVRR § 202.8-g.

**SECTION 2: DEFENDANT’S STATEMENT OF UNDISPUTED
MATERIAL FACTS IN FURTHER OPPOSITION TO PLAINTIFF’S
PARTIAL SUMMARY JUDGMENT MOTION AND IN SUPPORT
OF DEFENDANT’S CROSS-MOTION FOR SUMMARY JUDGMENT**

1. Plaintiff has repeatedly lost town elections for public office in the Town of Cheektowaga. Spitzer Aff. ¶ 9.

2. In the 2023 general election for Cheektowaga Town Board Councilmember, Gerald Kaminski, a candidate of choice for Black voters, was elected. Spitzer Aff. ¶ 20 (Ex. E, p. 4).
3. In the 2023 general election for Cheektowaga Town Supervisor, the candidate of choice of Black voters, Supervisor Brian Nowak, won the contest. Spitzer Aff. ¶ 20 (Ex. E, p. 4)
4. In the 2023 general election for the Town's Superintendent of Highways, the candidate of choice for Black voters, Richard Rusiniak, won the seat. Spitzer Aff. ¶ 20 (Ex. E, p. 4).
5. In the 2021 general election for Town Board Councilmember, two of the three elected candidates, Brian Nowak and Brian Pilarski, were the candidates of choice for Black voters and were elected. Spitzer Aff. ¶¶ 20 (Ex. E, p. 5), 24 (Ex. F, pp. 32-33).
6. 62 of the 95 Cheektowaga election districts voted for Nowak in the 2021 general election. Spitzer Aff. ¶ 24 (Ex. F, pp. 32-33).
7. 50 of the 95 election districts voted for Pilarski in the 2021 general election. *Id.*
8. In the 2019 general election, four of the five contests for Town office were not statistically racially polarized. Spitzer Aff. ¶ 20 (Ex. E, p. 5).
9. In the 2019 general election for Town Supervisor, 89 out of the 95 election districts supported the candidate for choice of Black voters—Diane Benzkowski. Spitzer Aff. ¶¶ 20 (Ex. E, p. 5), 25 (Ex. F, pp. 17-18).
10. In the 2019 general election to fill the Councilmember vacancy, 94 out of 95 election districts supported the candidate of choice of Black voters—Richard Rusiniak.

Spitzer Aff. ¶¶ 20 (Ex. E, p. 5), 25 (Ex. F, pp. 20-21). The remaining election district's votes resulted in a tie between Rusiniak and the other candidate. *Id.*

11. In the 2019 general election for Town Clerk, Kimberly Burst—the candidate of choice of Black voters—won 89 of the 95 election districts. Spitzer Aff. ¶¶ 20 (Ex. E, p. 5), 27 (Ex. F, pp. 23-24). One of the six election districts that Burst did not win ended in a tie between herself and the other candidate. *Id.*

12. In the 2019 general election for Town Justice, the candidate of choice of Black voters—David Stevens—won 51 of the 95 election districts. Spitzer Aff. ¶¶ 20 (Ex. E, p. 5), 28 (Ex. F, pp. 26-27). Three of the other election district's votes resulted in a tie between Stevens and the other candidate. *Id.*

13. Although the 2019 Town Justice race was “racially polarized” as defined in the NYVRA, Stevens—the choice of Black voters—still won the election. *Id.*

14. In the 2019 general election for Superintendent of Highways, Mark Wegner—the candidate of choice of Black voters—won all 95 election districts. Spitzer Aff. ¶¶ 20 (Ex. E, p. 5), 29 (Ex. F, pp. 29-30).

15. In the 2017 general election for Town Board Councilmember, voting was not statistically racially polarized. Spitzer Aff. ¶ 20 (Ex. E, p. 5).

16. The candidates of choice of Black voters in the 2017 Councilmember election were (i) Brian Nowak; (ii) Timothy Meyers; and (iii) James Rogowski. *Id.*

17. Nowak won 90 of the 95 election districts in the 2017 general election. Spitzer Aff. ¶ 31 (Ex. F, pp. 14-15).

18. Meyers won 91 of the 95 election districts in the 2017 general election. Spitzer Aff. ¶ 32 (Ex. F, pp. 14-15).

19. Rogowski won 92 of the 95 election districts in the 2017 general election. Spitzer Aff. ¶ 33 (Ex. F, pp. 14-15).
20. In the 2016 general election for Town Board Councilmember, the candidate of choice for Black voters, Alice Magierski, won the seat. Spitzer Aff. ¶¶ 20 (Ex. E, pp. 5-6), 24 (Ex. pp. 4-5).
21. In 2015, none of the three contested races for Town office were racially polarized. Spitzer Aff. ¶ 20 (Ex. E, p. 6).
22. All of the candidates of choice for Black voters in the races analyzed by Dr. Lisa Handley were Democrats. Spitzer Aff. ¶ 20 (Ex. E, pp. 4-6).
23. In elections held for Town offices in Cheektowaga since 2015, 82.6% of the seats won were won by candidates supported by Black voters. Spitzer Aff. ¶ 23 (Ex. E, p. 7).

Dated: September 3, 2024

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Word Count Certification

I hereby certify, pursuant to 22 NYCRR 202.8-b, that the total number of words in the foregoing statement/counterstatement, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, signature block, or any authorized addendum containing statutes, rules and regulations is 3,055. In making this certification, I relied on Microsoft Word's "Word Count" tool.

Dated: September 3, 2024



Daniel A. Spitzer

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