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11 **IN THE UNITED STATES DISTRICT COURT**
12 **DISTRICT OF ARIZONA**

13 MARIA M. GONZALEZ, et al.,
14 Plaintiffs,
15 v.
16 STATE OF ARIZONA, et al.
17 Defendants.

No. CV06-01268 PHX ROS
No. CV06-1362 PCT ROS (Cons)
No. CV06-1575 PCT ROS (Cons)

**MOTION TO STRIKE PORTIONS
OF ITCA PLAINTIFF FACTUAL
SUBMISSION IN RESPONSE TO
MOTION FOR SUMMARY
JUDGMENT BY DEFENDANT
ARIZONA SECRETARY OF STATE**

(Assigned to the Honorable
Roslyn O. Silver)

1 **MOTION**

2 Pursuant to Fed. R. Civ. P. 56(e) and Fed. Rs. Evid. 602, 801(c) and 802,
3 Defendant Arizona Secretary of State Janice Brewer moves to strike from ITCA
4 Plaintiffs’ factual submission, which is attached to the Declaration of Karen J. Hartman-
5 Tellez, dkt. 810, exhibits 15, 17, 21, 51-57, and 59-69. As explained below, those
6 exhibits are not admissible under the Federal Rules of Evidence and should be excluded
7 from the record on summary judgment. In addition, because plaintiffs improperly rely
8 on those exhibits to support portions of plaintiffs’ response to Defendant’s statement of
9 facts, the Court should strike the following facts from plaintiffs’ response: response to
10 Defendant’s fact 8, plaintiffs’ supplemental facts 2-4, 6-7, 9, 11, 13-17, 20-21, 32-33,
11 38, 54-55, 64, 67, and 69-73.

12 **MEMORANDUM**

13 **A. The Court Should Strike the Reports of Mr. Sissons and Drs. Lanier,
14 Espino, Engstrom, Chapa, Rosales and Handley (Exs. 17, 22, 52-58,
15 60-65).**

16 “A trial court can only consider admissible evidence when ruling on a motion for
17 summary judgment.” *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002);
18 *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 345 n.4 (9th Cir.
19 1995); *Beyene v. Coleman Sec. Servs. Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). Hearsay
20 is not admissible unless it falls under some exception to inadmissibility as provided in
21 the Rules of Evidence or other legal authorities. *See* Fed. R. Evid. 802.

22 Hearsay is “a statement, other than one made by the declarant while testifying at
23 the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Fed.
24 R. Evid. 801(c). Thus, for purposes of deciding a summary judgment motion, the Court
25 should exclude hearsay evidence and any assertions of fact based on such evidence.
26 *E.g.*, *Orr*, 285 F.3d at 778-79 (affirming the district court’s exclusion of hearsay
27 testimony given in deposition in granting summary judgment).

28 Although the federal rules governing summary judgment permit movants and
respondents to submit affidavits or declarations in supporting or opposing summary
judgment, parties may not submit out-of-court statements to prove the truth of the

1 matters asserted in those statements. *E.g.*, *Waddell v. Comm’r of Internal Revenue*, 841
2 F.2d 264, 267 (9th Cir. 1988) (excluding report by appraiser who had died shortly before
3 trial because report was hearsay and no exception to its inadmissibility was established)
4 *Beyene*, 854 F.2d at 1182-83 (exhibit that consisted of two exhibits admitted in a
5 separate trial and which were third party memoranda were hearsay and thus inadmissible
6 for purposes of summary judgment).

7 Plaintiffs submitted documents purporting to be the reports of Ronald Sissons,
8 Lisa Handley and each of the Gonzalez plaintiffs’ five experts (Drs. Lanier, Espino,
9 Engstrom, Chapa and Rosales). Plaintiffs cite to the statements in those reports to prove
10 the truth of the information asserted therein. Accordingly, those reports are hearsay.
11 Moreover, they do not meet any exception to inadmissibility. Accordingly, the Court
12 should strike those exhibits (22, 52-58, 60-65) from plaintiffs’ factual submission and
13 plaintiffs’ facts (2, 38, 69-73) which rely on those respective reports.

14 **B. The Court Should Strike Those Portions of the Declaration of**
15 **Linda Brown that Are Based on Hearsay or Lack Proper**
16 **Foundation (Ex. 15).**

17 “A witness may not testify to a matter unless evidence is introduced sufficient to
18 support a finding that the witness has personal knowledge of the matter.” Fed. R. Evid.
19 602. Thus, an affiant must have personal knowledge and the proponent of such
20 testimony must offer evidence to support a finding of such personal knowledge. *E.g.*,
21 *U.S. for Use and Benefit of Conveyor Rental & Sales Co. v. Aetna Cas. & Surety Co.*,
22 981 F.2d 448, 454 (9th Cir. 1992) (holding that affiant’s statement was inadmissible to
23 prove the truth of the matter asserted therein where the statement lacked any indication
24 of personal knowledge on the part of the affiant).

25 Paragraphs 6(b), 7, 8, 12-14, 17-19 of Ms. Brown’s declaration (ex. 15) include
26 numerous statements about which she lacks personal knowledge. For example, Ms.
27 Brown states that “Ms. Steele does not have access to Documentary Evidence of
28 Citizenship” and that “Ms. Preiss wishes to register to vote in Arizona . . . but does not
possess and cannot obtain Documentary Evidence of Citizenship.” [Brown decl. ¶¶ 7, 8]
Ms. Brown also describes events that she asserts took place at 19 different polling places

1 on Election Day in November 2006. [See Brown decl. ¶¶ 12-19] Ms. Brown lacks
2 personal knowledge of those events. Accordingly, those paragraphs of Ms. Brown's
3 declaration are inadmissible.

4 In addition, Ms. Brown's declaration is based in part on hearsay. For example,
5 she states that she spoke to Senator Gould and "he expressed concern that Ms. Preiss
6 could not register to vote because of the Proposition 200 ID Requirements." [Brown
7 decl. ¶ 9] That statement is hearsay and thus inadmissible. Moreover, because the
8 remainder of that paragraph is irrelevant without the inadmissible portion, the entire
9 paragraph 9 should be stricken from Ms. Brown's declaration.

10 Paragraphs 12 through 19 similarly are inadmissible because they are based on
11 hearsay. Ms. Brown purports to testify about what "poll workers were telling people"
12 and information told to representatives of Arizona Advocacy Network by other
13 individuals. [Brown decl. ¶¶ 12-19] All of the information contained in those
14 paragraphs describing such events and statements likely is double hearsay, but it is
15 hearsay in any event. As such, those statements are inadmissible and should be stricken
16 from the summary judgment record. *E.g., Opuku-Boateng v. California*, 95 F3d 1461,
17 1471 (9th Cir. 1996) (district court erred by admitting results of an informal poll taken in
18 the work place; such statements were inadmissible hearsay); *Harkins Amusement*
19 *Enters., Inc. v. General Cinema Corp.*, 850 F.2d 477, 489-90 (9th Cir. 1988) (deposition
20 testimony about what the deponent had been told was hearsay and not admissible for
21 purposes of summary judgment); *Jacobsen v. Filler*, 790 F.2d 1362, 1367 (9th Cir. 1986)
22 (deposition testimony about what the deponent was told or had read was inadmissible
23 hearsay and could not defeat summary judgment).

24 The Court also should strike plaintiffs' response to Defendant's fact 8 and
25 plaintiffs' supplemental facts 7, and 20-21, which are supported by Ms. Brown's
26 declaration.
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28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 20th day of June, 2008, I electronically transmitted
3 the attached document to the Clerk's Office using the ECF System for filing, and
4 transmittal of a Notice of Electronic Filing to the following ECF registrants:
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6 **COPY** served the 20th day of June, 2008, via hand-delivery, with Notice of Electronic
7 Filing, on:

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13 /s Elizabeth Stark

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