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23 UNITED STATES DISTRICT COURT
24 DISTRICT OF ARIZONA

25 Maria M. Gonzalez, et al.,
26 Plaintiffs,

27 vs.

28 State of Arizona, et al.,
Defendants.

) No. CV06-01268-PHX-ROS (Lead)
) CV06-01362-PHX-ROS (Cons)
) CV06-01575-PHX-ROS (Cons)

) **RESPONSE IN OPPOSITION TO**
) **MOTION TO STRIKE**
) **PORTIONS OF ITCA PLAINTFF**
) **FACTUAL SUBMISSION IN**
) **RESPONSE TO MOTION FOR**
) **SUMMARY JUDGMENT**

24 The Inter Tribal Council of Arizona, Inc., the Hopi Tribe, the Arizona
25 Advocacy Network, the League of Women Voters of Arizona, the League of United
26 Latin American Citizens, and Rep. Steve Gallardo (collectively, the "ITCA Plaintiffs")
27 hereby oppose the Motion to Strike Portions of ITCA Plaintiff Factual Submission in
28 Response to Motion for Summary Judgment by Defendant Arizona Secretary of State

1 (the “Motion to Strike”). The Court may consider all of the expert reports, public or
2 business records, articles and declarations that the ITCA Plaintiffs submitted in
3 opposition to the Motion for Summary Judgment, and should not strike those exhibits,
4 nor the supplemental disputed facts, which cite both those exhibits and other exhibits to
5 which Defendant has *not* objected. This Response is supported by the following
6 Memorandum of Points and Authorities.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 Preliminary Statement

9 On summary judgment, there must be no issue of any material fact and the
10 moving party must demonstrate the right to judgment as a matter of law in the context of
11 undisputed facts. *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 591 (9th Cir. 1981)
12 (citing *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980)). All evidence
13 and inferences therefrom are to be construed in the light most favorable to the party
14 opposing a motion for summary judgment. *United States v. Diebold*, 369 U.S. 654, 655
15 (1962); see *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624
16 (9th Cir. 1977). In deciding a motion for summary judgment the court must be
17 concerned with the *content* of the evidence presented, *not* its form:

18 At the summary judgment stage, we do not focus on the admissibility of
19 the evidence’s form. We instead focus on the admissibility of its contents.
20 *Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir. 2001) (“To
21 survive summary judgment, a party does not necessarily have to produce
22 evidence in a form that would be admissible at trial, as long as the party
23 satisfies the requirements of Federal Rules of Civil Procedure 56.”); *Fed.*
Deposit Ins. Corp. v. N.H. Ins. Co., 953 F.2d 478, 485 (9th Cir. 1991)
24 (“[T]he nonmoving party need not produce evidence in a form that would
25 be admissible at trial in order to avoid summary judgment.”).

26 *Fraser v. Goodale*, 342 F.3d 1032, 1036-1037 (9th Cir. 2003) (internal quotation marks
27 and citation omitted in original); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

28 Here, Defendant attempts to elevate form over substance and strike facts
and exhibits that are supported by evidence that is admissible at trial. Indeed, Defendant

1 even has requested that the Court strike facts that are supported by exhibits whose
2 admissibility Defendant does not challenge.¹ As explained more fully below, the
3 Exhibits contain admissible evidence which should be considered in opposition to the
4 Motion for Summary Judgment, and Defendant's Motion to Strike should be denied.

5 I. THE COURT SHOULD NOT STRIKE THE EXPERTS' REPORTS CITED IN
6 THE ITCA PLAINTIFFS' RESPONSE TO THE SECRETARY OF STATE'S
STATEMENT OF FACTS.

7 A. The August 2006 Sissons Report Has Been Admitted Into Evidence in
8 This Case.

9 Defendants move to strike as hearsay the expert report by R. Anthony
10 Sissons. [Mot. to Strike, at 1-2 (Hartman-Tellez Decl., Ex. 17)] Mr. Sissons testified at
11 the preliminary injunction hearing in this action on August 30 and 31, 2006, and his
12 report was admitted by the Court at that time as Exhibit 21.² Evidence admitted at
13 preliminary injunction hearings remains in the record through trial. "Even when
14 consolidation is not ordered, evidence that is received on the motion and that would be
15 admissible at trial becomes part of the trial record and need not be repeated at trial."
16 Fed. R. Civ. P. 65(a)(2). While the Court's decision expressed some reservations about
17 the reliability Mr. Sissons's estimates of the number of persons without "satisfactory

18 ¹ Defendant has asked the Court to strike ITCA Plaintiffs' response to Defendant's fact
19 number 8 and supplemental facts numbered 2-4, 6-7, 9, 11, 13-17, 20-21, 32-33, 38, 54-
20 55, 64, 67 and 69-73. Among these, only supplemental facts 4, 9, 14-17, 33, 54-55 and
21 70-73 rely solely on exhibits Defendant seeks to strike. (Assuming that the Motion asks
22 to strike Exhibits 15, 17, 21, 51-57, 59-69, and not Exhibits 22, 52-58, 60-65, to which it
23 refers on page 2.)

24 ² Before the August 2006 preliminary injunction hearing, the Defendants reserved a
25 foundation objection to the Sissons report. [Doc. 177 at 6] At the outset of the hearing,
26 the Court stated that "I am well aware of the objections to the exhibits, and I have, at
27 this point, taken them into account. I have not resolved whether or not they are reliable.
28 I will admit them, understanding the objections." [8/30/06 Hr'g Tr. at 12:11-12:15].
Upon admitting the Sissons report and other exhibits, the Court stated: "I think it is a
good idea for the Court to now admit all of the exhibits that are offered, and that fall
within the parameters of what I have stated, which is they may not technically be
admissible, but they may be reliable, and I will make that determination before I render
my decision." [*Id.* at 15:14-15:19]

1 evidence of citizenship,” the Court did not rule that his report was inadmissible.³ Thus
2 under Rule 65(a)(2), the Sissons Report remains part of the record and the ITCA
3 Plaintiffs properly have relied upon it.

4 B. The Gonzalez Plaintiffs’ Expert Reports Are Admissible at Trial and
5 Should Be Considered in Connection with Plaintiffs’ Opposition to
6 Summary Judgment.

7 Defendants move to strike as hearsay thirteen exhibits to the ITCA
8 Plaintiffs’ Response, each of which is a copy of an expert report disclosed to the
9 Defendants by the Gonzalez Plaintiffs. [Mot. to Strike at 1-2] The Gonzalez Plaintiffs
10 designated each of these reports as an exhibit for trial and they provided separate copies
11 as exhibits in opposition to Defendants’ Motions for Summary Judgment against them.
12 [See Doc. 824, Ex. C (listing expert reports as Exhibits 862, 866-67, 872, 874-75, 879-
13 80, 884, 886, 888-89)]⁴ The Defendants do not argue that the ITCA Plaintiffs are
14 precluded from citing evidence put before the Court by the Gonzalez Plaintiffs, nor does
15 their Motion to Strike directed to the Gonzalez Plaintiffs include any specific argument

16 ³ The Court expressed “reservations regarding the reliability of the [] statistics” in the
17 Sissons report concerning the number of individuals who do not possess “satisfactory
18 evidence of citizenship.” [Doc. 219, at 9] However, this did not go to the admissibility
19 of the report. The Court also stated that it was “not presented with sufficiently reliable
20 information regarding the number of voters that do not have adequate forms of
21 identification and will not be receiving, free of charge, adequate forms of identification
22 prior to the elections.” [10/11/06 Order at 10-11] The Sissons report did not attempt to
23 quantify the number of people who lacked such identification and the Court did not
24 specifically refer to that report concerning the lack of reliable evidence.

25 ⁴ See Mot. to Strike at 1-2 (Hartman-Tellez Decl. Ex. 21, Louis R. Lanier (Fourth
26 Supplemental Report May 9, 2008); Ex. 51, Arturo Rosales (January 4, 2008); Ex. 52,
27 Jorge Chapa (January 4, 2008); Ex. 53, Richard L. Engstrom (Preliminary Report
28 January 4, 2008); Ex. 54, Rodolfo Espino (Written Report January 4, 2008); Ex. 55,
Rodolfo Espino (Rebuttal Report March 7, 2008); Ex. 56, Louis R. Lanier (January 4,
2008); Ex. 57, Louis R. Lanier (Rebuttal Report March 7, 2008); Ex. 59, Rodolfo
Espino (January 4, 2008); Ex. 60, Louis R. Lanier (Fifth Supplemental Report); Ex. 62,
Richard L. Engstrom (Supplemental Report June 4, 2008); Ex. 63, Arturo F. Rosales
(Rebuttal Report March 7, 2008); and Ex. 64, Richard L. Engstrom (Rebuttal Report
March 7, 2008)). Some of these reports are the subject of a pending Motion in Limine
by the Defendants – based upon the timing of the reports’ disclosures. [See Doc. 820]

1 concerning their expert reports. [*See* Doc. 854] *See Orr v. Bank of America*, 285 F.3d
2 764, 776 (9th Cir. 2002) (considering exhibit that was not authenticated because another
3 party had submitted the same exhibit properly authenticated).

4 The Defendant objects that these reports have been offered as inadmissible
5 hearsay. But expert reports routinely are admitted as evidence at trials and the Gonzalez
6 Plaintiffs have stated their intention to call each expert as a witness at trial. Therefore,
7 these reports would be admissible, and they properly are considered by the Court for
8 purposes of summary judgment in ascertaining whether there are genuine issues of
9 material fact. *See Farrakhan v. Gregoire*, 2006 WL 1889273, at *5-*6 (E.D. Wash.
10 July 7, 2006) (discussing, at length, plaintiffs’ expert reports in considering cross-
11 motions for summary judgment in Section 2 case).

12 C. Under the Hearsay Rules, the Report by Dr. Lisa Handley is Admissible.

13 The Defendants also move to strike as hearsay a report by Dr. Lisa
14 Handley for the Arizona Redistricting Commission. [*See* Mot. to Strike at 1-2
15 (Hartman-Tellez Decl., Ex. 61)] The public records and reports exception to the hearsay
16 rule on its face applies to Dr. Handley’s report. “Records, reports, statements or data
17 compilations, *in any form* of public offices or agencies, setting forth . . . (B) matters
18 observed pursuant to duty imposed by law as to which matters there was a duty to
19 report. . . .” Fed. R. Evid. 803(8) (emphasis added). As a report prepared for a public
20 redistricting agency this document falls four-square within the terms of the public
21 records rule.

22 Furthermore, because the Handley Report documents the existence of
23 racially polarized voting it may also be considered a statement against interest by a
24 person authorized by the State of Arizona, and thus not hearsay under Fed. R. Evid.
25 801(d)(2)(C). Alternatively, the circumstances under which the Handley Report was
26 issued provide sufficient guarantees of trustworthiness to qualify for the residual hearsay
27 exception under Fed. R. Evid. 807. The evidence is material to the claims under Section
28 2 of the Voting Rights Act; it is the most probative evidence of what was known – by

1 the State of Arizona and its residents – about the existence of racially polarized voting
2 prior to the adoption of Proposition 200, and it cannot reasonably be replicated; it would
3 also serve the interests of justice for the Court to consider what State officials have been
4 advised on this important issue.

5 II. THE HEARSAY RULES DO NOT BAR THE COURT FROM CONSIDERING
6 THE DECLARATION OF LINDA BROWN.

7 The motion to strike is somewhat inconsistent in asking at Pages 1 and 3
8 for Exhibit 15 to be stricken (apparently in its entirety), while the argument focuses only
9 upon specified paragraphs. Because the hearsay problems claimed by the Defendants do
10 not affect the entire Brown Declaration, there is no basis to strike the entire Declaration.
11 The identified statements of which the Defendants complain are admissible too, and the
12 Motion to Strike therefore should be denied.

13 It is true that the Brown Declaration includes statements made to Ms.
14 Brown by Shirley Preiss about her inability to obtain registration identification.
15 However, Ms. Preiss has provided a separate declaration that establishes the truth of
16 those matters. [Hartman-Tellez Decl., Ex. 9] The Brown Declaration, on the other hand,
17 documents an instance in which Proposition 200 interfered with the organizational
18 mission of Plaintiff the Arizona Advocacy Network (“AzAN”) to register voters. What
19 Ms. Preiss told Ms. Brown was an important aspect of how AzAN attempted to respond.
20 That is, the Brown Declaration establishes the information upon which AzAN acted.
21 This falls outside the hearsay rule because it is not offered for the truth of the matter
22 asserted by Ms. Preiss.

23 The portions of Ms. Brown’s declaration that discuss events at polling
24 places, which the Defendants seek to strike as hearsay, likewise present admissible
25 evidence outside the scope of the hearsay rule. [See Mot. to Strike, at 2-3 (citing
26 Hartman-Tellez Decl., Ex. 15, ¶¶ 12-19)] Ms. Brown has provided examples of the
27 types of problems stemming from Proposition 200 that were reported to the Arizona
28 Advocacy Network and that formed the basis for its decisions as to how to allocate its

1 resources; in other words, this information documents the nature of the burden upon the
2 Plaintiff, and it is admissible for that purpose. Even if evidence establishing what
3 occurred at different polling places was independently presented by first-hand witnesses,
4 that would not suffice to establish the harm to the Plaintiff because it would fail to
5 establish the direct impact on AZAN that Ms. Brown’s declaration does.

6 III. THE COURT MAY CONSIDER EXHIBITS 65-69.

7 Defendant further argues that the Court should strike the ITCA Plaintiffs’
8 Exhibits 65-69 on hearsay grounds. [Mot. to Strike, at 4] Defendant acknowledges that
9 one of the exhibits was authored Rodolfo Espino, one of the Gonzalez Plaintiffs’ expert
10 witnesses. [*Id.*] As discussed above, the Gonzalez Plaintiffs intend to call Dr. Espino as
11 a witness at trial, at which time he can provide testimony establishing the admissibility
12 of his report prepared for RenewtheVRA.org. In the circumstances, Dr. Espino’s report
13 concerning Voting Rights in Arizona from 1986 to 2000 may be considered by the Court
14 for purposes of summary judgment in ascertaining whether genuine issues of material
15 fact exist.

16 The ITCA Plaintiffs also submitted two records of plaintiff the Inter Tribal
17 Council of Arizona, Inc. (the “ITCA”), which are admissible under the hearsay
18 exceptions for public or business records. Fed. R. Evid. 803(6), (8). The ITCA is an
19 intergovernmental organization, the members of which are the top elected officials of
20 each of its 19 Member Tribes. The History of Indian Voting in Arizona [Ex. 66] and the
21 Statement of the ITCA Before the National Commission on the Voting Rights Act [Ex.
22 67] therefore constitute “[r]ecords, reports, statements, or data compilations . . . setting
23 forth (A) the activities of the office or agency.” Fed. R. Evid. 803(8). As such, they are
24 admissible to prove the truth of the matter asserted therein. In addition, the ITCA
25 documents are records of “acts, events, conditions [or] opinions, . . . made at or near the
26 time by, or from information transmitted by, a person with knowledge, [and] kept in the
27 course of regularly conducted business.” Fed. R. Evid. 803(6). Accordingly, the
28 business records exception to the hearsay rule also applies. The ITCA Plaintiffs have

1 identified as potential trial witnesses individuals who are employed by the ITCA who
2 may testify concerning Exhibits 66 and 67.

3 Furthermore, the ITCA attached a copy of Exhibits 66-69 to its response to
4 Defendant's Second Set of Interrogatories. Defendant has identified that document as
5 an Exhibit she intends to offer at trial. [See Doc. 824, Ex. B, Ex. 26]

6 Conclusion

7 For the foregoing reasons, the Court should deny the Motion to Strike.

8 RESPECTFULLY SUBMITTED this 24th day of June, 2008.

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I further certify that I caused a copy of the attached document to be mailed
on the 25th day of June, 2008 to:

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