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22 of Arizona, Inc., et al.

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)

) **ITCA PLAINTIFFS'**
) **RESPONSE IN OPPOSITION TO**
) **NOTICE OF SPECIFIC**
) **OBJECTIONS TO PLAINTIFF**
) **EXHIBITS AND STATEMENTS**
) **OF ASSERTED FACT ON**
) **SUMMARY JUDGMENT**

29 The Inter Tribal Council of Arizona, Inc., the Hopi Tribe, the Arizona
30 Advocacy Network, the League of Women Voters of Arizona, the League of United
31 Latin American Citizens, and Rep. Steve Gallardo (collectively, the "ITCA Plaintiffs")
32 hereby respond in opposition to the specific objections to their exhibits and statements

1 of disputed fact filed by the State of Arizona and the Arizona Secretary of State
2 (collectively, “Defendants”).

3 I. THE DECLARATION OF LINDA BROWN (EXHIBIT 15).

4 Defendants object under Rule 602 that Linda Brown lacks personal
5 knowledge concerning Eva Steele (Paragraph 7) and Shirley Preiss (Paragraph 8).
6 However, both Ms. Steele and Ms. Preiss are persons with whom Ms. Brown personally
7 met, and whom she attempted to help register to vote. Ms. Brown thus has personal
8 knowledge to recount her interactions with Ms. Steele and Ms. Preiss, and personal
9 knowledge of the information she was provided that formed the basis of her subsequent
10 actions; all of this is admissible to prove the impact of Proposition 200 upon the voter
11 registration activities of plaintiff the Arizona Advocacy Network (“AzAN”).

12 Defendants also object under Rule 602 that Ms. Brown lacks personal
13 knowledge concerning Paragraph 6(b) of her Declaration, which concerns the reluctance
14 of persons to provide the additional personal information required by Proposition 200 to
15 persons conducting voter registration, and the consequent negative impact this has upon
16 AzAN’s voter registration activities.¹ Ms. Brown is in the position to know about
17 AzAN’s difficulties in conducting voter registration – both on the basis of her first-hand
18 experience and as director of AzAN’s operations – which necessarily include the
19 reasons given by persons for declining to register. In addition, Ms. Brown can testify
20 based upon personal knowledge about AzAN’s policy decisions resulting from those
21 statements. The facts that registrants made these statements to AzAN workers, and that
22 AzAN acted upon them, are admissible to show the impact of Proposition 200 upon
23 AzAN’s operations.

24 Defendants object to Paragraph 9 as irrelevant under Rule 402 and as
25 hearsay under Rule 802. Senator Gould’s statements are relevant to the State’s interest

26
27 ¹ In addition, representatives of plaintiffs and defendants have testified to the same
28 reluctance. [See Doc. 810, Ex. 7 (Deposition of Krysty Marin), Ex. 20 (Preliminary
Injunction Hr’g testimony of Bonnie Saunders)]

1 under the ITCA Plaintiffs' equal protection claim, and to the totality of the
2 circumstances under the ITCA Plaintiffs' claim under Section 2 of the Voting Rights
3 Act. ITCA Plaintiffs do not contest the hearsay objection for the truth of Senator
4 Gould's statements.

5 Defendants object under Rule 602 to Paragraphs 12-14 and Paragraphs 17-
6 19 of Ms. Brown's Declaration. Defendants also object to those paragraphs under Rule
7 802 as hearsay. Paragraphs 12-14 of Ms. Brown's Declaration concern information
8 obtained during AzAN's survey efforts in the 2006 elections, concerning voters
9 erroneously being turned away from the polls, or provided the incorrect ballot type.
10 Paragraph 18 similarly concerns reports of inconsistent application of Proposition 200 at
11 the polls obtained by AzAN staff during the 2006 elections. Paragraph 17 is evidence of
12 contemporaneous corrective actions taken by AzAN staff and volunteers in response to
13 voters who reported having been turned away from their polling places. Ms. Brown
14 personally participated in those efforts. Paragraph 19 concerns future actions that
15 AzAN plans to take in response to Proposition 200.

16 Taken together these paragraphs are admissible to establish: 1) the
17 decisions that have been made by AzAN in response to Propositions 200, and 2)
18 AzAN's reasons for making those decisions. With regard to Rule 602, the decisions by
19 AzAN to devote additional resources to poll monitoring clearly are facts within Ms.
20 Brown's personal knowledge. AzAN's reasons for making those decisions likewise are
21 within Ms. Brown's personal knowledge. With regard to Defendants' hearsay
22 objections, the content of statements by voters seeking assistance as they exited the polls
23 is admissible under the hearsay exception of Rule 803(1), as a present sense impression
24 of their experience in voting or "immediately thereafter." In addition, Paragraph 19
25 contains no out-of-court statements – for the truth of the matter asserted or otherwise –
26 and Rule 802 therefore simply is inapplicable to it.

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1 II. THE CHAPA, ENGSTROM, ESPINO, LANIER, ROSALES AND SISSONS
2 REPORTS (EXHIBITS 17, 21, 51-57, 59-60 AND 62-64).

3 A. Courts Routinely Consider Expert Reports on Summary Judgment Even
4 Though They Are Out of Court Statements Offered to Prove the Truth of
5 the Matter Asserted.

6 Defendants object to each of the expert reports included as exhibits to the
7 ITCA Plaintiffs' Response in Opposition to Motion for Summary Judgment (the
8 "Response") as inadmissible hearsay under Fed. R. Evid. 802.² [See Doc. 885, Tab 2, at
9 1-7] The ITCA Plaintiffs acknowledge that the cited expert reports are out-of-court
10 statements, offered to prove the truth of matters asserted therein. See Fed. R. Evid.
11 801(c). In response to a motion for summary judgment, however, such hearsay evidence
12 can and should be considered by the Court. Indeed, at the summary judgment stage, the
13 Court should "not focus on the admissibility of the evidence's form, [but] on the
14 admissibility of its contents." *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir.
15 2003) (emphasis added) (citing *Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th
16 Cir. 2001) ("To survive summary judgment, a party does not necessarily have to
17 produce evidence in a form that would be admissible at trial, as long as the party
18 satisfies the requirements of Federal Rules of Civil Procedure 56."); *Fed. Deposit Ins.*
19 *Corp. v. N.H. Ins. Co.*, 953 F.2d 478, 485 (9th Cir. 1991) ("[T]he nonmoving party need
20 not produce evidence in a form that would be admissible at trial in order to avoid
21 summary judgment.")); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

22 In the Ninth Circuit, "expert opinion is admissible and may defeat
23 summary judgment if it appears the affiant is competent to give an expert opinion and
24 the factual basis for the opinion is stated in the affidavit" *Walton v. U.S. Marshals*
25 *Serv.*, 492 F.3d 998, 1008 (9th Cir. 2007) (quoting *Bulthuis v. Rexall Corp.*, 789 F.2d

26 ² Defendants further objected to the Lanier and Espino Reports under Fed. R. Evid. 702
27 and 703. [See Notice, Ex. 2, at 3-5] With respect to those objections, the ITCA
28 Plaintiffs join and incorporate herein by reference the Gonzalez Plaintiffs' Response in
Opposition to State Defendants' Reply in Support of Motion to Strike Portions of
ITCA's Factual Submission. [Doc. 889]

1 1315, 1318 (9th Cir. 1986)). Defendants have not argued that Plaintiffs' experts are not
2 competent to provide expert opinions.

3 Courts "may consider hearsay evidence contained in an expert report or
4 affidavit where the expert 'could later present that evidence through direct testimony,
5 i.e. in a form that would be admissible at trial.'" *Murphy v. County of Yavapai*, 2006
6 WL 2460916, at *5 (D. Ariz. Aug. 23, 2006) (declining to consider expert report only
7 because expert would not be available to testify at trial) (quoting *Williams v. Borough of*
8 *W. Chester*, 891 F.2d 458, 465 n.12 (3d Cir. 1989); see also *Grupo Gigante S.A. de C.V.*
9 *v. Dallo & Co., Inc.*, 119 F. Supp. 2d 1083, 1087 n. 3 (C.D. Cal. 2000) (overruling
10 hearsay and foundation objection to expert report submitted at summary judgment
11 stage), *vacated on other grounds* 391 F.3d 1088 (9th Cir. 2004); *Farrakhan v. Gregoire*,
12 2006 WL 1889273, at *5-*6 (E.D. Wash. July 7, 2006) (discussing, at length, plaintiffs'
13 expert reports in considering cross-motions for summary judgment in Section 2 case).
14 This more relaxed application of the hearsay rule on summary judgment represents "the
15 proper accommodation between Rule 56(e) and Fed. R. Evid. 705." *Bulthuis*, 789 F.2d
16 at 1318 (concluding that trial court should have considered plaintiff's expert opinions on
17 summary judgment). Moreover, expert reports submitted in opposition to a motion for
18 summary judgment are held to even "'less exacting standards' than a moving party's
19 affidavit." *Single Chip Sys. Corp. v. Intermec IP Corp.*, 2006 WL 4660129, at *6 (S.D.
20 Cal. Nov. 6, 2006) (considering expert reports and denying summary judgment).

21 Here, Mr. Sissons' testimony at the August 30 and 31, 2006 Preliminary
22 Injunction Hearing confirmed the admissibility of the facts and opinions in his report.
23 [See, e.g., Ex. A (excerpts of 8/30/06 and 8/31/06 Hr'g Tr.)] The Gonzalez Plaintiffs
24 have submitted Declarations from Drs. Chapa, Engstrom, Espino, Lanier and Rosales
25 confirming and adopting their reports under penalty of perjury. [Doc. 871, Ex. 1-5];
26 *Single Chip Sys.*, 2006 WL 4660129, at *6 (accepting unsworn expert reports for which
27 party subsequently filed confirming declarations). In addition, the Gonzalez Plaintiffs
28 intend to call each of their experts at trial to testify to the facts and opinions in their

1 reports. [See Doc. 824, at 25] Accordingly, Defendants' hearsay objections cannot
2 justify striking Plaintiffs' expert reports. See *Fraser*, 342 F.3d at 1036-37; *Bulthuis*, 789
3 F.2d at 1318.

4 B. The Sissons Report Has Been Admitted, and the Portions the ITCA
5 Plaintiffs Cited Are Duplicated By Sissons' Testimony During the August
6 2006 Preliminary Injunction Hearing.

7 Even if the Court were to disregard the Sissons Report on summary
8 judgment, none of the ITCA Plaintiffs' disputed facts that cite the Report should be
9 struck, because Mr. Sissons' testimony at the preliminary injunction hearing supports
10 those facts.³ Defendants cannot argue that Mr. Sissons' in-court testimony is hearsay,
11 and have stated no other objections to the facts in his Report. [See Doc. 885, Tab 2, at
12 1-2]

13 C. The Facts Underlying the Expert Reports Are Admissible.

14 The majority of the facts forming the basis of Plaintiffs' experts' opinions
15 come directly from documents produced by Defendants during discovery. [See, e.g.,
16 Doc. 810, Ex. 17, at 5-6 (discussing Arizona Secretary of State's tabulation of number
17 of registered voters with driver's licenses); Ex. 21, at 2-3 (relying on rejected voter
18 registration forms produced by County Defendants); Ex. 56, at 3-4 (identifying state
19 voter registration database and rejected voter registration forms as data source); Ex. 59,
20 at 2 (basing analysis on state voter registration database)] As such, they are presumed
21 authentic and are not inadmissible hearsay. See Fed. R. Evid. 801(d)((2); *Orr v. Bank of*
22 *America*, 285 F.3d 764, 777 n.20 (9th Cir. 2002) (citing *Maljack Prods., Inc. v.*
23 *GoodTimes Home Video Corp.*, 81 F.3d 881, 889 n.12 (9th Cir.1996)).

24 ³ See Exhibit A (8/31/06 Hr'g Tr. at 24:14-24:23 (Response to Defs' fact 13); 8/31/06
25 Hr'g Tr. at 14:1-14:4 (ITCA Plaintiffs' SOF, ¶ 3); 8/30/06 Hr'g Tr. at 137:13-140:16
26 (SOF, ¶ 9); 8/30/06 Hr'g Tr. at 152:12-156:13 (SOF, ¶ 11); 8/30/06 Hr'g Tr. at 140:11-
27 142:15 (SOF, ¶ 13); 8/30/06 Hr'g Tr. at 156:14-158:6 (SOF, ¶ 14); 8/31/06 Hr'g Tr. at
28 9:10-10:9 (SOF, ¶ 15); 8/31/06 Hr'g Tr. at 10:10-11:13 (SOF, ¶ 16); 8/30/06 Hr'g Tr. at
143:16-149:3 (SOF, ¶ 17); 8/31/06 Hr'g Tr. at 24:11-25:16 (SOF, ¶ 32); 8/31/06 Hr'g
Tr. at 25:18-27:12 (SOF, ¶ 33); 8/31/06 Hr'g Tr. at 22:4-23:25 (SOF, ¶ 64)).

1 Those facts not obtained directly from Defendants’ discovery responses
2 were drawn from reliable public information sources such as government websites.
3 [See, e.g., Doc. 810, Ex. 17, App. B (listing documents from state and federal
4 government maintained websites); Ex. 52, Tables 1-9 (listing U.S. Census Bureau
5 sources); Ex. 53, at 3 (relying on election data obtained from the Arizona Independent
6 Redistricting Commission); Ex. 54, at 2 (noting Arizona Secretary of State website and
7 county recorders as sources of election data)] Such public records are self-
8 authenticating and fall within an exception to the hearsay rule. Fed. R. Evid. 803(8)
9 (excepting from exclusion by the hearsay rule “[r]ecords, reports, statements, or data
10 compilations, *in any form*, of public offices or agencies, setting forth (A) the activities of
11 the office or agency, or (B) matters observed pursuant to a duty imposed by law as to
12 which matters there was a duty to report . . .”) (emphasis added); *Gilbrook v. City of*
13 *Westminster*, 177 F.3d 839, 858 (9th Cir. 1999). Indeed, the State Defendants have
14 notified the ITCA Plaintiffs that they will *not* object to admission of documents obtained
15 from state agencies’ websites. [See Exhibit B, June 26, 2008 email from B. Bailey to K.
16 Hartman-Tellez] In short, the factual bases for the experts’ reports are admissible. For
17 this additional reason, the Defendants’ hearsay objections should be overruled, and the
18 Court should consider the expert reports.

19 III. ADDITIONAL EXHIBITS SUBMITTED IN SUPPORT OF SECTION 2
20 CLAIM (EXHIBITS 61 AND 65-69).

21 The Court should not strike Exhibits 61 and 65-69. Defendants argue that
22 the Court should strike the ITCA Plaintiffs’ Exhibits 61 and 65-69 on hearsay and
23 relevancy grounds, but both objections lack merit. [Doc. 851, at 4; Doc 810, Ex. 2, at 7-
24 8]

25 The Defendants object to a report by Dr. Lisa Handley for the Arizona
26 Redistricting Commission as hearsay. The public records and reports exception to the
27 hearsay rule on its face applies to Dr. Handley’s report. “Records, reports, statements or
28 data compilations, *in any form* of public offices or agencies, setting forth . . . (B) matters

1 observed pursuant to duty imposed by law as to which matters there was a duty to
2 report. . . .” Fed. R. Evid. 803(8) (emphasis added). As a report prepared for a public
3 redistricting agency this document falls four-square within the terms of the public
4 records rule.

5 Furthermore, because the Handley Report documents the existence of
6 racially polarized voting it may also be considered a statement against interest by a
7 person authorized by the State of Arizona, and thus not hearsay under Fed. R. Evid.
8 801(d)(2)(C). Alternatively, the circumstances under which the Handley Report was
9 issued provide sufficient guarantees of trustworthiness to qualify for the residual hearsay
10 exception under Fed. R. Evid. 807. The evidence is material to the claims under Section
11 2 of the Voting Rights Act; it is the most probative evidence of what was known – by
12 the State of Arizona and its residents – about the existence of racially polarized voting
13 prior to the adoption of Proposition 200, and it cannot reasonably be replicated; it would
14 also serve the interests of justice for the Court to consider what State officials have been
15 advised on this important issue.

16 Defendants acknowledge that Exhibit 65 was authored Rodolfo Espino,
17 one of the Gonzalez Plaintiffs’ expert witnesses. [Doc 851, at 4] As discussed above,
18 the Gonzalez Plaintiffs intend to call Dr. Espino as a witness at trial, at which time he
19 can provide testimony establishing the admissibility of Exhibit 65, his report prepared
20 for RenewtheVRA.org. In addition, Exhibit 65 is part of the Congressional Record, and
21 therefore excepted from the hearsay rule as a public record. Fed. R. Evid 803(8); Hr’g
22 Before the Subcommittee on the Constitution of the Committee on the Judiciary, H.R.
23 Rep. 109-103, v.2 at 2094-2351 (2006). In the circumstances, Dr. Espino’s report
24 concerning Voting Rights in Arizona from 1986 to 2000 may be considered by the Court
25 for purposes of summary judgment in ascertaining whether genuine issues of material
26 fact exist. *See Fraser*, 342 F.3d at 1036-1037, *Murphy*, 2006 WL 2460916, at *5.

27 The ITCA Plaintiffs submitted two records of plaintiff the Inter Tribal
28 Council of Arizona, Inc. (the “ITCA”), which are admissible under the hearsay

1 exceptions for public or business records. Fed. R. Evid. 803(6), (8). First, the
2 information contained in these exhibits is part of the legislative history of the Voting
3 Rights Act's reauthorization. Hr'g Before the Subcommittee On the Constitution of the
4 Committee on the Judiciary, House of Representatives, H.R. Rep. 109-70, at 303-04
5 (2005). Second, the ITCA is an intergovernmental organization, and its members are
6 the top elected officials of each of its 19 Member Tribes. The History of Indian Voting
7 in Arizona [Ex. 66] and the Statement of the ITCA Before the National Commission on
8 the Voting Rights Act [Ex. 67] therefore constitute "[r]ecords, reports, statements, or
9 data compilations . . . setting forth (A) the activities of the office or agency." Fed. R.
10 Evid. 803(8). As such, they are admissible to prove the truth of the matter asserted
11 therein.

12 In addition, the ITCA documents are records of "acts, events, conditions
13 [or] opinions, . . . made at or near the time by, or from information transmitted by, a
14 person with knowledge, [and] kept in the course of regularly conducted business." Fed.
15 R. Evid. 803(6). Accordingly, the business records exception to the hearsay rule also
16 applies. The ITCA Plaintiffs have identified as potential trial witnesses individuals who
17 are employed by the ITCA who may testify concerning Exhibits 66 and 67.
18 Furthermore, the ITCA attached a copy of Exhibits 66-69 to its response to Defendants'
19 Second Set of Interrogatories. Defendants have identified that document as an exhibit
20 they intend to offer at trial. [See Doc. 824, Ex. B, Ex. 26]

21 Defendants' relevance objections to Exhibits 61 and 65-69 are likewise
22 without merit. "Relevant evidence" means "evidence having any tendency to make the
23 existence of any fact that is of consequence to the determination of the action more
24 probable or less probable than it would be without the evidence." Fed. R. Evid. 401.
25 The "basic standard of relevance thus is a liberal one." *Daubert v. Merrell Dow*
26 *Pharmaceuticals, Inc.*, 509 U.S. 579, 587113 S.Ct. 2786, 2794 (1993); *see also DXS,*
27 *Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 475 (6th Cir.1996) ("[E]ven if a district
28 court believes the evidence is insufficient to prove the ultimate point for which it is

1 offered, it may not exclude the evidence if it has the slightest probative worth.”).
2 Exhibits 65-69, all of which address voting rights of Latinos or Native Americans in
3 Arizona, are relevant to the ITCA Plaintiffs’ Section 2 claim. Exhibit 69 is additionally
4 relevant to ITCA Plaintiffs’ Fourteenth Amendment claim because it addresses
5 socioeconomic factors of Arizona’s on-reservation Indian population, including poverty
6 rates and per capita income.

7 Finally, Defendants argue – without any support or legal authority for the
8 proposition – that Exhibits 61 and 65-69 should be stricken from the record because
9 ITCA Plaintiffs did not specifically cite to those exhibits in the Statement of Facts.
10 However, a plaintiff’s failure to cite exhibits attached to summary judgment briefing
11 does not warrant striking those pages or sources not cited. *See Switzer v. Rivera*, 174 F.
12 Supp. 2d 1097, 1109 (D. Nev. 2001) (denying motion to strike and noting that “[w]hile
13 Defendants are correct that Rule 56 requires that a party opposing summary judgment
14 provide ‘specific facts,’ the Court finds no reference to ‘specific citations’ in the rule”).

15 Conclusion

16 For the foregoing reasons, the Court should deny the Motion to Strike and
17 consider (1) Exhibits 15, 17, 21, 51-57 and 59-69, (2) the ITCA Plaintiffs’ Response to
18 Defendants’ facts 8 and 13 in their entirety, and (3) the ITCA Plaintiffs’ Supplemental
19 Disputed Facts 3-4, 6-7, 9, 13-17, 21, 32-33, 38, 54-55, 64, 67 and 69-73, all of which
20 demonstrate a general issue of material fact precluding summary judgment.

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RESPECTFULLY SUBMITTED this 2nd day of July, 2008.

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I further certify that I caused a copy of the attached document to be mailed
on the 2nd day of July, 2008 to:

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