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13
14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 SANTEYA DANYELL WILLIAMS,
MARY RUTH SCOTT, KAREN
17 LATREECE COLEMAN, PRISCILLA
BUNTON, and ALYCE DENISE PAYNE,
18 on behalf of themselves and all others
similarly situated,

19 Plaintiffs,

20 v.

21 CITY OF ANTIOCH,

22 Defendant.

No. C-08-2301 SBA

**MOTION TO STRIKE EXHIBITS AND
PORTIONS OF DECLARATIONS AND
OBJECTIONS TO EVIDENCE**

DATE: January 12, 2010

TIME: 1:00 PM

BEFORE: Honorable Sandra Brown
Armstrong

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<u>Page</u>
I. THE COURT SHOULD STRIKE ALL DOCUMENTS THAT WERE NOT PRODUCED DURING DISCOVERY	2
II. THE COURT SHOULD STRIKE EXHIBITS TO THE SCHWITTERS AND BITTNER DECLARATIONS THAT HAVE BEEN ALTERED OR CREATED FOR PURPOSES OF DEFENDANT’S OPPOSITION	5
III. THE COURT SHOULD STRIKE ALL EXHIBITS THAT VIOLATE CIVIL LOCAL RULE 7-5.....	7
IV. THE COURT SHOULD STRIKE HEARSAY STATEMENTS AND STATEMENTS LACKING PERSONAL KNOWLEDGE FROM DEFENDANT’S DECLARATIONS	9
A. Inadmissible Hearsay Statements.....	9
B. Statements Lacking Personal Knowledge.....	10
V. THE COURT SHOULD STRIKE IMPROPER EXPERT TESTIMONY	11

TABLE OF AUTHORITIESPage**FEDERAL CASES**

1		
2		
3	FEDERAL CASES	
4	<i>Cambridge Electronics Corp. v. MGA Electronics, Inc.</i>	
5	227 F.R.D. 313 (C.D. Cal. 2004)	2, 3
6	<i>Carmen v. San Francisco Unified School Dist.</i> ,	
7	237 F.3d 1026 (9th Cir. 2001).....	8
8	<i>Mannick v. Kaiser Foundation Health Plan, Inc.</i> ,	
9	2006 WL 2168877 (N.D. Cal. 2006).....	8, 9
10	<i>Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec</i> ,	
11	854 F.2d 1538 (9th Cir. 1988).....	8
12	<i>Orr v. Bank of America</i> ,	
13	285 F.3d 764 (9 th Cir. 2002).....	9
14	<i>Ortiz-Lopez v. Sociedad Espanola de Auxilio Mutuo y Beneficiencia de Puerto Rico</i> ,	
15	248 F.3d 29 (1st Cir. 2001)	3
16	<i>Self-Ins. Inst. of America, Inc. v. Software and Info. Indus. Ass'n.</i> ,	
17	208 F.Supp.2d 1058 (C.D. Cal. 2000)	3
18	<i>Yeti by Molly, Ltd. v. Deckers Outdoor Corp.</i>	
19	259 F.3d 1101 (9th Cir. 2001).....	3

RULES

20	Civil Local Rule 7-5.....	<i>passim</i>
21	Fed. R. Civ. P. 26	2, 3, 11
22	Fed. R. Civ. P. 37	<i>passim</i>
23	Fed. R. Evid. 802	2, 5, 9
24	Fed. R. Evid. 602	2, 10
25	Fed. R. Evid. 702	2, 11
26		
27		
28		

NOTICE

1
2 Please take notice that on January 12, 2010 at 1:00 p.m., or as soon thereafter as this
3 motion may be heard, before the Honorable Saundra Brown Armstrong, U.S. District Court,
4 1301 Clay Street, Suite 400, Oakland, California, Plaintiffs will, and hereby do, move for an
5 order striking portions of the declarations and exhibits filed in support of Defendant's Opposition
6 to Class Certification. A complete list of the evidence to which Plaintiffs object is attached as
7 Exhibit A to the Declaration of Kendra Fox-Davis. This motion is based on this Notice of
8 Motion, the supporting memorandum of points and authorities, the Declarations of Kendra Fox-
9 Davis and Tony Dang and all accompanying attachments thereto, and any further evidence or
10 argument submitted at the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES**IN SUPPORT OF MOTION SUMMARY OF ARGUMENT**

11
12
13 Defendant's declarations and accompanying exhibits in support of its Opposition to Class
14 Certification are replete with evidentiary and procedural defects, and demonstrate a wholesale
15 disregard for the rules of evidence and the rules of this Court:

- 16 • Defendant has submitted dozens of pages of documents that were improperly
17 withheld during discovery and provided to Plaintiffs for the first time in
18 Defendant's Opposition. Under Federal Rule of Civil Procedure 37(c)(1), "[i]f a
19 party fails to provide information . . . as required by Rule 26(a) or (e), the party is
20 not allowed to use that information or witness to supply evidence on a motion . . .
21 unless that failure was substantially justified or is harmless." The parties have
22 engaged in an extensive discovery process, and Defendant has had ample
23 opportunity to disclose all responsive documents. There is no justification for
24 withholding such documents during discovery and then sandbagging Plaintiffs in
25 the Opposition to Class Certification.
- 26 • Defendant has submitted documents that have been created and/or apparently
27 altered for its Opposition, though the declarant who attests to the documents
28 claims that they "are kept in the course of regularly conducted business activity."

1 Defendant has also submitted audio files that have been altered and spliced from
2 their original state, although this is nowhere noted in the supporting declaration.

- 3 • Defendant consistently violates Civil Local Rule 7-5, which requires that
4 “[f]actual contentions made in support of or in opposition to any motion must be
5 supported by an affidavit or declaration and by appropriate references to the
6 record.” Rather than provide “appropriate references,” Defendant in numerous
7 instances just cites vaguely to entire exhibits or to lengthy deposition transcripts
8 (none of which include the required court reporter certification).
- 9 • Defendant has submitted numerous declarations that contain obvious hearsay and
10 that include statements for which the declarants have no personal knowledge, in
11 violation of Federal Rules of Evidence 802 and 602 and Civil Local Rule 7-5(b).
12 Particularly troubling are those statements that simply reflect declarants passing
13 along rumor or innuendo about what other people told them about Section 8
14 tenants or neighborhood problems.
- 15 • The declaration of Antioch Police Chief Jim Hyde includes improper statements
16 that purport to opine about whether Defendant’s conduct is discriminatory. This
17 testimony should be struck pursuant to Fed. R. Civ. P. 26(a)(2) and 37(c), Fed. R.
18 Evid. 702, and Civil Local Rule 7-5(b), because Chief Hyde is not an expert and
19 does not purport to be so, the statements are conclusory, and they represent
20 conclusions about an ultimate question of law.

21 ARGUMENT

22 **I. THE COURT SHOULD STRIKE ALL DOCUMENTS THAT WERE** 23 **NOT PRODUCED DURING DISCOVERY**

24 Under Rule 37(c)(1) of the Federal Rules of Civil Procedure, a party is generally
25 precluded from using evidence not disclosed as required under Rule 26(e)(1).¹ *See Cambridge*

26 _____
27 ¹ Rule 26(e)(1) of the Federal Rules of Civil Procedure provides that litigants have a continuing
28 duty to supplement or correct all interrogatory responses and requests for production if their prior

(Footnote Continued on Next Page.)

1 *Electronics Corp. v. MGA Electronics, Inc.* 227 F.R.D. 313, 321 (C.D. Cal. 2004); *Self-Ins. Inst.*
 2 *of America, Inc. v. Software and Info. Indus. Ass'n.*, 208 F.Supp.2d 1058, 1066 (C.D. Cal. 2000).
 3 Rule 37 provides that “[i]f a party fails to provide information . . . as required by Rule 26(a) or
 4 (e), the party is not allowed to use that information . . . to supply evidence on a motion, at a
 5 hearing, or at trial, unless the failure was substantially justified or harmless.” Fed. R. Civ. P.
 6 37(c)(1). The burden of demonstrating that the failure is substantially justified or harmless falls
 7 on the offending party. *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp.* 259 F.3d 1101, 1107
 8 (9th Cir. 2001).

9 As noted by the Ninth Circuit in *Yeti*, Rule 37 is intended to provide a strong inducement
 10 for disclosure, and a “self-executing” and “automatic” sanction for the failure to produce
 11 material during the discovery process. *Id.* at 1106 (citing Fed. R. Civ. P. 37 advisory
 12 committee's note (1993) and noting “particularly wide latitude” given to district courts to exclude
 13 evidence under this provision). “Courts have upheld the striking of such evidence even when the
 14 litigant’s entire cause of action or defense has been precluded.” *Id.* (citing *Ortiz-Lopez v.*
 15 *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de Puerto Rico*, 248 F.3d 29, 35 (1st Cir.
 16 2001)). Nor is it necessary to show willful intent on the part of the offending party; exclusion is
 17 an appropriate remedy in the absence of bad faith or an explicit court order. *See Yeti*, 259 F.3d at
 18 1106.

19 Here, the parties have engaged in an extensive discovery process. *See* Declaration of
 20 Kendra Fox-Davis ¶ 3. Yet Defendant has now submitted with its Opposition dozens of pages of
 21 new documents that were not produced during discovery, even though these documents are
 22 directly responsive to discovery requests that Plaintiffs propounded. *See id.* ¶¶ 3-5, Exs. A-C.
 23 These unproduced documents include such critical material as official minutes from City Council
 24

25 _____
 26 (Footnote Continued from Previous Page.)

27 responses are either incomplete or incorrect. Fed. R. Civ. P. 26(e)(1); *see also Cambridge*
 28 *Electronics Corp.*, 227 F.R.D. at 321.

1 meetings and Quality of Life Forums, CAT reports, APD audio files, and purported letters of
2 eviction to Section 8 tenants.²

3 A complete listing of the unproduced documents is provided in Exhibit A to the
4 Declaration of Kendra Fox-Davis. By way of illustration, the following unproduced documents
5 were attached as exhibits to the declaration of Antioch City Administrator Jim Jakel:

- 6 • Exhibit A, City Council Subcommittee Report regarding the creation and purpose of
- 7 Quality of Life forums
- 8 • Exhibit E, Minutes from 7/22/2006 Quality of Life Forum
- 9 • Exhibit Q, Agenda and Minutes from 5/04/2009 Quality of Life Forum No. 8

10 All of these types of documents were the subject of specific discovery requests. *See, e.g.*, Fox-
11 Davis Decl. ¶ 5, Ex. C (Plaintiffs’ October 17, 2008 First Request for Production) (requesting,
12 *inter alia*, “All records of meetings attended by any Antioch employee or elected official,
13 including but not limited to the Mayor, City Council Members, Crime Prevention Commission
14 Members, City Manager, Police Chief, police officers, and the City Attorney, where population,
15 demographic changes, quality of life or neighborhood improvement issues in Antioch were
16 discussed.”). Indeed, other similar documents were produced in discovery – just not these upon
17 which Defendant now relies. *See id.*

18 Similarly, the declarations of several Antioch Police Department officers and CAT
19 members include unproduced documents as exhibits. For example, the Declaration of Officer
20 Bittner attaches unproduced letters he claims are from homeowner Riaz Patras and his wife,
21 evicting section 8 tenants. *See Bittner Decl., Exs. A, B.*³ Given that these documents are highly

22
23 ² Even when Defendant’s counsel filed documents that *had* been produced in discovery, they
24 regularly failed to use Bates-stamped versions of the documents. This meant that Plaintiffs had
25 to first sift through Defendant’s voluminous filing even to uncover which documents had never
26 before been produced in discovery. On December 11, 2009, Plaintiffs’ counsel contacted
27 Thomas Beatty, counsel for Defendant, raising questions about a number of documents that
28 appeared to fall into this category. *See Fox-Davis Decl. ¶¶ 3-4, Ex. B.* Defendant’s counsel
responded on December 15, 2009, confirming that numerous documents identified by Plaintiffs
had in fact not been produced. *See id.* ¶ 4, Ex. B.

³ In fact, the letters are from Mr. Patras’ deceased mother-in-law. As discussed in section III
infra, lack of personal knowledge is another problem that runs throughout Defendant’s

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1 relevant to the issues in this case, it is not surprising that Plaintiffs requested them in discovery,
2 yet they were never produced. *See* Fox-Davis Decl. ¶ 5, Ex. C.

3 Plaintiffs have been denied the opportunity to analyze these documents and to include
4 them in Plaintiffs' examination of Defendant's employees, including city officials, and Antioch
5 Police Department and Community Action Team members. Defendant had ample opportunity to
6 disclose this information and to supplement its discovery responses but chose instead to bury
7 dozens of pages of new documents in its Opposition to Plaintiffs' Class Certification Motion.
8 The Court should strike these unproduced documents pursuant to Fed. R. Civ. P. 37.

9 **II. THE COURT SHOULD STRIKE EXHIBITS TO THE**
10 **SCHWITTERS AND BITTNER DECLARATIONS THAT HAVE**
11 **BEEN ALTERED OR CREATED FOR PURPOSES OF**
12 **DEFENDANT'S OPPOSITION**

13 At least three of the exhibits to the Declaration of Sgt. Mitchell E. Schwitters have been
14 created and/or apparently altered for purposes of Defendant's Opposition. This is not disclosed
15 to the Court; to the contrary, Sgt. Schwitters states in his declaration that all of the records he
16 identifies were made "at or near the time of the event described" and "in the course of regularly
17 conducted business activity." *See* Schwitters Decl. at 8:13-16.⁴ Similarly, the two audio files
18 attached to the Declaration of Desmond Bittner have both been altered and spliced from their
19 original state – again without any indication to the Court of this alteration in the supporting
20 declaration. Because none of these exhibits are regularly-created business records, they
21 constitute hearsay and should be stricken. Fed. R. Evid. 802.

22 Exhibit B to the Schwitters declaration is entitled "APD CAT OVERVIEW FROM JULY
23 2006 THRU SEPTEMBER 2009." The exhibit contains one-page reports for each month. The

24 _____
(Footnote Continued from Previous Page.)

25 declarations.

26 ⁴ Because many of Defendant's declarations do not have paragraph numbers, Plaintiffs cite them
27 herein by their page number, then a colon, then the line number(s). For consistency's sake,
28 Plaintiffs maintain this citation procedure even for those declarations that do have paragraph
numbers.

1 top portion of each page is entitled “CAT Activity,” and includes bullet point summaries similar
2 to previously produced CAT monthly reports. The bottom portion of each page is entitled
3 “Phone log examples,” and includes narratives of phone calls apparently made to the CAT team.
4 These phone log narratives have never been produced to Plaintiffs. When Plaintiffs’ counsel
5 brought this to Defendant’s counsel’s attention, Defendant’s counsel admitted that “[t]his
6 document was created in response to your motion” and that it was “put together as a rebuttal
7 document.” Fox-Davis Decl., Ex. B. Defense counsel provided no explanation for why Sgt.
8 Schwitters in his declaration had testified to the contrary that “[t]hese identified records above
9 were either made by me or members of the Department at or near the time of the event described,
10 or information transmitted, with knowledge, and are kept in the course of regularly conducted
11 business activity.” Schwitters Decl. at 8:13-15.

12 Similarly, Exhibit D to the Schwitters declaration is a map of the City of Antioch that
13 purports to show the location of all properties identified as CAT files. Schwitters Decl. 8:2-3.
14 Sgt. Schwitters also refers to this exhibit in his declaration as one that is kept in the course of
15 regularly conducted business activity. *Id.* at 8:13-15. Because this map had never been
16 produced in discovery, Plaintiffs’ counsel asked Defendant’s counsel why not. *See* Fox-Davis
17 Decl. ¶ 4, Ex B. In response, as with Exhibit B, Defendant’s counsel admitted that this map
18 “was created as a rebuttal response” to Plaintiffs’ class certification motion. *See id.* Ex. B.
19 Defendant’s counsel provided no explanation for why Sgt. Schwitters testified otherwise in his
20 declaration to the Court.

21 Exhibit C to the Schwitters declaration has apparently been altered. This exhibit is a
22 CAT Monthly report for July 2006. In the version of the document produced to Plaintiffs in
23 discovery, the number of section 8 cases referred to the Housing Authority is a typewritten
24 number “10”. Dang Decl. (Motion to Strike), Ex. B. In the version submitted to the Court as
25 Exhibit C, the typewritten number has been crossed out, and the number “8” is handwritten
26 instead. It is unclear to Plaintiffs when this alteration was made. If it was made at some point
27 prior to the instant motion, it is a document that Defendant failed to produce as required by
28 discovery rules, *see supra* at Section I. If it was altered for purposes of Defendant’s Opposition,

1 it is not a business record that falls under a hearsay exception. In either case, it should be
2 stricken.

3 The two audio recordings of police contacts, attached to the Bittner declaration, have also
4 been altered. In neither case is this noted for the Court. The first, Exhibit C, has not only been
5 shortened from the version produced to Plaintiffs in discovery, but is apparently different parts of
6 one audio recording spliced together. *See* Dang Decl. (Motion to Strike) ¶¶ 4-5. The second
7 audio file, Exhibit D, has also been cut. Chief among the excisions from this audio file is the
8 following exchange between Officers Bittner and Dillard:

9 Dillard: *I will never rent a Section 8 home, never. Never.*

10 Bittner: It is a nightmare.

11 Dillard: *They know that if they sit here and act ghetto enough*, and scream and
12 holler and yell enough, that decent reasonable people will finally give in and just
13 go away. Or -- or cave in. And that's what's happening right now. And I feel sick
that I am brokering it.

14 Dang Decl., ¶ 7, Ex. A (emphasis supplied). While it is clear why Defendant did not want to
15 place this evidence before the Court, it is equally clear that it is highly improper to simply
16 present an excised version as a complete exhibit. Exhibits C and D to the Bittner Declaration
17 should be stricken.

18 These are just the document alterations that Plaintiffs have been able to uncover to date.
19 Plaintiffs respectfully request that the Court order Defendant to disclose any other exhibits filed
20 with its Opposition that have been altered from their original form or created for this litigation,
21 so that the Court may take appropriate action as to those as well.

22 **III. THE COURT SHOULD STRIKE ALL EXHIBITS THAT VIOLATE**
23 **CIVIL LOCAL RULE 7-5.**

24 Defendant's Opposition also contains scores of factual assertions that are supported only
25 by vague references to voluminous declarations and exhibits. This practice violates Civil Local
26 Rule 7-5, which mandates that "[f]actual contentions made in support of or in opposition to any
27 motion must be supported by . . . declaration and by appropriate references to the record." As
28 explained more fully in Plaintiffs' Reply Brief In Support Of Class Certification, the Court

1 should disregard those factual contentions in Defendant’s brief that are not properly supported by
2 “appropriate references” to the record. *See* Reply Brief at Section II. A.; *see also Carmen v. San*
3 *Francisco Unified School Dist.*, 237 F.3d 1026, 1030-31 (9th Cir. 2001) (“the district court need
4 not examine the entire file for evidence . . . where the evidence is not set forth in the opposing
5 papers with adequate references so that it could conveniently be found.”); *Nilsson, Robbins,*
6 *Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988)
7 (district court need not search through voluminous record where counsel fails to provide
8 appropriate references as required by local rules). In addition, Plaintiffs hereby request that the
9 Court strike on this basis those exhibits for which Defendants fail to provide appropriate
10 citations.

11 Most egregiously, Defendant has provided the Court with five voluminous binders
12 pertaining to the named plaintiffs. *See* Exhibits attached to Declaration No. 2 of Thomas G.
13 Beatty in Support of Defendant City of Antioch’s Memorandum of Points and Authorities
14 Opposing Class Certification. These are a mish-mash of various types of documents (attorney-
15 generated lists, police logs, police reports, etc.) that by Plaintiffs’ count total approximately 3300
16 pages. Defendant candidly concedes the “sheer volume of these documents” and states that “it is
17 not expected that the Court can carefully review all 5 such binders” Opposition Brief at 10.
18 Neither the Beatty declaration nor the brief provide any specific citations to direct the Court to
19 what is contained therein, or to separate out different categories of documents that have been
20 jumbled together. *See* Beatty Decl. No. 2 ¶ 4 (“many may involve complaints by the plaintiffs,
21 as opposed to being against the plaintiffs or residents of their households”). This evidence
22 should be stricken, as it fails to comply with Local Rule 7-5. *See Mannick v. Kaiser Foundation*
23 *Health Plan, Inc.*, 2006 WL 2168877 (N.D. Cal. 2006) at *18 (refusing to consider “evidence
24 that is buried in a two-foot tall stack of paper”).

25 Similarly, Defendant attaches voluminous deposition transcripts as exhibits to
26 Declaration No. 1 of Thomas G. Beatty and then simply refers to the transcripts generally in the
27 brief, often at the beginning or end of a long tirade purporting to be supported by the deposition.
28 Not *once* does Defendant provide the Court with a specific page number (much less line number)

1 for any of these deposition cites.⁵ Many of the deposition excerpts run to 40 pages or more. *See*,
 2 *e.g.*, Beatty No. 1 Decl., Ex. A. (Payne Excerpt) (60 pages); *id.*, Ex. B (Bunton Excerpt) (48
 3 pages); *id.*, Ex. D (M. Scott Excerpt) (54 pages); *id.*, Ex. K (Gray Excerpts) (61 pages); *id.*, Ex. L
 4 (Alexander Excerpt) (63 pages).

5 The Court should decline Defendant's invitation to sift through a voluminous record in
 6 search of support for Defendant's contentions. The factual contentions in the brief that are not
 7 supported by appropriate citations should be disregarded, and the five binders and deposition
 8 transcripts should be stricken.

9 **IV. THE COURT SHOULD STRIKE HEARSAY STATEMENTS AND**
 10 **STATEMENTS LACKING PERSONAL KNOWLEDGE FROM**
 11 **DEFENDANT'S DECLARATIONS**

12 Defendant's declarations are equally problematic, disregarding fundamental evidentiary
 13 rules that require a declarant's testimony to be based on personal knowledge and that bar hearsay
 14 statements.

14 **A. Inadmissible Hearsay Statements**

15 Federal Rule of Evidence 802 prohibits hearsay statements, subject to limited exceptions.
 16 The declarations filed in support of Defendant's Opposition to Class certification are replete with
 17 obvious hearsay statements for which no exception exists.

18 For example, many of the citizen declarations repeat what other people told the declarant
 19 about Section 8 tenants or problems in the neighborhood. These are not only inadmissible, they
 20 also go to the heart of why hearsay is generally excluded: a court must base its rulings on facts,
 21 not rumor and innuendo. Thus, Jesse Zuniga's declaration includes several statements told to
 22 Mr. Zuniga by his neighbors, other homeowners, and a Department of Fair Employment and
 23 Housing Investigator. He states that "One of my African-American neighbors informed me that
 24 teenagers from the home had been throwing rocks at my dog and into my pool when I was
 25 _____

26 ⁵ Nor does Defendant provide the reporter's certification for any of the transcripts. This is in and
 27 of itself grounds for excluding the exhibits. *See Orr v. Bank of America*, 285 F.3d 764, 774 (9th
 28 Cir. 2002) (citing cases).

1 away.” Zuniga Decl., 2:24-25. Mr. Zuniga also repeats conversations he had with other
 2 homeowners: “I talked to the owner who stated that the tenants were section 8. . . .” *Id.* at 2:21-
 3 22. In another second-hand account of a conversation, Mr. Zuniga describes what a homeowner
 4 told him about a tenant: “[d]uring our conversation, he walked next door and spoke to the tenant
 5 – she yelled and screamed . . . He came back and said ‘My hands are tied.’” *Id.* at 3:6-8.
 6 Mr. Zuniga also claims that an unnamed Department of Fair Housing and Employment
 7 investigator “stated that he wouldn’t tolerate the unruly behavior in his neighborhood either.” *Id.*
 8 at 3:16.

9 Other declarations on other topics are also replete with hearsay, and sometimes hearsay
 10 upon hearsay. *See, e.g.*, Declaration of Gary Gilbert 4:27-5:4 (stating that Congresswoman Ellen
 11 Tauscher’s aide “advised me that Congresswoman Tauscher was extremely upset that Supervisor
 12 Glover refused to meet with members of UCBN; and as a result of his behavior, the
 13 congresswoman telephoned Supervisor Glover from Washington D.C. and reminded him
 14 that . . .”).

15 This type of classic hearsay testimony is inadmissible and should be struck from
 16 Defendant’s declarations. A chart of objections, including the portions of each declaration
 17 Plaintiffs seek to strike and an individualized analysis of each objection, is included in Exhibit A
 18 to the Fox-Davis Declaration.

19 **B. Statements Lacking Personal Knowledge**

20 Similarly, Federal Rule of Evidence 602 requires that a witness’ testimony be based on
 21 personal knowledge, and Civil Local Rule 7-5(b) requires that declarations “may contain only
 22 facts . . . and must avoid conclusions and argument.” Yet many of Defendant’s declarants make
 23 bald statements without even attempting to establish a foundation of personal knowledge, or
 24 otherwise set forth conclusory or argumentative statements.⁶

25

26

27 ⁶ As with the other categories of evidence to which Plaintiffs object, a complete listing of all
 28 such statements is included within Exhibit A to the Fox-Davis Declaration.

28

1 Thus, Declarant Hans Ho provides a lengthy description of a complaint he received from
 2 a neighbor in May 2008, with no indication that he has any personal knowledge of the incident.
 3 See Ho Decl. 2:24-3:1. He ends the story by saying he is aware that Plaintiffs in this case allege
 4 racial discrimination and that “I am certain that is not the case” – about as conclusory a statement
 5 as can be imagined. *Id.* 3:2-3. His declaration concludes with the following unsupported
 6 assertion: “APD/CAT . . . don’t attempt to have tenants removed unless many earlier efforts to
 7 resolve the problem have proven unsuccessful.” *Id.* 4:16-19.

8 Similarly, Jesse Zuniga’s declaration includes a lengthy description of what he believes
 9 to be limitations on permissible activity under the Section 8 program. See Zuniga Decl. 4:6-12.
 10 For example, Mr. Zuniga asserts that “[i]f a Section 8 recipient allows a parolee or probationer . .
 11 . to live in their household they must understand that law enforcement officials may conduct a
 12 probation or parole search without probable cause . . . A section 8 recipient, who signs the
 13 Housing Authority contract, is also aware of the guidelines they must abide by (i.e., no
 14 unauthorized occupants, disturbances, etc.).” *Id.* at 4:6-10. Although Mr. Zuniga states that he is
 15 a retired from the Hayward and Tracy police departments, his declaration provides no basis for
 16 any knowledge of the rules governing the Contra Costa County Housing Authority or the
 17 Section 8 program, and his contention regarding what Section 8 recipients “must understand”
 18 when they sign their housing contract is sheer speculation.

19 **V. THE COURT SHOULD STRIKE IMPROPER EXPERT**
 20 **TESTIMONY**

21 Finally, Defendant improperly presents a lay witness as an expert. Chief Hyde asserts that
 22 “[i]n reviewing [police reports], I did not see any signs of racial or economic profiling.” Hyde
 23 Decl. 9:10-11. Hyde goes on to critique the findings of Plaintiffs’ expert witnesses, contending
 24 that “none of [plaintiffs’] experts have expressed any opinion with regard to racial or economic
 25 profiling based on their review of the Community Action Team files.” Hyde Decl. 10:2-4.

26 The conclusions drawn by this testimony require specialized knowledge, yet there are no
 27 facts establishing that Hyde qualifies as an expert on the subject of his testimony. Consequently,
 28 this testimony should be struck pursuant to Fed. R. Civ. P. 26(a)(2) and 37(c), Fed. R. Evid. 702,

1 and Civil Local Rule 7-5(b), because Chief Hyde is not an expert nor purports to be so, the
2 statements are conclusory, and they represent conclusions about an ultimate question of law.

3 **CONCLUSION**

4 For the reasons set forth above, Plaintiffs respectfully request that their Motion to Strike
5 be granted and that the exhibits and portions of declarations set forth in Exhibit A to the Fox-
6 Davis Declaration be stricken. Plaintiffs additionally request that the Court order Defendant to
7 immediately disclose whether any additional exhibits filed in conjunction with its Opposition
8 have been altered or modified from their original form or otherwise created specifically for
9 purposes of this litigation.

10 DATED: December 18, 2009

LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF
THE SAN FRANCISCO BAY AREA

11
12
13 By: _____ /s/ Oren Sellstrom
14 Oren Sellstrom
Attorneys for Plaintiffs and the Proposed Class
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