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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)

**REPLY IN SUPPORT OF
NOTICE OF SPECIFIC
OBJECTIONS TO GONZALEZ
PLAINTIFF EXHIBITS AND
STATEMENTS OF ASSERTED
FACT ON SUMMARY JUDGMENT
BY DEFENDANTS STATE OF
ARIZONA AND ARIZONA
SECRETARY OF STATE**

(Assigned to the Honorable
Roslyn O. Silver)

1 Pursuant to the Court’s order dated June 27, 2008, dkt. 881, Defendants State of
2 Arizona and Arizona Secretary of State (“State Defendants”) hereby reply in support of
3 their Notice of Specific Objections to Gonzalez plaintiff exhibits and statements of
4 asserted fact on summary judgment.

5 **1. Plaintiffs’ “Corrected” Documents Do Not Cure the Deficiencies in**
6 **Plaintiffs’ Summary Judgment Submission.**

7 Plaintiffs assert that Defendants’ objections to plaintiffs’ summary judgment
8 submission are unfounded because plaintiffs have “corrected” their “clerical” errors.
9 That “corrected” submission, however, was never filed and is not part of the summary
10 judgment record before the Court because leave was never granted for plaintiffs to file
11 their new exhibits. [See dkt. 869, 873]

12 Moreover, as explained in Defendants’ reply in support of their motion to strike,
13 the Court should not grant such leave because plaintiffs are attempting to remove
14 substantive evidence and add other evidence to the record—after briefing was
15 completed on the motion. [See dkt. 874] Plaintiffs attempt to re-open the record on
16 summary judgment by making additional argument and adding new “facts” and
17 evidence. Those plaintiff facts that rely upon evidence that is not part of the summary
18 judgment record before the Court should be stricken, as reflected in Defendants’ chart
19 at Tab 1 to Defendants’ notice. [See dkt. 885]

20 For the same reason, the approximately 800 “additional facts” submitted by
21 plaintiffs that are not cited in their response brief should be stricken. As explained
22 above, plaintiffs were not granted leave to file their “corrected” response, to which
23 Defendants have not had an opportunity to respond on summary judgment. Moreover,
24 plaintiffs’ corrected response, like their initial response, fails to cite to hundreds of
25 “facts.” The following “facts” (again) are not cited in plaintiffs’ “corrected” response:

26 2-4, 6, 8, 10, 13-21, 23-34, 36-51, 53-130, 134-135, 142-160, 162-175, 177-336,
27 338-361, 363-391, 393-417, 419-422, 424-497, 499-511, 514-531, 533-538, 547-549,
28 551-556, 560, 562-571, 573-574, 579-581, 583-588, 592-594, 596-714, 716-719, 721-
723, 735-740, 742-748, 750-768, 770-774, 776-782, 784-797, 804-807, 1148-1169,

1 1356-1357, 1360-1368, 1438-1467

2 Plaintiffs continue to make representations regarding what they have or have not
3 changed in their “two summary judgment submissions” apparently in an attempt to
4 make it difficult for the Court or Defendants to know with any precision what they are
5 arguing or what “facts” or evidence they are relying on in opposition.

6 In any event, those “facts” not cited in plaintiffs’ summary judgment brief
7 should be stricken from the summary judgment record. *E.g., Harkins Amusement*
8 *Enters., Inc. v. Gen. Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988) (holding that only
9 those items referred to in the summary judgment memoranda, would be considered on
10 appeal; court would not consider voluminous factual submission unless specifically
11 cited in motion papers; “the [district court] judge was not required to examine
12 thousands of additional pages of record even if they were physically presented to him”).

13 **2. Plaintiffs’ Expert Reports Are Not Reliable Under Rule 702.**

14 Plaintiffs do not dispute that their bare expert reports are hearsay. Instead,
15 plaintiffs argue (at 10-11) that cases hold that declarations that contain hearsay are
16 admissible for summary judgment purposes if the declaration could be presented in
17 admissible form at trial. This is not a case where plaintiffs’ experts submitted
18 declarations containing their opinions and such declarations contained hearsay. The
19 reports themselves are hearsay.

20 In any event, the Court instructed Defendants to address whether the proffered
21 expert reports are unreliable. [Dkt. 876] Defendants again came forward with a
22 declaration from defense expert Dr. Jeffrey Zax explaining in substantial detail that the
23 reports of plaintiff expert Drs. Lanier and Espino were not based on methodology that
24 is acceptable in the scientific community, that those methodologies had not been
25 subjected to peer review or tested, and that the potential rates of error in those
26 methodologies are unknown. [See dkt. 880 ¶¶ 3-20]

27 The opinions expressed in Dr. Zax’ declaration are specifically based on the
28 reports disclosed by Drs. Lanier and Espino, including those experts’ own disclosure of

1 data and methodologies. It is undisputed that Dr. Lanier’s own disclosed reports
2 demonstrate that both Latino and non-Latino voter registrations have increased (by the
3 same magnitude) in the post Prop 200 period over the comparable pre Prop 200 period.
4 It also is undisputed that the data disclosed in Dr. Espino’s own reports do not
5 demonstrate any disparate impact on Latinos if one properly considers the 2004
6 Presidential election cycle. In addition, it is undisputed that Dr. Espino never tested for
7 the statistical significance of his numbers in any event.

8 ITCA plaintiffs have never addressed the reliability of the conclusions of Drs.
9 Lanier and Espino. Although Gonzalez plaintiffs were granted leave to sur-reply
10 regarding the reliability of those experts’ conclusions, rather than respond with any
11 explanation from Drs. Lanier or Espino as to how their reports demonstrate reliability
12 on their face, Gonzalez plaintiffs merely filed a brief from their counsel making
13 argument about what those reports mean.

14 To the extent the Court considers the hearsay reports of Drs. Lanier and Espino,
15 the Court should consider whether the conclusions asserted therein are supported by the
16 data disclosed therein and whether the methodologies employed are reliable under
17 evidentiary standards. Plaintiff counsel’s argument cannot supplement those reports
18 with an explanation of the acceptability of the methodologies in the scientific
19 community, whether those methodologies have been peer reviewed, whether those
20 methodologies have been tested, or whether the potential rates of error are known.¹

21 Moreover, plaintiffs cannot escape their own experts’ data, which undisputedly
22 show that Latino registration numbers and percentage of the overall electorate have
23 *increased* in the post Prop 200 period. Gonzalez plaintiffs offer “population estimates”
24

25 ¹ Plaintiffs’ argument that Dr. Zax did not conduct his own analysis of thousands of
26 voter registration forms is irrelevant to Dr. Zax’ conclusions about the methodologies
27 employed. Plaintiffs—not Defendants—have the burden of proving disparate impact.
28 To the extent their experts attempt to do so, those experts must employ reliable
methodologies in accordance with the standards set forth in Fed. R. Evid. 702, as
interpreted by *Daubert*.

1 in their sur-reply attachments, in an apparent attempt to convince the Court that there is
2 some “other” explanation for the undisputed rise in Latino registrations. Their experts’
3 reports—the specific items relied upon by plaintiffs in opposition to summary
4 judgment—offer no scientifically reliable basis for such a conclusion, however. The
5 Court is not required blindly to accept conclusions of disparate impact that are not
6 supported by the disclosed data or by a showing of reliable methodology.

7 **3. Plaintiffs Have Not Substantively Responded to Defendants’**
8 **Foundation Objections.**

9 Plaintiffs attempt to shift to Defendants a burden of proving that plaintiffs’
10 evidence lacks foundation. Defendants have no such burden. Instead, the proponent of
11 the evidence must lay the proper foundation for that evidence. E.g., *Beyene v. Coleman*
12 *Sec. Servs., Inc.*, 854 F.2d 1179, 1182 (9th Cir. 1988) (“The foundation is laid for
13 receiving a document in evidence by the testimony of a witness with personal
14 knowledge of the facts who attests to the identity and due execution of the document
15 and, where appropriate, its delivery.”). Plaintiffs offered bare documents, with no
16 foundation as to what those documents are, who prepared them, under what
17 circumstances they were prepared, who received them or when they were prepared or
18 received, or how they are relevant to any material fact on summary judgment.

19 “[P]roper foundation must be laid regardless of the source of evidence.” *De La*
20 *Torre v. Merck Enters., Inc.*, 540 F. Supp. 2d 1066, 1075 (D. Ariz. 2008) (striking
21 numerous items of evidence submitted by non-movant on summary judgment because
22 the evidence lacked foundation); *see also Hamilton v. Keystone Tankship Corp.*, 539
23 F.2d 684, 686 (9th Cir. 1976) (holding that district court erred by considered on
24 summary judgment those exhibits for which “there was no proper foundation laid”).

25 Defendants’ foundation objection and other evidentiary objections were
26 specified in accordance with the Court’s order. Indeed, Defendants’ submission of a
27 comprehensive chart indexing plaintiffs’ exhibits—something plaintiffs failed to do for
28 the Court or counsel—and setting forth Defendants’ specific evidentiary objections for

1 appropriate exhibits accords with the Court’s civil trial conduct instructions for stating
2 objections to evidence. [See [http://www.azd.uscourts.Gov/azd/contacts.nsf/E20C4
4 AC1A26CEAE907256CFE00785981/\\$file/Decorum.pdf?openelement](http://www.azd.uscourts.Gov/azd/contacts.nsf/E20C4
3 AC1A26CEAE907256CFE00785981/$file/Decorum.pdf?openelement) (“Objections are
5 to be limited to stating ‘objection,’ and setting forth the basis for the objection (e.g.,
6 ‘leading’ or ‘hearsay’) and/or the number of the Federal Rules of Evidence relied upon
7 (e.g., ‘Objection: Rule 403’).) (underscoring omitted)]

8 Plaintiffs have not substantively responded to Defendants’ foundation objections
9 and do not dispute that no foundation was laid for their exhibits. Accordingly, those
10 objections should be sustained as to each exhibit to which they were made.

11 **4. Plaintiffs Have Established No Basis for the Admissibility of Emails
12 and Other Bare Documentary Exhibits Based on Rule 801(d)(2).**

13 Defendants assert hearsay objections to numerous documents that consist of
14 emails, notes, slides, software specifications, and statements that lack any foundation to
15 establish that such documents are not hearsay. As an initial matter, those documents
16 necessarily meet the definition of hearsay: They are out-of-court statements offered to
17 prove the truth of the matter asserted. See Fed. R. Evid. 801(c). The documents
18 asserted by plaintiffs as “admissions” under Rule 801(d)(2) do not establish any basis
19 for such conclusion and plaintiffs have provided none.

20 Rule 801(d)(2)(D) exempts from the hearsay definition statements that are made
21 by a party’s agent or servant concerning the matter within the scope of the agency or
22 employment. The exemption from the hearsay definition under Rule 801(d)(2)(D) for
23 statements of party agents or servants “requires the proffering party to lay a foundation
24 to show that an otherwise excludable statement relates to a matter within the scope of
25 the agent’s employment.” *Breneman v. Kennecott Corp.*, 799 F.2d 470, 473 (9th Cir.
26 1986) (excluding statements as hearsay because proponent failed to provide evidence
27 that the statements concerned a matter within the scope of the declarants’ employment).
28 Moreover, although the contents of the statement shall be considered, they “are not
alone sufficient” to establish “the agency or employment relationship and scope

1 thereof” under the rule. See Fed. R. Evid. 801(d)(2); *See also Sea-Land Serv., Inc. v.*
2 *Lozen Int’l, LLC*, 285 F.3d 808, 821 (9th Cir. 2002) (same).

3 As with the remainder of their exhibits, plaintiffs have laid no foundation to find
4 that any of their proffered documents meet the criteria of Rule 801(d)(2). In any event,
5 on their face the documents for which plaintiffs have asserted such an argument do not
6 fall under any of the categories of that rule.

7 For example, plaintiffs have submitted numerous “VRAZ Committee Notes” as
8 various exhibits. Apart from the lack of any relevancy to any material issue on
9 summary judgment, those documents reflect no author, no recipients, no indication of
10 any authority under which those notes were prepared, in some cases no dates, and no
11 other information that would establish that they are “admissions” by any party in this
12 case. [*See, e.g.*, exs. 14, 16, 17, 18, 19, 24, 32, 34, 36, 37, 44]

13 Plaintiffs cite (at 9) to *MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966
14 (C.D. Cal. 2006), for the proposition that documents bearing trade names, logos and
15 trademarks are not hearsay, and therefore, the PowerPoint or slide presentations, along
16 with other similar documents, offered as exhibits by Plaintiffs are admissible as
17 admissions by a party opponent. However, Defendants have not objected on hearsay
18 grounds to slide or PowerPoint presentations, or other documents, that bear the logo or
19 insignia of the State or counties. Rather, Defendants have objected on hearsay grounds
20 to such documents that do not bear any such identifying marks. [*See, e.g.*, exs. 85, 88,
21 187, 221, 265, 269-271] Plaintiffs attempt (at 9) to overcome these valid objections by
22 misstating the holding in *MGM Studios* as follows: “Likewise, other documents that do
23 not contain identifying insignias or marks, ‘but were created by . . . employees are
24 admissible as vicarious admissions under Rule 801(d)(2)(D).’ *See id.*” Immediately
25 after the language quoted by Plaintiffs, the court in *MGM Studios* goes on to note
26 deposition testimony existing in the record establishing that the document without
27 insignia was indeed created by an employee of the party. *MGM Studios*, 454 F. Supp.
28

1 2d at 974. Here, however, there is no such evidence in the record establishing that the
2 documents without insignia or identifying marks were created by an employee of
3 Defendants.

4 In the case of emails sent by a state or county election official, Defendants did
5 not assert objections unless the document contained hearsay. For example, some of
6 plaintiffs' exhibits appear to be emails sent to a county or state recipient by some
7 unknown individual who was purportedly making a statement about his or her
8 registration experience. [See, e.g., exs. 9, 127, 128, 129, 130, 132] Such statements are
9 hearsay and inadmissible. The statements of such individuals do not become
10 "admissions" simply because they were received by a state or county employee.
11 Plaintiffs have not met their burden of establishing that any exception applies to those
12 exhibits to which Defendants have objected on grounds of hearsay.²

13 **5. Plaintiffs Have Laid No Foundation for the Public Records or Business**
14 **Records Exception to Hearsay Inadmissibility.**

15 Plaintiffs concede (at 11-14) that many of the exhibits to which Defendants have
16 objected as hearsay are indeed hearsay. Plaintiffs instead argue that those exhibits fall
17 under some exception to hearsay inadmissibility. A proponent of evidence that is

18
19 ² Plaintiffs' argument that any document that was forwarded by an employee or agent
20 meets the criteria of Rule 801(d)(2)(B) lacks merit. That subprovision exempts from
21 the hearsay definition statements of which a party has manifested an adoption or belief
22 in their truth. The only case cited by plaintiffs in support of their argument under Rule
23 801(d)(2)(B) is plainly distinguishable. In *U.S. v. Safavian*, 435 F. Supp. 36, 43
24 (D.D.C. 2006), the court found that the "context and content of certain e-mails"
25 demonstrated that the defendant himself had manifested an adoption or belief in the
26 truth of statements in emails. The court found that other emails did not demonstrate
27 such a manifestation. Here, plaintiffs have not shown how any of their submitted
28 documents manifest such an adoption or belief by any of the named defendants in this
case. The other case cited by plaintiffs does not involve an exception under Rule
801(d)(2)(B), but rather Rule 801(d)(2)(D). That case establishes that the proponent of
such evidence must lay foundation for the exception to otherwise excludable hearsay.
See Sea-Land Serv., Inc. v. Lozen Int'l, LLC, 285 F.3d 808, 821 (9th Cir. 2002) (Rule
801(d)(2)(D) requires that the proponent lay foundation to show that the statement
relates to a matter within the scope of the agent's employment).

1 hearsay must lay the foundation for any applicable exception to hearsay inadmissibility.
2 *E.g., Beyene*, 854 F.2d at 1182-83 (holding that documents were not admissible for
3 summary judgment purposes because its proponent offered the documents for the truth
4 of the matters stated in them and “did not attempt to lay a foundation for any exception
5 to the hearsay rule”; proponent “failed to lay a foundation for any exception to the
6 hearsay rule”). Plaintiffs do not dispute that they have laid no foundation for any
7 hearsay exception for any of the documents they submitted.

8 Instead, plaintiffs offer conclusions in their brief that various documents they
9 have submitted meet the criteria for the business records or public records exception to
10 hearsay inadmissibility. Plaintiffs, as the proponent of their evidence, however, have
11 the burden to lay foundation showing that a document is a record “made at or near the
12 time by, or from information transmitted by, a person with knowledge,” that the record
13 is “kept in the course of a regularly conducted business activity,” and that “it was the
14 regular practice of that business activity to make” the record, “all as shown by the
15 testimony of the custodian or other qualified witness.” *See* Fed. R. Evid. 803(6)
16 (business record exception to hearsay inadmissibility).

17 For public records, plaintiffs have the burden to lay foundation showing that a
18 document is a record of a public office or agency “setting forth (A) the activities of the
19 office or agency, or (B) matters observed pursuant to a duty imposed by law as to
20 which matters there was a duty to report.” *See* Fed. R. Evid. 803(8) (public records
21 exception to hearsay inadmissibility).

22 Plaintiffs assert that public records are not subject to reasonable dispute and are
23 generally considered trustworthy. Plaintiffs’ assertion, however, begs the question
24 whether their exhibits *are* public records under Rule 803(8). Because they have not
25 laid any foundation to establish the criteria for public records, they have not overcome
26 Defendants’ hearsay objection on that basis.

27 Plaintiffs concede that they are unable to establish the criteria for the business
28

1 records exception under Rule 803(6) but argue that they are unable to obtain testimony
2 from a qualified witness to lay foundation for the business records exception. Plaintiffs
3 took dozens of depositions of state and county witnesses during discovery in this case.
4 They had ample opportunity to lay foundation for whatever documents they found
5 “material” in this case. The fact that they failed to do so does not mean their proffered
6 documents should not be deemed hearsay.

7 Plaintiffs do not dispute in their response that they laid no foundation for any
8 hearsay exception to their exhibits. Accordingly, those exhibits should be stricken from
9 the summary judgment record. *E.g., U.S. v. Ordonez*, 737 F.2d 793, 805 (9th Cir. 1984)
10 (holding that hearsay evidence is admissible as a business record only if foundational
11 facts are established).

12 **Relief Requested**

13 For the reasons stated in Defendants’ motions to strike and replies in support
14 thereof, Defendants’ notice of objections to plaintiffs’ summary judgment exhibits and
15 facts, and this reply, the Court should grant Defendants’ motion to strike those portions
16 of the factual record as identified in Defendants’ notice, Tabs 1 and 2.

17 RESPECTFULLY SUBMITTED this 3rd day of July, 2008.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 3rd day of July, 2008, I electronically transmitted the
3 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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