TENTATIVE RULING

HEARING DATE: **January 6, 2012** TRIAL: February 7, 2012

CASE: **Felicitas Gonzalez, et al. v. City of Compton, et al.**

CASE NO.: **BC450494**

Opposed: **Yes**

MOTION FOR SUMMARY JUDGMENT

MOVING PARTY: Plaintiffs Felicitas Gonzalez and Flora Ruiz

RESPONDING PARTY(S): Defendant City of Compton

PROOF OF SERVICE:

- Correct Address: Yes
- 75 (CCP § 437c): Ok. Served via messenger on October 19, 2011 (79 days).

- **DENY motion for summary judgment.**

ANALYSIS

Plaintiffs' Request For Judicial Notice

Plaintiffs request that the Court take judicial notice of the following: (1) Compton City Charter, §§ 500, 1301 and 1302; (2) Chapter VI, Election Procedures, Compton Municipal Code; and (3) Pages from the website of the United States Census Bureau regarding the definition of the term "Latino." Request No. 1 is GRANTED per Evid. Code § 451(a)(charter provisions of California cities and counties). Request No. 2 is GRANTED. The Court may take judicial notice of the regulations and legislative enactments of a public entity. Evid. Code § 452(b). Request No. 3 is GRANTED. The Court may take judicial notice of information found on the United States Census Bureau's web site. Moehring v. Thomas (2005) 126 Cal.App.4th 1515, 1523 n.4.

Defendant's Request For Judicial Notice

Defendant requests that the Court take judicial notice of the following: (1) January 19, 2011 ruling by Judge Ann I. Jones in this case denying Plaintiffs' motion for a preliminary injunction; and (2) Documents from Avita, et al. v. Tulare Local Healthcare District, Tulare Superior Court, Case No. 07-224773.

Request No. 1 is GRANTED per Evid. Code § 452(c)(official judicial acts) and § 452(d)(court records). Request No. 2 is DENIED. These documents are hearsay and irrelevant to the instant motion. "The hearsay rule applies to statements contained in judicially noticed documents, and precludes consideration of those statements for their truth unless an independent hearsay exception exists." North Beverly Park Homeowners Assn. v. Bisno (2007) 147 Cal.App.4th 762, 778. The Court need only take judicial notice of relevant materials. Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal.4th 1057, 1063.

Plaintiffs' Evidentiary Objections

No. 1: OVERRULED. Declarant has personal knowledge; objection goes to weight.
No. 2: OVERRULED. Declarant has personal knowledge; objection goes to weight.
No. 3: OVERRULED. Votes are acts of legal significance. "This is not hearsay but is 'original evidence. . .. [W]ritten or oral utterances, which are acts in themselves constituting legal results in issue in the case, do not come under the hearsay rule.'" Kunec v. Brea Redevelopment Agency (1997) 55 Cal.App.4th 511, 524.
No. 4: OVERRULED. Declarant has personal knowledge; objection goes to weight.
No. 5: OVERRULED. Not hearsay.
No. 6: OVERRULED. Votes are non-hearsay acts of legal significance. Kunec, supra, 55 Cal.App.4th at 524.
No. 7: OVERRULED. Declarant has personal knowledge; objection goes to weight.
No. 8: OVERRULED. Objection to entire declaration is not justified.
No. 9: OVERRULED. Objection to entire declaration is not justified.
No. 10: SUSTAINED. Exh A: Rough draft deposition transcripts cannot be cited. CCP § 2025.540(b). Exh. B: No reporter's certification attached.
No 11(1): OVERRULED. Court may take judicial notice of court records (Evid. Code § 452(d)) and official judicial acts (Evid. Code § 452(c)).
No. 11(2)(a)-(d): SUSTAINED. Irrelevant; hearsay.

Motion For Summary Judgment

1. Sole Cause of Action for Violation of the California Voting Rights Act of 2001 ("CVRA").

> The CVRA [California Voting Rights Act—Elections Code §§ 14025-14032] provides a private right of action to members of a protected class where, because of "dilution or the abridgement of the rights of voters," an at-large election system "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election ... ." (§ 14027; see § 14032.) To prove a violation, plaintiffs must show racially polarized voting. They do not need to show that members of a protected class live in a geographically compact area or demonstrate an intent to discriminate on the part of voters or officials. (§ 14028.)

Sanchez v. City of Modesto (2006) 145 Cal.App.4th 660, 667.

The Sanchez court summarized the provisions of the CVRA [Elections Code §§ 14025-14032] as follows:

—Section 14027 sets forth the prohibited government conduct: "An at-large method of election may not be imposed or applied **in a manner that impairs the ability** of a protected class **to elect candidates of its choice or its ability to influence the outcome of an election**, as a result of the **dilution or the abridgement of the rights of voters** who are members of a protected class, as defined pursuant to Section 14026." (Bold emphasis added.)

—A protected class is a class of voters "who are members of a race, color or language minority group, as this class is referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.)." (§ 14026, subd. (d).)

—Section 14032 gives a right of action to voters in protected classes.

—Section 14028 lists facts relevant to proving a violation: The dilution or abridgement described in section 14027 is established by showing racially polarized voting. (§ 14028, subd. (a).) Circumstances to be considered in determining whether there is racially polarized voting are described. (§ 14028, subd. (b).) Lack of geographical concentration of protected class members and lack of discriminatory intent by the government are not factors in determining liability. (§ 14028, subds. (c), (d).) Certain other probative factors are included. (§ 14028, subd. (e).)

—The court shall "implement appropriate remedies, including the imposition of district-based elections," if it finds liability. (§ 14029.)

—Prevailing plaintiffs shall be awarded attorney fees. Prevailing defendants can recover only costs, and then only if the action was frivolous. (§ 14030.)

Sanchez v. City of Modesto (2006) 145 Cal.App.4th 660, 669-70.

More specifically Elections Code § 14026(e) defined "racially polarized voting" as follows:

(e) "Racially polarized voting" means voting in which there is a **difference,** as defined in case law regarding enforcement of the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.), **in the choice** of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.) to establish racially polarized voting **may** be used for purposes of this section **to prove that elections are characterized by racially polarized voting.**

(Bold emphasis and underlining added.)

Elections Code § 14028 provides:

> (a) **A violation of Section 14027 is established if it is shown** that **racially polarized voting occurs** in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision. **Elections conducted prior to the filing of an action pursuant to Section 14027 and this section are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.**
>
> (b) The occurrence of racially polarized voting shall be determined from **examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class. One circumstance** that may be considered in determining a violation of Section 14027 and this section is **the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on Section 14027** and this section. In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis.
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> . . .

(Bold emphasis and underlining added.)

Here, Plaintiffs' Separate Statement sets forth the following undisputed facts ("UF") upon which the Court focuses its analysis:

UF No. 10: UF No. 10 states: "The term 'Latino' refers to 'Hispanic' or 'Latino' as those terms are commonly defined by the United States Bureau of the Census and includes Mexican, Puerto Rican, and Cuban as well as those who indicate that they are 'other Spanish, Hispanic or Latino.' Origin can be viewed as heritage, nationality group, lineage or country of birth of the person or the person's parents or ancestors before arrival in the United States. . . ." (Bold emphasis added.) Plaintiffs cite the Census Bureau attached to the Declaration of David Ely as Exh. B, but do not specify on what page such terminology can be found. Indeed, Defendant's opposing separate statement disputes this fact and points out the lack of supporting evidence. The Court was unable to find a definition of the term "Latino" in the document cited by Plaintiffs. However, the definition cited by Plaintiffs is in fact found at the United States Census Bureau's website a printout of which is attached as Exhibit H to The Declaration of Leslie Mehta, of which the Court has taken judicial notice pursuant to **Plaintiffs'** request. See above.

The Census Bureau document defines "Spanish/Hispanic/Latino" as follows:

Spanish/Hispanic/Latino
For Census 2000 and the American Community Survey: People who identify with the terms "Hispanic" or "Latino" are those who classify themselves in one of the specific Hispanic or Latino categories listed on the Census 2000 or ACS questionnaire—"Mexican," "Puerto Rican," or "Cuban"—as well as those who indicate that they are "other *Spanish*, Hispanic, or Latino." Origin can be viewed as the *heritage, nationality group, lineage*, or *country of birth* of the person or the *person's parents or ancestors before their arrival in the United States.* People who identify their origin as *Spanish*, Hispanic, or Latino may be of any race. (Italics added.)

For 1990 Census of Population and Housing:
A self-designated classification for people whose origins are from Spain, the Spanish-speaking countries of Central or South America, the Caribbean, or those identifying themselves generally as Spanish, Spanish-American, etc. Origin can be viewed as ancestry, nationality, or country of birth of the person or person's parents or ancestors prior to their arrival in the United States.

Spanish/Hispanic/Latino people may be of any race. Listed below are the 28 Hispanic or Latino categories displayed in Census 2000 tabulations:

. . .
Other Hispanic or Latino:
Spaniard
Spanish
Spanish American
All other Hispanic or Latino

(Italics and underlining added.)

As discussed below, given this Census Bureau definition of "Latino," a triable issue of material fact exists as to whether a "Latino" has ever been elected to the Compton City Council.

UF Nos. 11, 12 and 13: The population of the City of Compton is 96,455, approximately 62,669 or 65% of which are Latino, and approximately 37.17% are of voting age. Ely Decl., ¶ 10, Table 1. Defendant disputes the 37.17% rate, but the Court does not find any unreported margin of error to be material. Notably, Plaintiffs do not set forth in the Separate Statement what percentage of the Latino voting age citizen population are registered voters. However, Page 4 of the J. Morgan Kousser's Report states that as of 2008, nearly 30% of the registered voters in Compton had Spanish surnames. While this does not necessarily mean each of these person were in fact Latino (due to married non-Latino women taking their Latino spouses names), the Court will analyze Kousser's report on the assumption that approximately 30% of the registered voters are Latino.

UF No. 14: Plaintiffs state that "[a] Latino has not been elected to the City Council for the City of Compton **at any time** since the City was founded in 1888." (Bold emphasis added.)

Plaintiffs cite Exh. C to Mehta Decl., ¶¶ 1-7; and Mehta Decl., Exh. F, ¶¶ 1-22. The references to ¶¶ 1-7 and 1-22 are confusing, as these exhibits are Defendant's Responses to Plaintiffs' Special Interrogatories, Set One (Exh. C) and Defendant's Response To Plaintiffs' Request For Admission, Set One (Exh. F). Moreover, the Court notes that in response to Interrogatory No. 1 asking Defendant to list any Hispanics or Latinos Defendant contends has ever been elected to City Council for the City of Compton, Defendant responded that "Delores Zurita, who was elected in April 20, 1999, has a Hispanic surname, as does her daughter Janna Zurita, who was elected to the City Council in June, 2011." Thus, Plaintiff's evidence actually supports the opposite conclusion than that stated in UF No. 14, or at the very least is ambiguous as to the race of Delores Zurita and Janna Zurita, who have a "Hispanic surname."

UF Nos. 15 and 16: Plaintiff states that from 2001 to 2011 there have been a total of seven Latino candidates for the offices of city council and the mayor, but that not a single Latino candidate was successful. Plaintiff cites Exh. F to Mehta Decl., ¶¶ 1-22; Exh.C to Mehta Decl., ¶¶ 3-5. As noted above re: UF No. 14, Defendant's response to Interrogatory No. 1 states that Delores Zurita and Janna Zurita, both elected to City Council, have a Hispanic surname. Thus, Plaintiff's evidence at the very least ambiguous as to the race of Delores Zurita and Janna Zurita. Plaintiffs also cite the Report of J. Morgan Kousser at pp. 5, 7, 13-28, Exh. A to the Kousser Decl. The Court notes that Pages 5 (Table 1) and 7 (Table 2) of Kousser's Report fails to classify Delores Zurita and Janna Zurita as Latinos despite their Hispanic surname. This is the same concern upon which Judge Jones commented at Page 5 of her Ruling on Plaintiffs' Motion for Preliminary Injunction in this case. See Judge Jones' January 19, 2011 Ruling, Exh. A to Def's RJN.

UF Nos. 17 and 18, 23: Plaintiffs state that in every election studied, the Latino preferred choice candidates lost the vast majority of elections despite receiving the most votes from Latino voters, whereas non-Latino voters provided only minimal support (less than 5% in all instances and in two mayoral races less than 1%) to the Latino candidates. Plaintiffs cite Exh. A to the Kousser Decl. at pp. 4-28; Exh. C to Mehta Decl., ¶¶ 1-6; Exh. F to Mehta Decl., ¶¶ 1-22. Exhs. C and F to the Mehta Decl. do not provide any statistics on votes, only whether certain candidates with Hispanic surnames lost their elections.

The Court has examined the cited pages of the Kousser report and notes that the Tables appear to show racially polarized elections. Table 2 shows that there is a great disparity in the estimated percentage of support for Latino candidates (as identified by Hispanic surname) by non-Latino Voters as compared with Latino Voters for the years 2001, 2005, 2009 and 2011. Table 2 shows that under either the ER, Weighted ER or EI analysis, Latino candidates received very low support from non-Latino voters, and substantial support from Latino voters. Tables 3-10 to the Kousser Decl. appear to show the same disparity, although less drastically so when measured by percentage of Registration. As such, Kousser's report suggests the existence of racially polarized elections.

The Court has read the Herron Memorandum on Morgan Kousser's Declaration, attached as Exh. A to the Declaration of Michael C. Herron, cited in support of Defendant's dispute of Facts Nos. 17 and 18. The Court agrees that some of the problems with Kousser's analysis pointed out by Herron in his Memorandum may affect Kousser's findings in terms of the

percentage of support by Latino voters versus non-Latino voters. For instance, aggregation bias may indeed be present to some extent (Herron Memo at Pages 10-11, 20); Latino turnout in primaries may have been low (Herron Memo at Pages 22-23); Kousser cannot identify the race of absentee voters (Herron Memo at Page 23:-535-227); and Kousser's ecological inference method results are logically impossible due to negative values or totaling more than 100% (Herron Memo at Pages 29:665-32:720).

However, in turn, Herron fails to establish with actual data that any such errors in Kousser's analysis would reduce the percentage disparities reflected in Kousser's Tables to such a degree that there would be no appearance of racially polarized elections. Herron's Table 2, for instance, simply reflects his conclusion that there is no group ("None") that Herron can **"definitively"** say had a greater support rate for a Latino candidate from Latino voters than from non-Latino voters. Herron conveniently concludes that "[g]iven the plethora of "None" lines in Table 2, it follows that, for nine of the 11 Compton electoral contests analyzed by Dr. Kousser, there are no groups of Latino voters who can be said to have voted for a Latino candidate (specified by Dr. Kousser) at a rate greater than a group of non-Latino voters." Herron Memo. Page 17:434-18:347. However, Herron does not explain why he is so certain of his conclusion other than that he applied an exercise to 11 contests and concluded "None." Herron Memo, Page 17:416-433. Moreover, the fact that Herron cannot "definitively" say that Latino voters voted for a certain Latino candidate at a rate greater than non-Latino voters does not negate the existence of such a disparity. Herron appears to be using the presence or absence of an overlap of bounds as the criteria for whether he can say "definitively" that Latino voters voted for Latino candidate at a rate greater than did non-Latino voters. See Herron Memo, Pages 18:438-19:19:457. However, Herron does not explain why a small or even moderate degree of overlap negates Latino/non-Latino voter disparity. "'[A]n expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based.'" Johnson v. Superior Court (2006) 143 Cal.App.4th 297, 308.

Thus, the Court finds that Kousser's report is sufficient to demonstrate the existence of racially polarized elections for city council and mayor. This does not end the inquiry, however, as the Court finds below that triable issues of material fact exist as to whether the at-large election has impaired the ability of Latinos to elect candidates of its choice or ability to influence the outcome of an election due to dilution or abridgment of their voting rights. Elections Code § 14027

UF Nos. 21 and 22: Plaintiffs refer to the election data on Proposition 187 and Proposition 227, citing Exh. A to Kousser Decl. at pages 3-8, 13-28; Appendix C at p. 18 to Kousser Decl. There is additional evidence suggesting that there was racial polarization in the Proposition 187 and Proposition 227 elections in Compton, due to the higher opposition to these measures among Latino voters compared to non-Latino voters. Kousser Decl., Exh. A, Kousser Report Pages 40-41, Tables 11 & 12.

UF No. 25: Plaintiffs state that racial polarization in the City of Compton impairs the ability of Plaintiffs to elect candidates of their choices or influence the outcome of elections, citing Exh. A to Kousser Decl. at pages 3-28; Kousser Decl. at ¶¶ 3-4. This is where Kousser's failure to

include Janna Zurita as a Latino candidate raises a triable issue of material fact as to whether Latinos have been unable to elect candidates of their choice.

As noted above, Elections Code § 14028(b) provides that:

> One circumstance that may be considered in determining a violation of Section 14027 and this section is the **extent** to which **candidates who are members of a protected class** and who are **preferred by voters of the protected class**, as determined by an analysis of voting behavior, **have been elected** to the governing body of a political subdivision that is the subject of an action based on Section 14027 and this section.

(Bold emphasis added.)

Here, Delores Zurita has filed a Declaration[1] stating that she was elected as a member of the City Council for the City of Compton in April 1999, representing District 1, but was defeated in the April 2003 primary despite garnering over 30 percent of the vote. Delores Zurita Declaration, ¶¶ 2, 3. Although she is of African-American race, she is married to Clarence Zurita, whose mother was born in Spain, which explains why she has a Hispanic surname. Id. at ¶ 4. Delores Zurita is the mother of current City Council Woman, Janna Zurita. Id. at ¶ 5.

In turn, Janna Zurita states that she is currently a member of the City Council of the City of Compton, that she was one of the top two finishers in the April 2011 primary election for the council seat for District 1, and was elected in the June 2011 general election to represent City Council District 1. Declaration of Janna Zurita, ¶ 2. She states that she is of Hispanic heritage as well as African-American race, and that her paternal grandmother was born in Spain. Id. at ¶ 3. As discussed above, the Census Bureau definition of Latino allows for inclusion of persons of any race. Importantly, Table 9 at Page 27 of the Kousser Report (Exh. A to Kousser Decl.) shows that **Janna Zurita was the preferred candidate of Latino voters** in the 2011 Primary for City Council District 1, 2011. However, Kousser ignores Janna Zurita, highlighting only Francisco Rodriguez on the basis of his Spanish surname—not giving Janna Zurita the same treatment on the basis of her Spanish surname. Rodriguez, however, was the Latino voter's second choice behind Janna Zurita, who is currently a member of the City Council. Plaintiffs in their Reply attempt to explain this by impeaching Rodriguez's character and desirability as a candidate, but that is a factual issue which was not addressed in the moving papers and would

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[1] The Court notes that Yvonne Arceneaux—currently serving her fifth term as representative for the Third City Council District—states that she is of African-American race and Hispanic heritage, her maiden name is Garcia, and her father was born in Mexico (Decl. of Yvonne Arceneaux, ¶ 3). However, the Tables in Kousser's Report reflect that Arceneaux was not the preferred candidate of Latino voters. See Kousser Report, Exh. A to Kousser Decl., Table 3 at Page 14; Table 4 at Page 17; Table 5 at Page 20; Table 6 at Page 23; Table 7 at Page 25; Table 8 at Page 26.

The Court also notes that while Satra Zurita submitted a declaration stating that she is currently a member of the Board of Trustees of the Compton Unified School District, there is no data in Kousser's Report regarding Satra Zurita. Thus, whether she was the Latino's preferred candidate is not addressed in Kousser's Report.

require a trier of fact to determine why Latino voters preferred Janna Zurita over Francisco Rodriguez.

Although "[e]lections conducted prior to the filing of an action pursuant to Section 14027 and this section are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action," (Elections Code § 14028(a)), the court cannot weigh evidence on summary judgment. Reid v. Google, Inc. (2010) 50 Cal.4th 512, 540.

As such, the Court finds that a triable issue of material fact as to whether Janna Zurita would be considered Latino for purposes of the CVRA and as to what extent the election of Janna Zurita to City Council in 2011 is evidence that the at-large method of election does not prevent Latino residents from electing candidates of their choice or influencing the outcome of Compton's City Council elections. See Complaint, ¶ 1.