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                 UNITED STATES DISTRICT COURT
14
                NORTHERN DISTRICT OF CALIFORNIA
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16 | RON DUDUM, MATTHEW | Case No. CV 10-00504 SI
     SHERIDAN, ELIZABETH MURPHY,
17 | KATHERINE WEBSTER, MARINA | **DEFENDANTS' EVIDENTIARY**
     FRANCO and DENNIS FLYNN, | **OBJECTIONS TO DECLARATION OF**
18 | | **JONATHAN KATZ, PH.D.**
                      Plaintiffs,
19 | | Hearing Date: March 19, 2010
                                          | Time: 9:00 a.m.
20 | vs. | Place: Courtroom 10
                                          | Judge: Hon. Susan Illston
21 | JOHN ARNTZ, Director of Elections of
     the City and County of San Francisco; the
22 | CITY AND COUNTY OF SAN
     FRANCISCO, a municipal corporation;
23 | the SAN FRANCISCO DEPARTMENT
     OF ELECTIONS; the SAN FRANCISCO
24 | ELECTIONS COMMISSION; and DOES
     1-20,
25 |
                      Defendants.
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DEFENDANTS' EVIDENTIARY OBJECTIONS;   1   n:\ethics\li2010\100870\00612300.doc
USDC No. C10-00504 SI

	EVIDENCE	OBJECTIONS
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2	1. Declaration of Jonathan Katz,	**1. Fed. R. Evid. 702**:
3	Ph.D., in Support of Plaintiffs'	• Professor Katz's statements do not "assist the trier of
4	Motion for Preliminary Injunction	fact," *see* Fed. R. Evid. 702, because San Francisco's
5	("Katz Decl.") ¶ 10	ranked-choice voting ("RCV") system may be
6		understood by non-experts without any "scientific,
7		technical, or other specialized knowledge," *see id.*
8		Since 2004, hundreds of thousands of San Francisco
9		voters – without expert assistance – have used the
10		City's RCV system in six municipal elections to select
11		their local officials. The City's RCV system, and the
12		implications of the rankings it permits, is a matter of
13		common knowledge in San Francisco.
14		• Professor Katz's opinion that the concerns he
15		discussed "cause[d] some jurisdictions that use IRV to
16		require voters to rank all candidates in the race" are
17		not "based upon sufficient facts or data," *see* Fed. R.
18		Evid. 702(1). His declaration does not disclose the
19		basis for this conclusion.
20		**2. Fed. R. Evid. 602**: As a layperson, Professor Katz's
21		statement that *his* concerns "cause[d] some jurisdictions that
22		use IRV to require voters to rank all candidates in the race"
23		are inadmissible because he lacks personal knowledge of the
24		bases for other jurisdictions' decisions to use "unrestricted"
25		IRV.
26		**3. Fed. R. Evid. 403**: To the extent that Professor Katz's
27		statements have any probative value, such value is
28		substantially outweighed by their "confusion of the issues"

	and "misleading" nature. For example, Professor Katz mischaracterizes the City's RCV system as not "counting" votes even though there is no dispute that it provides voters with the opportunity to select up to three candidates for a single office and there is no dispute that the RCV tabulation process "counts" every ballot.
2. Katz Decl. ¶ 16 ("By using Restricted IRV [jurisdictions] can use their old optical scan equipment with minor modifications for both the local Restricted IRV elections as well as the non-IRV elections for state and Federal offices and ballot measures.")	**1. Fed. R. Evid. 702**: Professor Katz is not qualified to render an opinion on the ability of San Francisco to modify its voting equipment to accommodate "unrestricted" RCV elections because he has no "knowledge, skill, experience, training, or education," *see* Fed. R. Evid. 702, regarding election administration, the requirements of California election law, voting system hardware and software, or most importantly – San Francisco's optical scan voting machines. **2. Fed. R. Evid. 602**: Nor can Professor Katz offer this testimony as a layperson, because he has made no showing that he has any personal knowledge of San Francisco's optical scan equipment.
3. Katz Decl. ¶¶ 17-25 (Restricted Instant Runoff Voting in San Francisco)	**1. Fed. R. Evid. 702**: • Professor Katz's discussion of a hypothetical example of an "unrestricted" vs. "restricted" IRV election does not "assist the trier of fact," *see* Fed. R. Evid. 702, because San Francisco's RCV system may be understood by non-experts without any "scientific, technical, or other specialized knowledge," *see id.* Since 2004, hundreds of thousands of San Francisco voters – without expert assistance – have used the City's RCV system in six municipal elections to elect

their local officials. The City's RCV system, and the implications of the rankings it permits, is a matter of common knowledge in San Francisco.

- Professor Katz's analysis of hypothetical election results are not the "product of reliable principles and methods," *see* Fed. R. Evid. 702(2), and reflect no "more than subjective belief or unsupported speculation," *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993). In a separate case, a Washington State Superior Court concluded that Professor Katz improperly assumed facts "that determine[d] the outcome [he] obtain[ed]." *See* Request for Judicial Notice, Exh. 7, at 16 (*Borders v. King County*, No. 05-2-00027-3 (Wash. Sup. Ct. Jun. 24, 2005) (final judgment)). Professor Katz does the same here, by making the following assumptions: (a) significant numbers of voters would rank more than three candidates if provided the opportunity to do so, Katz Decl. ¶¶ 17-18; and (b) voters that cast ballots in primary elections always return in vote in runoff elections in the same numbers, *id.* ¶ 23 n.14.

- Professor Katz's hypothetical is not "based upon sufficient facts or data," *see* Fed. R. Evid. 702(1). The actions and voter preferences that he assumes in his example are not informed by any actual past local election results, or any empirical studies or surveys of how San Francisco voters would behave in an IRV system in which voters could rank as many choices as

DEFENDANTS' EVIDENTIARY OBJECTIONS;
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	there are candidates on the ballot. **2. Fed. R. Evid. 403**: To the extent that Professor Katz's statements have any probative value, that value is substantially outweighed by their "confusion of the issues" and "misleading" nature. For example, he equates "strategic voting" – a theoretical voting tactic that could be used in many types of elections, RCV or otherwise – with "misreporting of election results" – even though those two concepts are completely distinct. *Id.* ¶ 24.
4. Katz Decl. ¶¶ 26-30 (San Francisco IRV Election Results)	**1. Fed. R. Evid. 702**: • Professor Katz's statements do not "assist the trier of fact," *see* Fed. R. Evid. 702, because San Francisco's RCV system may be understood by non-experts without any "scientific, technical, or other specialized knowledge," *see id.* Since 2004, hundreds of thousands of San Francisco voters – without expert assistance – have used the City's RCV system in six municipal elections to elect their local officials. The City's RCV system, and the implications of the rankings it permits, is a matter of common knowledge in San Francisco. This objection particularly applies here because Professor Katz's analysis in this section of his declaration is no more than the calculation of percentages based upon publicly available election results. **2. Fed. R. Evid. 403**: • To the extent that Professor Katz's statements have any probative value, they are substantially outweighed

1   by their "confusion of the issues" and "misleading"

2   nature. For example, ballots may become "exhausted"

3   for many reasons, not necessarily because a voter

4   ranked three candidates – none of whom were the last

5   two candidates to survive RCV tabulation. *See* Arntz

6   Decl. ¶ 12. A ballot can be exhausted in the manner

7   that Professor Katz suggests – where a voter ranks

8   three candidates and each of those candidates is

9   eliminated during the tabulation process. *See id.*

10 However, many ballots are also exhausted when a

11 voter chooses to rank only one or two candidates, and

12 those candidates are eliminated during the RCV

13 tabulation. *See id.* But in either instance, Professor

14 Katz's statement that "voters who cast . . . exhausted

15 ballots were disenfranchised" is clearly misleading.

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17 Dated: February 26, 2010

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