MINUTE ORDER

DATE: 10/26/2016   TIME: 03:07:00 PM   DEPT: C-73

JUDICIAL OFFICER PRESIDING: Joel R. Wohlfeil
CLERK: Juanita Cerda
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2016-00020273-CL-MC-CTL** CASE INIT.DATE: 06/16/2016
CASE TITLE: **Lutz vs Michael Vu [IMAGED]**
CASE CATEGORY: Civil - Limited   CASE TYPE: Misc Complaints - Other

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APPEARANCES

See copy of Statement of Intended Decision attached.

The Status Conference (Civil) is scheduled for 12/01/2016 at 03:00PM before Judge Joel R. Wohlfeil.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CITIZENS OVERSIGHT, INC., a Delaware non-profit corporation; RAYMOND LUTZ, an individual,	Case No. 37-2016-00020273-CL-MC-CTL
Plaintiffs,	**STATEMENT OF INTENDED DECISION**
v.	Judge: Hon. Joel R. Wohlfeil Dept.: 73
MICHAEL VU, San Diego Registrar of Voters; HELEN N. ROBBINS-MEYER, San Diego County Chief Administrative Officer; SAN DIEGO COUNTY, a public entity; DOES 1-10,	
Defendants.	

This case came on regularly for trial on October 4 – 6 and 11, 2016 before the Honorable Joel R. Wohlfeil, Judge presiding. Plaintiffs CITIZENS OVERSIGHT INC. ("COI") and RAYMOND LUTZ ("Plaintiff" or "Lutz") (collectively "Plaintiffs") were represented by Alan L. Geraci of CARE Law Group PC; Defendants MICHAEL VU ("Defendant" or "Vu"), HELEN N. ROBBINS-MEYER ("ROBBINS-MEYER") and COUNTY OF SAN DIEGO ("County") (collectively "Defendants") were represented by TIMOTHY M. BARRY and STEPHANIE KARNAVAS of the County Counsel for the County of San Diego The Court, after hearing testimony of witnesses (Vu, Lutz, Erin Mayer, Deborah Seiler, Charlie Wallis, Jill LaVine, Dean Logan, Julie Rodewald (through her deposition taken on September 23, 2016 – Exh's "196, 197") and Phillip Stark), receiving exhibits into evidence including the materials that the Court took judicial notice of (Exhibits "1, 4, 9 – 14, 19, 49 – 53, 56, 58, 59, 62, 68, 69, 100 – 107, 109, 110, 138 – 140, 146, 147, 149, 150, 152, 154, 155, 158, 171, 175 – 180, 195, 199"), reading pre-trial

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1   briefs (ROA # 92, 93), hearing arguments of counsel, reading post-trial closing briefs (ROA # 116,

2   118,), and good cause appearing therefore, hereby issues this Statement of Intended Decision

3   ("SOID").

4

5   **Introduction**

6

7   No other country in the world works as hard as the United States to preserve its election

8   integrity, a bedrock of its democratic principles.

9   Plaintiffs allege that Defendants have not done enough; that Defendants have, in effect, cut

10   corners; that Defendants have not conducted the post-election 1% manual tally of "all" votes cast,

11   one risk of which is that Defendants have compromised the security of the County's voting system;

12   to wit, "a nefarious insider or a "hacker" could alter the results and the alterations would be

13   invisible to this audit procedure thereby making the audit procedure useless." ROA # 92, page 3.

14   Defendants respond that the 1% manual tally statute is ambiguous and susceptible to more

15   than one interpretation; that Defendants have complied with the most reasonable of the competing

16   interpretations; and that to direct Defendants to do more would place an undue burden on

17   Defendants' resources, one risk of which is that Defendants would be unable to "complete the

18   official canvass and certify election results to the Secretary of State's office no later than 30 days

19   after an election." Elections Code Section 15372.2. ROA # 93, page 1.

20   Simply stated, Plaintiffs argue breadth and Defendants respond with burden, the

21   reconciliation of which is, from the Court's perspective, not easy.

22

23   **Operative Pleadings**

24

25   In their verified Second Amended Complaint ("SAC" - ROA # 79), Plaintiffs allege causes

26   of action for declaratory relief and mandamus under CCP 1085, the focus of which is California

27   Election Code Section 15360.

28

1   In their verified Answer (ROA # 81) to the SAC, Defendants, at par. 11, "generally and

2 specifically deny that the Registrar does not fully comply with the requirements of Section 15360"

3 and assert as an affirmative defense that the SAC "fails to set forth facts sufficient to constitute a

4 cause of action or right of relief against defendants, or any of them."

5

6 **The Court's July 25, 2016 Minute Order (ROA # 70)**

7

8   The Court's previous order states, in pertinent part:

9   "The Application of Plaintiffs Citizens Oversight Inc. and Raymond Lutz ("Plaintiffs") for

10 a Preliminary Injunction to direct Defendants MICHAEL VU, San Diego Registrar of Voters,

11 HELEN N. ROBBINS-MEYER, San Diego County Chief Administrative Officer, and COUNTY

12 OF SAN DIEGO ("Defendants") to comply with California Election Code Section 15360, in

13 certifying the Primary Election results of June 7, 2016, is DENIED AS MOOT, without prejudice,

14 as reflected below.

15   First, the Court takes judicial notice of the July 15, 2016 press release from the California

16 Secretary of State certifying California's June statewide primary results. Evid. Code 452(c).

17 (http://www.sos.ca.gov/administration/news-releases-and-advisories/2016-news-releases-and-

18 advisories /secretary-state-padilla-certifies-election-results/). The Court infers that the state

19 certification also entails the certification of the San Diego County primary results. As a result, the

20 Application for preliminary injunction is MOOT as to Plaintiff's request for injunctive relief for

21 the certification of the June 7, 2016 election. "In dismissing the appeal as moot...reversal of the

22 judgment could not afford the plaintiffs relief because the issuance of an injunction restraining the

23 defendant from doing that which he has already done, would be an idle and frivolous act, since

24 such decision would have no binding authority and would not affect the legal rights of the parties."

25 *Finnie v. Town of Tiburon* (1988) 199 Cal. App. 3d 581, 586. "... [A]lthough a case may originally

26 present an existing controversy, if before decision it has, through act of the parties or other cause,

27 occurring after the commencement of the action, lost that essential character it becomes a moot

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1 case or question which will not be considered by the court." *Wilson v. Los Angeles County Civil*

2 *Service Commission* (1952) 112 Cal. App. 2d 450, 453.

3 However, the Court is cognizant of the importance and exigent circumstances in this

4 action, thereby necessitating an expedited ruling in this matter. Although moot to the Primary

5 Election results of June 7, 2016, when an issue of broad public interest is posed, the Court may

6 exercise its inherent discretion to resolve the issue. *Johnson v. Hamilton* (1975) 15 Cal. 3d 461,

7 465.

8 Liberally construing the first cause of action for declaratory relief in Plaintiff's First

9 Amended Complaint (FAC"), Plaintiff appears to seek a declaration regarding all future elections,

10 which may recur as imminently as the upcoming November election. Therefore, the first cause of

11 action is not moot.

12 The "1 percent manual tally is a procedure used in California to test whether there are any

13 discrepancies between the electronic record generated by a voting machine and what is essentially

14 a manual audit of that electronic record." *Nguyen v. Nguyen* (2008) 158 Cal. App. 4th 1636, 1643.

15 In accordance with California law, the official canvas must include a manual tally as a means of

16 verifying the accuracy of the system count. Elec. Code 15360. "This procedure is conducted

17 during the official canvass to verify the accuracy of the automated count." Elec. Code 336.5.

18 Section 15360 provides two alternative methods to conduct this manual tally, using section

19 15360(a) (1) or 15360(a) (2). Initially, Defendants opted to conduct the 1 percent manual tally

20 under section 15360(a) (2). A public notice was subsequently posted on the San Diego County

21 Registrar's website. Thereafter, Defendants' chose to conduct the 1 percent manual tally utilizing

22 section 15360(a) (1). Declaration of Vu, pg. 6, 1-2.

23 California Elections Code 15360(a) (1), reads in relevant part: (a) During the official

24 canvass ... the official conducting the election shall conduct a public manual tally of the ballots

25 tabulated by those devices, including vote by mail ballots, using either of the following methods:

26 (1) (A) A public manual tally of the ballots, including vote by mail ballots, cast in 1 percent of the

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precincts chosen at random by the elections official. If 1 percent of the precincts is less than 1

whole precinct, the tally shall be conducted in 1 precinct chosen at random by the elections

official.

Plaintiffs provide evidence that Defendants are not complying with the elections code by

failing to include all ballots cast in 1 percent of the precincts chosen at random. Specifically,

Plaintiffs demonstrate Defendants are in violation of the statute by 1) not including any provisional

ballots in the manual tally, and 2) by not including all vote by mail ballots.

The legislative history of California Elections Code 15360, amended in 2006, provides

insight: SB 1235 stems from anecdotal reports that some counties routinely exclude absent voter

and provisional ballots from the 1% manual tally process and may not be choosing the relevant

precincts in a truly "random manner." California Bill Analysis, S.B. 1235 Sen., 4/19/2006.

The comments addressing auditing for accuracy provides: "Requiring all of the ballots –

not just those cast at the polling place on Election Day – in a given precinct to be a part of the 1

percent audit should increase the thoroughness and the reliability of the audit. Absent a complete

count of all of the ballots in a precinct that's subject to the 1% audit, it's difficult to see how

elections officials can argue they've complied with the audit requirements under the law."

California Bill Analysis, S.B. 1235 Sen., 4/19/2006.

Therefore, in reviewing the legislative intent and explicit text of section 15360, there is a

reasonable probability Plaintiffs will prevail. Section 15360 requires election officials to include

Vote-by-Mail ballots cast and provisional ballots when conducting the one percent manual tally.

Defendants did not do this.

Defendants demonstrate that complying with section 15360 will require additional "man

hours" and additional costs in excess of $100,000. Vu Dec. (ROA # 35), par's 21, 30, 36.

Defendants also argue completing the manual tally process as soon as possible is a "prudent

business practice." Opposition, p. 12, par's 15-16. County elections officials have approximately

one month to complete their extensive tallying, auditing, and certification work so they can timely

send a report to the California Secretary of State.

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1   Plaintiffs' argue they 1) will be deprived of the verification required by law and 2) the

2   integrity of the election results will be compromised if Defendants are not in compliance with

3   section 15360. Section 15360 was enacted to serve as a check on the election process by means of

4   a manual audit. Notwithstanding the fact that San Diego County Registrar does not include

5   provisional ballots in their manual tally procedure, a practice consistent with other counties (ROA

6   #'s 36 – 42), it does not follow that Defendants are therefore in compliance with section 15360.

7   The San Diego County Registrar of Voters has a legal obligation to comply with section 15360. It

8   is imperative that auditing requirements are followed completely in order to ensure the continued

9   public confidence of election results. The San Diego County Registrar of Voters is obligated to

10   allocate its resources appropriately in order to comply with the law. If Defendants are unable to do

11   so, they must seek redress with the legislative or executive branches of government, not the

12   Court."

13

14   **Joint Trial Readiness Conference Report ("TRC") / Advance Trial Review Order ("ATRO")**

15

16   In their TRC (ROA # 91), Plaintiff and Defendants described the nature of the case as

17   follows:

18   "This is a Declaratory Relief and Mandamus action filed by Plaintiffs Raymond Lutz and

19   Citizens Oversight, Inc. against the County of San Diego, Michael Vu in his capacity of the

20   Registrar of Voters, and Helen Robbins-Meyer in her capacity as Chief Administrative Officer of

21   the County of San Diego. Plaintiffs contend that the manner in which the County conducts the one

22   percent manual tally, as defined by Elections Code 336.5, does not meet the requirements of

23   Elections Code Section 15360."

24   The parties identified the legal issues which are not in dispute as follows:

25   "1. Elections Code Sections 336.5 and 15360 are the operative provisions of the Elections

26   Code that define and govern the one percent manual tally.

27   2. Provisional voters are defined in Election Code Section 14310 - 14313.

28   3. Vote-by-mail voters are defined in Election Code Section 300.

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1   4. The one percent manual tally must be conducted and completed during the official

2   canvass.

3   5. The purpose of the manual tally is to verify the accuracy of the automated count."

4   The parties identified the legal issues which are in dispute as follows:

5   "1. The requirements imposed on elections officials by Elections Code Sections 336.5 and

6   15360.

7   2. Plaintiffs contend the above includes whether verifying the accuracy of the automated

8   count should include the review, supervision and oversight of ballots on which white out or ballots

9   were remade. Defendants contend this is not a "legal issue" to be addressed in this action."

10   After the parties filed the TRC Report, the Court entered the ATRO. ROA # 90.

11

12   Non-Jury Trial

13

14   The parties are not entitled to a jury trial in view of the nature of the relief at issue.

15

16   Motion for Non-Suit to Dismiss Defendant HELEN N. ROBBINS-MEYER ("ROBBINS-

17   MEYER")

18

19   After the opening statement of Plaintiff's counsel, Defendant ROBBINS-MEYER made a

20   Motion for non-suit. The Court, after hearing arguments of counsel, GRANTED the Motion and

21   dismissed ROBBINS-MEYER from this lawsuit.

22

23   Witnesses and Exhibits at Trial

24

25   Vu, Plaintiff, Mayer, Seiler, Wallis, LaVine, Logan and Rodewald testified to his / her

26   recollection of events which took place years ago. The recollection of these witnesses have been

27   influenced by their bias, prejudice or personal relationship with the parties involved in this case. If

28   for no reason other than the passage of time, much less the absence of reliable corroboration, the

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1 Court questions the capacity of the witnesses to accurately recollect and communicate his / her

2 perception of the events. The witnesses have "testified untruthfully about some things but told the

3 truth about others" and, accordingly, the Court has accepted the part it perceives to be true and has

4 ignored the rest. CACI 107, 212.

5 **Michal Vu**: He is the County's Registrar of Voters ("ROV"). He is responsible for overall

6 direction and conduct of SD elections. He is responsible for "the implementation of law." He was

7 chief election official for the County of Cuyahoga in Ohio during the 2004 presidential election.

8 He resigned from his position in Ohio though not because he was asked to do so following a

9 controversy involving two staff. The two staff were prosecuted following the controversy. His

10 current duties include application of his interpretation of the law. He is familiar with Election

11 Code 15360. He described his options on how to conduct the 1% manual tally. Exh. "4" is the

12 County's policy manual – 1% manual tally. He admits that Exh. "4" does not reflect the

13 "batching" method to conduct the 1% manual tally. The policy manual does not reflect the

14 County's practice of conducting the 1% manual tally by batching method. The County is in the

15 process of updating the policy to reflect its practice of the batching method. Exh. "19" is the

16 official results of County's June 7, 2016 election. There were 775,930 ballots cast. There were

17 1,523,251 registered voters. There were 285,000 ballots yet to be processed as of the end of

18 election day. Provisional ballots are cast at polling places. There were 68,000 validated

19 provisional ballots processed. There were 75,000 provisional ballots received. There were

20 490,000 votes by mail ("VBM") ballots received, the majority of which were received before the

21 election. There were non-party partisan ballots placed in provisional ballots. The County's

22 practice is to not include provisional ballots in the 1% manual tally. The County appears to

23 include in the "semifinal official" count, VBM ballots received on or before the election. The

24 County received 489,610 VBM ballots, of which 256,685 were included in the 1% manual tally.

25 The combination of the excluded VBM ballots and the provisional ballots numbered

26 approximately 37% of the total votes cast which were not subject to the 1% manual tally. He

27 excluded from the 1% manual tally VBM ballots received after the election and provisional ballots

28 cast at polling places. The County uses "white out tape" on ballots, one purpose of which is to

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1 identify an ineligible voter. The County created a non-partisan democratic ballot. The County

2 does not have written procedures for the use of white out tape. The County does not keep records

3 of the white out tape on ballots. The County does not maintain the white out tape on ballots for

4 inspection. He was employed for less than a year before the election controversy occurred in

5 Ohio. Exh. "140" is his CV. He described his duties as the County's ROV. He's been the

6 County's ROV since 2012. The County has 1,650,000 registered voters. 62% of the registered

7 voters vote by mail. 775,000 persons voted in the June election. He expects 1,200,000 persons to

8 vote in the November election, with 1,500 precincts and 623 ballot types. He described the

9 voluminous types of contests on the November ballot. Exh. "199" is a demonstrative sample

10 ballot for the November election. He described the challenges with a two card ballot. He

11 described the operational issues to manage the 7,000 to 8,000 poll workers to be hired for the

12 November election. He described the process of issuing VBM ballots to voters. A VBM voter can

13 only vote provisionally at the polling place after receiving a VBM ballot. 490,000 persons cast

14 VBM ballots in the June election. He estimated that 675,000 to 725,000 persons will cast VBM

15 ballots in the November election. Exh. "148" is the report of the provisional ballots cast in the

16 June election. The County counted 68.2% of the provisional ballots. Exh. "148" also reflects

17 persons who voted both by mail and a provisional ballot. The County partially counted 17,226

18 provisional ballots. The County did not count 6,773 provisional ballots. When a voter voted both

19 by mail and with a provisional ballot, the County counted the VBM ballot instead of a voter's

20 provisional ballot. The ROV employs 65 staff, and intends to hire 800 to 900 temporary workers.

21 He expects to recruit 7,400 to 8,000 poll workers for the November election. The County received

22 256,000 VBM ballots, of which 233,000 were included in the official canvas for the June election.

23 Exh. "146" is the County's procedures for processing VBM ballots. The County trains the staff

24 who process VBM ballots. Exh. "177" is a snap shot of the steps to process VBM ballots. The

25 County expended 10,000 or more staff hours to process VBM ballots in the June election. He

26 estimates the County will mail more than 900,000 VBM ballots to voters prior to the November

27 election. He described the process by which the County receives and counts the VBM ballots.

28 / / /

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1   The Pitney Bowes "sorter" sorts batches of no more than 400 VBM envelopes as a form of

2   quality assurance. The bar code on the envelopes are read and encoded into a memory card which

3   is imported into the County's voting system. Every single VBM ballot is counted manually. The

4   County evaluates the signatures on VBM ballots but liberally construes the signatures in favor of

5   counting the votes. The County begins to count VBM ballots 10 business days before the election.

6   He emphasized that the County counts every ballot cast by every eligible voter. He described the

7   process by which the County re-makes a ballot. He explained why the County uses "white out

8   tape." He explained the County's activities during the official canvas. He explained the

9   "reconciliation of the voting precincts." He explained the steps to avoid the risk of "double

10   voting" by voters. He referred to section 15302 to describe the steps the County takes to complete

11   the official canvas. The County has 35 days "to certify the election." The County can count VBM

12   ballots post marked no later than election day and received by the ROV within 3 days after the

13   election. Exh. "171" is a diagram of how paper ballots and touch screen votes are counted. The

14   County manually transfers touch screen votes to paper ballots. The provisional ballots are

15   processed after the election. Exh. "181" is a demonstrative video of ballots being processed by the

16   Pitney Bowes sorter in batches of 400 envelopes. The sorter outstacks or suspends ballots with a

17   perceived defect. The sorter sorts the envelopes at the rate of 24,000 envelopes per hour. After

18   election night, the County expends 10,000 or more hours to process VBM ballots. He expects the

19   volume of VBM ballots to be processed in November to be greater than the 235,000 VBM ballots

20   processed in the June election. Exh. "147" is the County's procedures for processing the

21   provisional ballots. Exh. "178" is a summary of the County's steps to process provisional ballots,

22   the purpose of which is to insure that the County counts every provisional ballot. Exh. "176" is a

23   provisional ballot envelope. The County uses 100 staff to process provisional ballots, most of

24   whom are temporary staff. The County conducts a background check of temporary staff. The

25   County completes the process of counting provisional ballots by the time the results are certified.

26   The County's processes are intended to balance the integrity of the voting system with the ROV's

27   ability to count the votes. The volume of the VBM ballots are larger than provisional ballots;

28   however, it takes more time to process the provisional ballots. He described the purpose and

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process of the 1% manual tally. The 1% manual tally must start as soon as possible after the election in order to timely certify the results. Exh. "179" is the 1% manual tally sheets for the June election. The County expends thousands of staff hours to complete the 1% manual tally. The 1% manual tally counted 7,800 ballots. The 1% manual tally counted ballots from randomly selected precincts as well as additional precincts. The 1% manual tally did not reveal any "issues." The County does not include VBM ballots not processed by election night in the 1% manual tally. The County does not include provisional ballots in the 1% manual tally. His first presidential election as the County's ROV was 2008. He described the severe impact on the County's ability to certify the November election results if the County included VBM ballots and provisional ballots in the 1% manual tally. He questioned the impact on the County's ability to complete an accurate count of the vote if required to include VBM and provisional ballots in the 1% manual tally. The County counts every vote, regardless of the type of ballot cast. The County reserves white space on the ballots to provide for additional languages as necessary, pursuant to the 1965 voting rights act. There were 490,000 VBM ballots cast in the June election. He agreed with the trend that more voters are voting by mail. 75,000 provisional ballots were cast in the June election. 256,000 of the VBM ballots were processed as part of the semi-final unofficial canvas. The 1% manual tally did not include 37 % of the total votes cast in the June election. The ballots of non-registered democratic voters cast for a democratic candidate in the June election were cast as provisional ballots which was not included in the semi-final unofficial canvas. He decided that the 1% manual tally would be changed from the batching method to the precinct method, after he received Plaintiffs' lawsuit. The County's procedures did not include processing the 1% manual tally of VBM ballots by batch. He expects to hire more than 7,000 poll workers for the November election.

Raymond Lutz: He is a citizen and registered voter in SD County. COI is a 501c3 non-profit organization, the purpose of which is to encourage citizen oversight of SD County elections. His education includes a master's degree in electronics. His work experience includes document imaging technology. Exh. "58" is his CV. He knows Vu. His participation in overseeing SD County elections dates back a number of years to 2008. He has developed a cooperative working

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relationship with Vu. He discovered in or about 2010 the County's practice of conducting the 1% manual tally, although the practice was not entirely clear to him. He video recorded the County's selection of the ballots which were the subject of the 1% manual tally for the June 2016 election. The County has 1,522 precincts. "Batches" are mixed precincts which are chosen from 32 areas. Batches must have a report of all the precincts from which the ballots are counted in the 1% manual tally. Vu's practice is to choose only 8 precincts, instead of 32 precincts, to develop the batches. He objected to Vu's practice. Exh's "12 – 14." He photographed a list of the batches chosen by Vu to conduct the 1% manual tally, although he did not receive a "batch mode report." He filed this lawsuit when he discovered that Wu decided not to conduct a 1% manual tally of all of the mail and provisional ballots cast in the June 2016 election. He considers himself to be a citizen advocate. He studied the election process used by the County in 2008 by evaluating votes cast in a sampling of 5 of the 85 precincts. He prepared a report of the 1% manual tally from the 2008 election. He concluded from his review that he needed the "snap shot file" from the County. He conducted another review of the 2014 election in "all counties in California" and, once again, realized he needed the "snap shot file." In 2014, he made a request from the registrar of voters in all counties. In his opinion, the County conducts a 1% manual tally without including VBM ballots. The ROV conducts a selection meeting the day after the election, selects the precincts and the batches. The ROV receives boxes of ballots from the polling places. Exh. "64" demonstrates the start and stop dates and times of the County's teams conducting the 1% manual tally of the selected precincts, the source of which is data created by the County. Exh's "49 – 52." The County's 1% manual tally did not start until June 27 with multiple stretches over the 30 day period in which the County did no work. In his opinion, the County could have conducted the 1% manual tally more efficiently and started the tally earlier than June 27. He conducted a roster review of the County's teams who participated in the 1% manual tally as well as a review of the votes cast from a sampling of 5 precincts. He reviewed and compared the 1% manual tally results with the snap shot file, which did not match. In his opinion, the 1% manual tally detects simple tabulator errors which could result in a shift of as many as 10,000 votes from one candidate to another. He requested the legislative history for the senate bill culminating in section 15360, from the secretary

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of state's office. Exh. "59." His question is whether the legislature intended to include VBM and provisional ballots in the 1% manual tally. He has never been a poll worker or an election official. He votes by mail at this time. The last time he voted at a poll was 2014. He has owned and operated multiple businesses, including Creative Minds Inc. He started COI in or about 2006, which is connected to the east county democratic party. He is the only officer and director and of COI. COI has due paying members. He is the sole operating manager of COI. An audit is "an historical review of something that happened." He is not familiar with the regulations adopted outside of the election code. He did not participate in the legislative process to amend Section 15360. He corresponded with Vu and other registrars of voters throughout California on the subject of the 1% manual tally. Exh's "9 – 11." He understood that not all ballots would be included in the "subset" of the votes for the 1% manual tally. In 2016, he again requested a snapshot of the "subset" of the votes for the 1% manual tally. Exh. "11." The County provided him with a snapshot of the "subset" of the votes for 1% manual tally of the June 7, 2016 election. He described his understanding of the process by which the County receives and records VBM ballots. His description appears to be reasonable and informed, although critical, in part, of the County's process. The County processes provisional ballots last, after first having processed VBM ballots. In his opinion, the ROV is required to include all of the provisional ballots. "Batch" is defined in section 15360. Section 15360(a) (B)(ii) states: ""batch" means a set of ballots tabulated by the voting system devices, for which the voting system can produce a report of the votes cast." He admits section 15360 does not refer to "all," "audit" or ""provisional ballots." He described his understanding of "hashing" as part of the County's security system. He believes that an outside hacker can hack into the County's security system. He has not witnessed any election fraud in the County. He considers the County's failure to follow his interpretation of the law to be a form of election fraud. He is not aware of anyone hacking into the County's "vote tabulation system." In the SAC, at par. 36, Plaintiffs allege that the County should include all VBM and provisional ballots in the 1% manual tally. A "snap shot file" is a snap shot of all votes the County counted. It was a big file ... 200 megabytes. One purpose of the snap shot was to evaluate whether an "internal hacker" had manipulated the election results. Exh. "56" is the snap shot he

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1   received from the County of the election results tabulated as of June 8, 2016 at 3:00 pm. He

2   received Exh. "56" just before the County conducted the "random draw." There are counties

3   which conduct the "random draw" as much as two months before the election which alerts

4   potential hackers of the precincts not to manipulate, to avoid detection. The County conducts the

5   1% manual tally after the random draw takes place.

6   **Erin Mayer**: She is chief departmental officer in charge of the 1% manual tally. She

7   supervises Diane Elsheikh. She has occupied her current position for 2 ½ years. She described the

8   procedure she has followed to conduct the 1% manual tally. The procedure changed from batching

9   to precincts after the County received a demand from Lutz. The precincts consisted of the

10 precincts randomly polled. She participated in a lot of discussions with Lutz during the random

11 draw. She referred to Exh's "49 – 52," the subject of which is the County's 1% manual tally after

12 the June 7, 2016 election. On June 13, her team started the process of counting the poll ballots.

13 On June 21, her team started the process of counting the touch screen ballots. On June 27, her

14 team started the process of counting the VBM from the precincts chosen in the random draw. The

15 1% manual tally did not include VBM ballots from precincts not selected in the random draw. The

16 1% manual tally did not include VBM ballots received by the County after the June election.

17 Exh."50" is the tally of the votes received from the precincts. Exh. "52" is the tally of the touch

18 screen votes. The County includes 100% of the touch screen ballots in the 1% manual tally. The

19 County tabulates the paper ballots followed by the VBM ballots. She denies any "problems" with

20 the "paper trail" of the votes in the June election. She agrees that the County is required to possess

21 a paper trail of the touch screen ballots. She described the "back end" of the processing of the

22 ballots which takes place before the beginning of the 1% manual tally. She described the technical

23 services necessary to process the ballots. The County can re-make a paper trail to memorialize the

24 touch screen ballots. The County started the 1% manual tally by batch before switching to

25 precincts.

26   **Deborah Seiler**: She is retired from the County. Previously, she was the ROV for the

27 County. She described her elections experience as reflected in her CV. Exh. "138." She

28 contributed to the development of elections legislation in California. She has acted as an election

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observer in other countries like, for example, the former Soviet Union. Her credentials / qualifications are impressive. She described her duties as ROV for the County. She described her understanding of the post-election 1% manual tally which has been in effect since 1965. The initial purpose of the 1% manual tally was to verify the accuracy of the "coding process." There have been multiple amendments to the 1% manual tally legislation. She encouraged the expansion of the 1% manual tally legislation. She participated in drafting the 1986 legislation amendment. She proposed a re-structuring of the "whole elections code." She proposed that the 1% manual tally be re-located into the "canvas procedures." The 1% manual tally was not contemplated to be a part of the re-count procedures. She referred to Elections Code section 336.5 which defines the "1% manual tally," the drafting of which she participated in. She described her understanding of "verify" in context of the 1% manual tally. A manual tally is required to be performed during the official canvas. Exh's "100 – 103" are the 2006 proposed amendments known as Senate Bill 1235. In her opinion, the absence of provisional ballots from the ultimate legislation is significant. She denies that the word "all" does not appear in section 15360. A reference to "all" and "provisional ballots" were stricken from the proposed amendments. Exh's "104, 180." The 2008 election was the first election she presided over as the County's ROV after AB 2769 was enacted. She included some, but not all, of the VBM ballots in the 1% manual tally. She made minor changes to the procedures for the 1% manual tally after the enactment of AB 2769. She was familiar with the enactment of section 15360.5, as urgency legislation, in 2010. Exh. "105." In her opinion, the application of section 15360.5 was limited to 4 specific counties. She described her understanding of the options available to counties to conduct the 1% manual tally. Exh. "106" is the 2011 proposed amendment to section 15360 which extended section 15360.5 to all counties. The 2011 amendment was financially important to, and was supported by, the County. The County based the 1% manual tally on the unofficial canvas. The inclusion of "all ballots" including VBM and provisional ballots in the 1% manual tally would have worked a financial and administrative hardship on the County. She characterized the Secretary of State's proposal (Exh. "109") as "an underground regulation" which the County successfully challenged. The County devoted 100 hours or more to respond to the accusations asserted by Lutz in 2010. Exh's "62, 110." She

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expressed her opinion of the remedies available to a citizen who challenges the integrity of the election results. She is not aware of any evidence that anyone has hacked into the County's voting system. She described the purpose of placing the "source codes" in escrow. The computer vote count program is deposited with the Secretary of State's office. Within 5 days after the election results are certified, any voter may demand a re-count at the challenger's expense; however, if the re-count is successful, the expense is reimbursed to the challenger. Any voter may file an election contest in Court. In 2006, Senator Debra Bowen was the sponsor of SB 1235. The Court takes judicial notice of the legislative history of section 15360. Exh. "59." The history indicates support to include absentee and provisional ballots in the 1% manual tally. She considers the reference to include absentee and provisional ballots to be an error. Provisional ballots are cast at the polls.

Charlie Wallis: He has been the principal IT analyst with the County for 26 years. He manages information technology for the ROV. He is responsible for supplying the information to the team who conduct the 1% manual tally. He supervised the information services for the June 7, 2106 election. He pulled the batches of ballots cast at the polling place and by mail. He is not aware of any issue with the voter verified paper trail. He first pulled the boxes for the polling place ballots. He next pulled the VBM ballots. He described the process to pull the precinct boxes. He delivered the precinct boxes to the 1% manual tally. The reference to "deck" and "batch" are synonymous. The boxes are secured in the ROV's office. He retrieved the VBM ballots from the chosen precincts, which took 40 staff working a full week to complete. He is familiar with the unofficial results of the June election. Exh. "56." He posted the unofficial results on the internet. He agrees that the unofficial results should match the computer reports. Exh. "44" is a report which "identifies how many cards for a particular precinct are in a deck." There is a comparable report for the VBM ballots. The County has a short period of time to certify the election. There were more provisional ballots in the June election than he expected. The County received more than 70,000 provisional ballots. He has noted an increase in VBM voting. He described the responsibilities he is performing to prepare for the upcoming November election. The County changes the precincts from one election to the next. He has been working 6 to 7 days per week, 12 hours per day, to prepare for the November election. He described the voter

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registration system. He described the election management system. He described the vote tabulation system. He described the global election management system ("GEM"). The County's election systems must be certified by the Secretary of State. The Secretary of State and the Federal Election Commission ("FEC") has certified the County's use of GEM. The Secretary of State provides the County with use procedures, including security, for GEM. He disagreed with Lutz that the security procedures for GEM are not available to the public. He described the hardware components for GEM. Exh. "155." The server of the County's GEM is not connected to the internet. He described the County's security for GEM. Since 2008, security for GEM has been "hardened." The security contemplates protection if the server is stolen. He described the County's touch screens. Exh. "154." Touch screens are available for voters with special needs. He described the County's security for the touch screens. The touch screens contain a memory card. 1,000 or fewer voters cast ballots using the touch screen in the June election. He described the function of voting on the touch screens. He described the paper trail generated by voting on the touch screens. He described the optical scan device to scan ballots and upload results to the County's central tabulator. Exh. "152." The County sets up approximately 160 optical scan devices on election night. He described the function of the optical scan device. He described the purpose of the memory card for the optical scan device. The optical scan device generates a paper trail. He described the "ender card" which is run through the scanner. Exh. "158." Exh. "190" demonstrates the paper tape generated by the scanner operator. He explained examples of why some ballots cannot be scanned. Exh."150" is a diagram of the County's election night central count floor. He described the roles performed by the staff depicted in the diagram. He estimates that the process for the upcoming election will take longer than usual. Exh. "151" is a video which reflects the County's "ballot inspection" during a past election. He described the function of the "serial digy box" and "os device" depicted in Exh. "153." He described the function of the "start card," referring to Exh. "157" for demonstrative purposes only. Each ballot is coded to a precinct. The os and tsx units are tested for use prior to the election. Exh. "159" is a test card to make sure the units are functioning before the election. After running the hardware tests, the County performs a full logic and accuracy test on the system, all of which takes place under his

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supervision. He described the series of tests he supervises to test the 623 ballot types. The County conducted approximately 20,000 tests prior to the June election. The test data is transmitted to GEM. He successfully completed logic and accuracy testing prior to the June election. The pre June election tests took approximately 10 days. The tests are conducted prior to every election. He recognizes Lutz but does not believe Lutz has taken advantage of the opportunity available to the public to observe the testing. Exh. "175" is the results bulletin for the 1% manual tally of polls ballots for the June election. The County's GEM generated Exh. "175." The County generates different reports for poll ballots and VBM ballots. The June election generated 600 to 700 decks. He described the process to produce a report for each deck. The County used GEM to process a re-count challenge within the last 12 years. The County's count was upheld. He described the process by which the integrity of the ballot tabulations is preserved. He described how the hash value of the GEM would change if the security system were breached. He is not aware of any manipulation of the County's GEM. In his opinion, it would be difficult, if not impossible, to hack into the County's GEM, alter data and manipulate election results. He is involved in the quality control process of re-making ballots. He described the County's use of "white out tape." He described the "uniform counting standards" which the County applies, if necessary, to use "white out tape." Exh. "149." The County submits the provisional ballots to a verification process. "VVPPT" stands for voter verified paper trail. The County is required to retain the paper trail under the Elections Code.

Jill LaVine: She has been the ROV for Sacramento County for 13 years. She described her duties as ROV. Her elections career dates back to 1987. "CACEO" stands for California Association of Clerks and Elections Officials. Sacramento has 900,000 eligible voters and 733,000 registered voters. Sacramento employs 34 staff and 2,800 poll workers. Sacramento will add up to 200 temporary staff for the upcoming election. She is familiar with the 1% manual tally. Sacramento conducts a random selection of precincts for the 1% manual tally. The January 1, 2007 amendment to section 15360 added VBM ballots. Exh. "109" is a directive to county clerk registrar of voters ("ccrov") throughout California on the subject of the post-election manual tally. The 2010 option to four counties was to choose between conducting the 1% manual tally by either

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batch or precinct process. Sacramento continued to conduct the 1% manual tally by the precinct process. Sacramento's procedures are consistent with the conclusion in Exh. "107" not to include VBM ballots or provisional ballots in the 1% manual tally. She described the process by which Sacramento counts VBM ballots and provisional ballots. Sacramento counts the provisional ballots at or near the end. To include all VBM ballots would create a logistical problem for Sacramento. She is not aware that Sacramento's voting system has been hacked. 340,000 persons voted in Sacramento's June election. 67% of Sacramento's voters voted by mail. Sacramento has not used the batching method to conduct the 1% manual tally. It is administratively more convenient for Sacramento to use the precinct method. Exh. "68" is Sacramento's 2014 report of the results of the 1% manual tally. The report reflects errors that did not match the computer count on election night. Exh. "69" is Sacramento's June 2016 report of the results of the 1% manual tally. The report reflects errors that did not match the computer count on election night. In both instances, Sacramento made the corrections in the official certified results. She described how Sacramento could conduct the 1% manual tally by including VBM ballots and provisional ballots. Sacramento would need to add staff and incur additional resources to include VBM ballots and provisional ballots. She denied that the batching method would assist Sacramento to conduct the 1% manual tally with the inclusion of VBM ballots and provisional ballots. Sacramento had not yet counted 136,000 ballots as of election night, none of which were subject to the 1% manual tally. Sacramento starts to count VBM ballots as early as 10 days before the election. Sacramento strives to include as many VBM ballots as possible into the 1% manual tally. Sacramento included 200,000 VBM ballots in the 1% manual tally. She explained the reasons for the discrepancy in the official certified results from the semi-final official results after the 1% manual tally. As reflected in Exh. "69", the discrepancy also arose from a break down in the scanning operation during the June election.

Dean Logan: He is the L.A. County ROV county clerk. Exh. "139" is his CV which reflects 25 years of elections experience. He described his duties as L.A.'s ROV. L.A. has 5,042,000 registered voters, of which 2,026,000 voted in the June election. 772,000 persons voted by mail. 271,000 persons cast provisional ballots. He described the reasons why persons cast

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provisional ballots. He expects L.A. to receive more VBM ballots in the November election. L.A.

employs 841 staff in the ROV office, all of whom participate in the election process (although

L.A. will add another 500 temporary staff for the November election). L.A. will use 22,000 poll

workers for the November election. L.A. included 387,000 VBM ballots in the semi-final results.

334,000 VBM ballots were not included in the 1% manual tally. L.A. assigns 150 staff to count

VBM ballots. He described the process by which L.A. counts VBM ballots, which he also

characterized as "labor intensive." He described the training L.A. provides to the staff to count

VBM ballots and the provisional ballots. L.A. staff devoted 57,000 hours to count VBM ballots as

of the June election. L.A. devoted an additional 12,000 staff hours to count VBM ballots received

after the June election. The official results included 236,788 of the total 271,000 provisional

ballots in the official results. L.A. starts to process provisional ballots the day after the election.

He described the process by which L.A. counts the provisional ballots. 150 to 400 staff counted

the provisional ballots cast in the June election. The processing of provisional ballots are more

labor intensive than the processing of VBM ballots. L.A. staff devoted 61,000 hours to process the

provisional ballots. He described his understanding of the 1% manual tally, a process which starts

the day after the election. In his opinion, the inclusion of VBM ballots and provisional ballots in

the 1% manual tally would delay the certification of the official results. He described the process

by which the 1% manual tally takes place after notice is provided to the public. L.A. devoted 55

staff to complete the 1% manual tally and 7,500 staff hours to count 20,217 ballots in the June

election. The 20,217 represents 1% of the total 2,026,068 ballots cast in the June election. L.A.

uses the precinct method to conduct the 1% manual tally. L.A. did not include VBM ballots that

were processed after the election, and did not include provisional ballots, in the 1% manual tally.

He's been employed with L.A. ROV office since 2006. Prior to 2007, L.A. did not include VBM

ballots in the random draw. L.A. has not included the provisional ballots in the 1% manual tally.

He described the reasons why L.A. has not included provisional ballots in the 1% manual tally.

The 2012 amendment allowed counties to choose between the batch or precinct method to conduct

the 1% manual tally. L.A. continues to not include all VBM ballots in the 1% manual tally. The

recent amendment to section 15360 allows VBM ballots received up to 3 days after the election to

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be counted in the election results. He described the additional delay and costs to include all ballots cast in the 1% manual tally, and still be able to certify the official results. He received multiple emails from Lutz on the subject of the 1% manual tally for the June election. Exh. "195." 12,000,000 persons reside in L.A. county. He is not aware of any person hacking into L.A.'s voting system. His departmental budget is more than $178,000,000 per year. L.A. has 5,000,000 eligible voters. 722,000 persons voted by mail. 271,000 provisional ballots were validated and included in the certified returns. 387,000 of the 722,000 VBM ballots were included in the semi-final official results. L.A. sorts VBM ballots by precinct prior to tabulation. He described the process by which L.A. secures the ballots. L.A. conducts the 1% random draw the day after the election. The actual 1% manual tally starts 2 or 3 days after the election. L.A. only includes VBM ballots which were both received and counted as of the election, in the 1% manual tally. L.A. takes 8 – 10 days to conduct the 1% manual tally. He described the process by which L.A. would conduct the 1% manual tally if all ballots cast were included; however, he questions whether L.A. could achieve the 1% manual tally within the statutorily required time frame, to certify the official results. He described L.A.'s vote tabulation system, components of which are the Inka vote and Inka vote plus. The Secretary of State certifies L.A.'s voting system. L.A.'s voting system is capable of processing VBM ballots by batch. He described his understanding of the batching methodology and, agreed that, arguably, a precinct is a batch.

     Julie Rodewald (through her deposition taken on September 23, 2016 – Exh's "196, 197"): She retired in 2014 as the county clerk recorder for San Luis Obispo County after 20 years. She described her duties to include "conducting elections." She also served as the ROV for San Luis Obispo. She was a member of CACEO. She described her understanding of the purpose of the 1% manual tally, and the process by which San Luis Obispo conducts the 1% manual tally. She described her understanding of the amendments to section 15360. San Luis Obispo does not include VBM ballots not counted as of the election or provisional ballots in the 1% manual tally. In her opinion, the law did not require San Luis Obispo to include provisional ballots in the 1% manual tally. San Luis Obispo was one of the four counties which were the subject of section 15360.5. The purpose of the 1% manual tally is "to verify the automated count ... to finish the

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official canvas within the 28 days." The 2011 amendment permitted all counties to tally VBM ballots by batch. San Luis Obispo did not change its practice to include, or not include, VBM ballots in the 1% manual tally. She is not aware that San Luis Obispo's voting system has been hacked. San Luis Obispo started the 1% manual tally one week after the election. San Luis Obispo included VBM ballots which had been received and processed as of the election in the 1% manual tally. San Luis Obispo has 145 polling precincts. 12 precincts were selected for the 1% manual tally. 60,228 persons cast VBM ballots in the November 2014 election, and approximately 90 - 95% were processed before San Luis Obispo started the 1% manual tally. San Luis Obispo could have included the provisional ballots, like VBM ballots, in the 1% manual tally. She observed that the volume of VBM ballots and provisional ballots cast continued to increase. The provisional ballots were the last ballots to be counted before the results were certified.

Phillip Stark: He is a professor of statistics at UC Berkley, and has been since 1988. His education includes a Ph.D. in earth science from UCSD. Exh. "53" is his CV. His qualifications are adequate, if not superior. He identified the materials he reviewed to form and express his opinions. He is familiar with Election Code 15360 including AB 985 effective January 1, 2012. He has reviewed the legislative history of SB 1235 effective January 1, 2007. Secretary of State Deborah Bowen appointed him to a committee to review post-election audit standards of the State's voting systems. He has spoken to 10 to 15 ROV's throughout the State. The foundation on which he based his opinions are adequate. He is familiar with the 1% manual tally which he characterized as a "quality control check" on election results. He has participated in a "risk limiting audit," the purpose of which is to confirm the confidence in the election result. The framework of the audit is based on a statistical model which confirms that the "outcome is correct." The risk of the audit varies depending upon the degree of confidence that the outcome is correct. He emphasized that a "robust chain of custody" is imperative to the reliability of the result. He identified the counties, including Orange, in the State which have utilized his audit. His bias, if any, is to promote election integrity, which is why he has chosen to testify without compensation. He identified the types of errors which the 1% manual tally can detect which includes whether the central tabulating system has been compromised. He described his

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understanding of the batching method and the precinct method to conduct the 1% manual tally. In his opinion, the batching method provides a higher statistical advantage to detect errors in the election result. In his opinion, it's important that all votes cast have been counted before the random selection / 1% manual tally occurs. In his opinion, the 1% manual tally conducted on a sampling of ballots instead of all votes cast, undermines, from a statistical perspective, the "accuracy of the voting system results." In his opinion, the County's random selection is, from a statistical perspective, flawed. He described his understanding of provisional ballots. In his opinion, the omission of ballots cast, including provisional ballots and VBM ballots, impairs the ability of the 1% manual tally to detect errors. In his opinion, the manner in which the County conducts the 1% manual tally creates a "frame bias." He has reviewed Plaintiff's SAC in this case as well as pertinent legislation connected to section 15360. He has not reviewed the County's procedures for processing VBM and provisional ballots. He has not participated in an audit of the County's 1% manual tally. He is not familiar with the County's GEM to process voting results. He performed election calculations relating to *Bush v. Gore*. He agreed that the official canvas includes elements other than the 1% manual tally. He agreed that he is not familiar with all of the requirements of the official canvas. His focus is limited to the completion of the 1% manual tally. He agreed that a risk limiting audit is different than the 1% manual tally, which have very different goals. The goal of a risk limiting audit is to confirm the accuracy of the election results. He disagreed that a risk limiting audit is similar to a recount procedure, though he characterized the 1% manual tally to be "like an intelligent incremental recount." He generally agreed that the "broad" goals of both a risk limiting audit and the 1% manual tally is to check that the election results are correct. He agreed that the 1% manual tally is not a recount. He agreed that the ROV is required to report discrepancies detected from the 1% manual tally to the Secretary of State. L.A. and San Francisco are developing their own vote tabulating systems. The Elections Code does not require that jurisdictions perform a risk limiting audit. In his opinion, the 1% manual tally is an ineffective and inefficient means to confirm election results. In his opinion, the 1% manual tally has a small chance of detecting errors in the election results. In his opinion, a risk limiting audit has up to a 90% chance of detecting errors in the election results. He agreed that the 1% manual

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1 tally measures, although ineffectively and inefficiently, the accuracy of the election count. The

2 pilot program he participated in conducted risk limiting audits in elections in eleven counties in

3 2011 – 2012. The audits used a software program other than the counties' existing voting system

4 software program. The most common tabulation error is, in his experience, the misinterpretation

5 of voter ballots, or voter intent. He is not familiar with the voter guidelines promulgated by the

6 Secretary of State. He is not familiar with the County's procedures to test whether ballots are

7 scanned properly. He agreed that a quality control system should reduce errors in the ballots

8 counted. He has not reviewed the County's 1% manual tally results for the June 2016 election. In

9 reviewing Exh. "51," he identified discrepancies in the scanned count and the 1% manual tally in

10 the June election. In his opinion, the entire election audit system needs an overhaul. He agreed

11 that the current voting system does not require a risk limiting audit. He is not familiar with the

12 term "semi-final official" canvas as reflected in the Elections Code. David Jefferson was the

13 chairperson of the post-election audit standards working group. He recognized Dean Logan to be

14 L.A. County's ROV. He identified the existing elements of the official canvas. In his opinion, the

15 existing elements of the official canvas, including the 1% manual tally, are "not enough." In his

16 opinion, the 1% manual tally as a "double check" is not as good as a risk limiting audit. He

17 assumed that the County, like other counties, has a quality control system in tabulating votes. He

18 described his understanding of the manner in which the County conducts its "random draw." He

19 has no opinion on the accuracy of the results of the County's June election. To be a reliable

20 accuracy indicator, the random draw should occur after the results of the election are known. He

21 expects that the risk limiting audit will be the next generation of audits in the State's election

22 procedures.

23

24 Plaintiffs' FIRST CAUSE OF ACTION for DECLARATORY RELIEF

25

26   Declaratory relief is a proper remedy. The purpose of a declaratory judgment is to serve

27 some practical end in "quieting or stabilizing an uncertain or disputed jural relation." *In re*

28 *Claudia E.* (2008) 163 Cal. App. 4th 627, 633 (declaration that Department of Social Services not

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complying with statutory time requirements for juvenile removal proceedings). Another purpose

is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in

subsequent litigation. *Id.* "The proper interpretation of a statute is a particularly appropriate

subject for judicial resolution." *Id.* Judicial economy strongly supports the use of declaratory

relief to avoid duplicative actions to challenge an agency's statutory interpretation or alleged

policies. *Id.* The remedy of declarative relief is cumulative and does not restrict any other remedy

such that it is wrong for a court to decline a declaration on the ground that another remedy is

available. *Id.* at 633-634.

In their trial brief (ROA #92), at pages 4 – 6, Plaintiffs assert:

"Election Code section 15360 describes the 1% manual tally audit procedure. This

provision begins as follows:

15360(a) During the official canvass of every election in which a voting system is used, the

official conducting the election shall conduct a public manual tally of the ballots tabulated by those

devices, including vote by mail ballots, using either of the following methods:

(1) (A) A public manual tally of the ballots, including vote by mail ballots, cast in 1 percent of the

precincts chosen at random by the elections official. If 1 percent of the precincts is less than one

whole precinct, the tally shall be conducted in one precinct chosen at random by the elections

official.

Section 15360(a) requires that "[d]uring the official canvass of every election in which a

voting system is used, the official conducting the election shall conduct a public manual tally of

the ballots tabulated by those devices, including VBM ballots." This process is called the 1%

manual tally. The purpose of the 1% manual tally is "to verify the accuracy of the automated

count." Section 336.5.

Section 15360 clearly states that "not less than 1 percent of the VBM ballots cast" must be

included in the 1% manual tally. Section 15360(a)(2)(B)(i). This quantity must be calculated

based on the total number of vote by mail ballots cast, not the number of vote by mail ballots

counted to date. 1% of the total number of ballots counted at that point is less than 1% of the total

number of ballots cast and ultimately counted after that point. Thus, including a mere 1% of the

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total number of ballots counted to date is in direct violation of the requirement that "not less than 1% of the VBM ballots cast in the election" be counted. Section 215360(a)(2)(B)(i).

The stated purpose of the 1% tally, "to verify the accuracy of the automated count," supports this conclusion. Section 336.5. The legislative history of Section 15360 also supports this conclusion. "In 2006, Elections Code 15360 was amended to require that all vote by mail ballots be included in the 1% manual tally by precinct. This requirement resulted in over 540 additional staff hours to complete the manual tally process and approximately 12,000 in additional costs for each election...." 06/03/11 - Senate Elections and Constitutional Amendments, 2011 Cal Stat. Ch. 52. Clearly, all vote by mail ballots have to be counted. The onerous nature of this requirement led the legislators to add the option to manually tally VBM ballots separately, in batches, to ensure, that all of them could be counted efficiently. Id. The proponents of AB707 state the intent clearly: "The votes on absentee ballots are no less valid or important than the votes cast at the polling place, and the potential for the vote to be incorrectly tabulated on an absentee ballot is just as likely as a vote cast in a traditional polling booth. Therefore, it makes no sense to exclude absentee ballots, provisional ballots and ballots cast at satellite locations from the 1% manual tally. By excluding them from the manual tally, there is no way to verify that the votes cast on them are being recorded accurately. Moreover, in the event that counties are authorized to conduct an all-mail election, this provision would ensure that the manual tally is still conducted in those counties." (Exhibit 54, page 3) Further support was provided by the then-serving Secretary of State Bruce McPherson (served from March 2005 - December 2006): "This proposal also requires a county election official to include all ballots cast in a precinct in the 1% manual tally. This means that a county will need to include any ballots cast at the polls, via absentee ballot, provisional voters, and any ballots cast on direct recording electronic (DRE) voting machines." (Exhibit 54, page 15). In the final recommendation to Governor Schwarzenegger: "Summary: This bill establishes a uniform procedure for elections' officials to conduct the 1% manual tally of the ballots including (1) the requirement that absentee ballots, provisional ballots, and ballots cast at satellite locations be included in the tally of ballots... " (Exhibit 54, page 37.)

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1   Precedent furthers the support for this conclusion. "Section 15360 appears on its face to be

2   concerned solely with assuring the accuracy of the vote, not with limiting unnecessary vote

3   tallying. Indeed, the explicit intent of section 15360, as expressed in a companion statute, is "to

4   verify the accuracy of the automated count." *County of San Diego v. Bowen* 166 Cal. App. 4th

5   501, 511-12 (Cal. Ct. App. 2008)."

6   In their trial brief (ROA # 93), Defendants assert, at pages 15 - 17:

7   When conducting the random sample selected for the manual tally by the Registrar

8   includes all ballots included in the semifinal official canvass the day after the election, including

9   VBM ballots. The County does not include VBM ballots that have yet to be processed and added

10 into the official canvass results. Similarly, the Registrar does not include any provisional ballots in

11 the manual tally. The practice followed by the Registrar is consistent with the intent and purpose

12 of the manual tally and satisfies the requirements of Section 15360.

13   **A. Section 15360 does not Require Provisional Ballots to be Included in the Manual**

14 **Tally**

15   The Registrar does not include provisional ballots in the manual tally. This practice is

16 consistent with the practices of other counties and the opinion of the Secretary of State. It is also

17 consistent with the original intent of the Legislature in conducting the 1% manual tally and does

18 not run afoul of the requirements of Section 15360.

19   As detailed above, prior to 2006, Section 15360 did not expressly require VBM or

20 provisional ballots to be included in the manual tally. In 2006, the Legislature enacted AB 2769

21 (Stats. 2006, c. 893, § 1) and AB 2769 (Stats. 2006, ch. 894) amending Section 15360 to read, in

22 relevant part as follows: "… the official conducting the election shall conduct a public manual

23 tally of the ballots tabulated by those devises, including absent voters' ballots, cast in 1 percent of

24 the precincts …."

25   When introduced, SB 1235 proposed that Section 15360 be amended to also include

26 "provisional ballots, and ballots cast at satellite locations, cast in 1 percent of the precincts" But,

27 the reference to "provisional ballots, and ballots cast at satellite locations" was deleted before the

28 second reading of the bill in committee. Similarly, AB 2769 when introduced also proposed to

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include VBM and provisional ballots in the manual tally, but also like SB 1235, once amended all references to provisional ballots were deleted. "'When the Legislature chooses to omit a provision from the final version of a statute which was included in an earlier version, this is strong evidence that the act as adopted should not be construed to incorporate the original provision.' [citation]" *UFCW & Employers Benefit Trust v. Sutter Health* 241 Cal. App. 4th 909, 927 (2015), citing *People v. Delgado* 214 Cal. App. 4th 914, 918 (2013). As such, it is clear that the Legislature considered but rejected the idea that provisional ballots were to be included in the manual tally.

B. The Registrar Properly Includes Vote by Mail Ballots in the 1 Percent Manual Tally

VBM ballots are received at different times by different means of delivery. The VBM ballots associated with a particular precinct are by the very nature of the process sprinkled throughout all of the VBM ballots included in the semifinal official canvass. Prior to 2012, after the precincts to be included in the manual tally were selected, elections officials were required to locate the VBM ballots associated with the randomly selected precincts and integrate those ballots into the ballots cast at the precincts. This process had to be initiated within several days of the election in order to complete the manual tally "during the official canvass" and of course could not include VBM ballots that have not yet been processed and counted.

In 2011, in an effort to streamline the process and reduce the costs of completing the manual tally, the Legislature enacted AB 985 amending Section 15360. As amended by AB 985, Section 15360 election officials now have an option for conducting the manual tally. Election officials can now conduct the manual tally by precinct as provided under 15360(a)(1)) or, alternatively may conduct a two part manual tally that allows elections officials to manually tally randomly selected batches of VBM ballots, thereby avoiding the cost and time of having to integrate the VBM ballots into the randomly selected precincts (see § 15360(a)(2)).

The intended purpose of AB 985 was to streamline the process and make it easier, more efficient and less costly to conduct the manual tally. If the court now interprets AB 985 to require the Registrar to include all VBM in the manual tally, that interpretation would make the process

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1 more difficult, less efficient and more costly, all of which are contrary to the stated purpose of the

2 amendment.

3 　　Both before and after the enactment of AB 985, the Registrar has only included VBM

4 ballots included in the semifinal official canvass in the manual tally. This practice is consistent

5 with the intent and purpose of the statute as amended and is also consistent with the practices of

6 other counties. The practice also reflects the practical necessity of having to complete the official

7 canvass of the election and certify the results within the statutorily mandated period after the

8 election.

9 　　Another reason for not waiting to conduct the manual tally until all of the VBM ballots are

10 included in the official canvass is that if the Registrar waited and then determined that the vote

11 tabulating devices were not recording the votes accurately, there would be no time left to correct

12 the error and rerun all of the ballots previously included in the official canvass. It is in the public's

13 interest and it is a prudent business practice to begin and complete the manual tally as soon as

14 possible. Waiting until all of the VBM ballots have been processed and included in the official

15 canvass would inarguably substantially delay that process."

16 　　In resolving the controversy over the scope of the "1 percent manual tally" in Section

17 15360, the Court accepts the issues the parties do not dispute: 1. Elections Code Sections 336.5

18 and 15360 are the operative provisions of the Elections Code that define and govern the one

19 percent manual tally (to wit, ""One percent manual tally" is the public process of manually

20 tallying votes in 1 percent of the precincts, selected at random by the elections official, and in one

21 precinct for each race not included in the randomly selected precincts."); 2. Provisional voters are

22 defined in Election Code Section 14310 – 14313 (to wit, "… a voter claiming to be properly

23 registered, but whose qualification or entitlement to vote cannot be immediately established upon

24 examination of the index of registration for the precinct or upon examination of the records on file

25 with the county elections official, shall be entitled to vote a **provisional ballot** …"); 3. Vote-by-

26 mail voters are defined in Election Code Section 300 (to wit, ""**Vote by mail** voter" means any

27 voter casting a ballot in any way other than at the polling place."); 4. The one percent manual tally

28 must be conducted and completed during the official canvass; 5. The purpose of the manual tally is

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1   to verify the accuracy of the automated count. (emphasis added by the Court)

2   The Court is disinclined to read any more into the term "1% manual tally" than is necessary

3   to reasonably construe or interpret its scope.

4   Though the subject of much discussion throughout its history (see, for example,

5   Defendants' trial brief, pages 2 – 4), the legislature chose not to include "provisional ballots" in

6   Section 15360. There appears to be good reason to conclude that this omission was not

7   inadvertent.

8   As Defendants argue, at pages 8 – 9 of their trial brief:

9   "Voters may be required to vote provisionally on the day of the election for a number of

10 reasons. One reason that a voter may be asked to vote provisionally is because the voter is

11 registered as a VBM voter and has been issued a mail ballot, but wants to vote at the poll. The

12 purpose of having a voter registered as a VBM voter vote provisionally is to provide a safeguard

13 against the possibility that the VBM voter has already returned his or her VBM ballot and had his

14 or her VBM ballot counted. In the June Presidential Primary more than one-half of the 75,386

15 voters who voted provisionally were VBM voters who appeared at the polls on election-day but

16 who could not surrender their VBM ballot. And, in fact, during the canvass, the Registrar

17 determined that 521 voters voted both their VBM ballot and a provisional ballot.

18   Another reason for requiring a voter to vote provisionally is because the voter does not

19 appear on the roster of voters at the precinct where they appear to vote. For example, if a non-

20 VBM voter is registered to vote in a precinct in Poway but the voter appears at a poll in Chula

21 Vista, that voter would be given a provisional envelope in which the voter would place his voted

22 ballot, which is then returned to the Registrar's office unopened for final determination. After

23 voting, the voter is instructed to complete all of the information required on the outside of the

24 provisional ballot envelope, including, among other things, the voter's current residence address.

25 The voter is also required to sign and seal the envelope, and return the envelope to the poll worker

26 for deposit into the ballot box. In the June Presidential Primary more than 12,000 voters appeared

27 at a poll other than where they were registered and voted provisionally.

28 / / /

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STATEMENT OF INTENDED DECISION

Another reason for requiring a voter to vote provisionally is unique to "semi-open primary" elections like the June Presidential Primary. The Republican, Green, and Peace and Freedom party primaries were "closed elections" meaning that only voters registered with one of those particular parties were allowed to vote for that party's presidential candidates. In contrast, the Democratic, American Independent, and Libertarian party primaries were "open primaries" meaning that voters who had registered "No Party Preference" ("NPP") were allowed to vote for any one of those parties' presidential candidates. In no instance could a voter registered with a particular party vote for the presidential candidates of another political party. These rules are established by the parties, not the State and not by local election officials."

Vu's trial testimony – which the Court perceived to be credible – is consistent with Defendants' trial brief explanation of the circumstances under which provisional ballots are cast. The Court finds the initial explanation (a provisional voter may be a voter who is "registered as a VBM voter and has been issued a mail ballot, but wants to vote at the poll") to be significant. The Court infers from this explanation that provisional ballots may be nothing more than duplicate ballots of VBM ballots cast by the same voters. Indeed, according to Defendants "In the June Presidential Primary, more than one-half of the 75,386 voters who voted provisionally were VBM voters who appeared at the polls on election-day but who could not surrender their VBM ballot. And, in fact, during the canvass, the Registrar determined that 521 voters voted both their VBM ballot and a provisional ballot." If the Court were to accept Plaintiffs' argument that Section 15360's 1% manual tally audit procedure includes "all ballots cast" including provisional ballots (Plaintiffs' trial brief at pages 4 – 7), Plaintiffs are, in effect, advocating that Defendants assume the risk of including **more than 100% of the ballots cast** in the 1% manual tally. Not only does this interpretation strike the Court as unreasonable but it has the inevitable consequences of adding burden to the County's ROV, whose resources are already stretched far too thin.

Accordingly, the Court rejects Plaintiff's interpretation that the 1% manual tally include provisional ballots.

On the other hand, Plaintiffs' interpretation that all VBM ballots should be included in the 1% manual tally strikes the Court as more reasonable than Defendants' rejection of the need to do

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1   so. First, Section 15360 specifically dictates that the 1% manual tally include VBM ballots.

2   Second, the statute's legislative history supports the inclusion of VBM ballots. Third, the

3   inclusion of all VBM ballots strikes the Court as more conducive to a **"uniform procedure** for

4   elections' officials to conduct the 1% manual tally of the ballots" (Plaintiffs' trial brief, at pages 5

5   – 6) and toward accomplishing the goal of verifying "the accuracy of the automated count." Based

6   on the trial evidence, the ROVs appear to include as many, or as few, VBM ballots as have been

7   received and processed in the 1% manual tally. For example, according to Rodewald, San Luis

8   Obispo does not include VBM ballots not counted as of the election day in the 1% manual tally;

9   according to Logan, L.A. only includes VBM ballots which were both received and counted as of

10   the election day in the 1% manual tally; according to LaVine, Sacramento strives to include as

11   many VBM ballots as possible into the 1% manual tally; according to Vu, San Diego does not

12   include VBM ballots not processed by election night in the 1% manual tally. The disparity of the

13   ROVs practices throughout the State strikes the Court as more a reflection upon the limited

14   resources within which the ROVs are expected to discharge their statutory duties than compliance

15   with a reasonable interpretation of Section 15360. The Secretary of State's contrary opinion (Exh.

16   "107") is rejected.

17   Accordingly, the Court accepts Plaintiff's interpretation that the 1% manual tally include

18   all VBM ballots. In doing so, the Court emphasizes that its intention is not to call into question the

19   credibility of the ROVs who testified at trial. It's apparent that the ROVs are experienced, skillful

20   and devoted public servants who are tasked with the challenge of overseeing an extraordinarily

21   complex voting system.

22

23   **Plaintiffs' SECOND CAUSE OF ACTION for MANDAMUS - CCP 1085**

24

25   A writ of mandate compelling the County Registrar of Voters Office to comply with the

26   California Elections Code is a proper remedy. The Court will issue a writ of mandate "to any

27   inferior tribunal, corporation, board, or person, to compel the performance of an act which the law

28   specifically enjoins, ... or to compel the admission of a party to the use and enjoyment of a right or

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1 office to which the party is entitled, and from which the party is unlawfully precluded by such

2 inferior tribunal, corporation, board, or person." Code Civ. Proc. 1085(a). "Mandamus is the

3 correct remedy for compelling an officer to conduct an election according to law.... It is also an

4 appropriate vehicle for challenging the constitutionality of statutes and official acts." *Hoffman v.*

5 *State Bar of California* (2003) 113 Cal. App. 4th 630, 639 (internal citations omitted).

6   In *People v. Karriker* (2007) 149 Cal. App. 4th 763, 774, the Court stated:

> ... Mandamus will lie, however, "to compel a public official to perform an official act required by law." (Ibid.) "Code of Civil Procedure section 1085, providing for writs of mandate, permits challenges to ministerial acts by local officials. To obtain such a writ, the petitioner must show (1) a clear, present, ministerial duty on the part of the respondent and (2) a correlative clear, present, and beneficial right in the petitioner to the performance of that duty. [Citations.] A ministerial duty is an act that a public officer is obligated to perform in a prescribed manner required by law when a given state of facts exists. [Citations.]

     The Court finds that Defendants are "obligated" to include all VBM ballots in the 1% manual tally, in performance of the requirements imposed on elections officials by Elections Code Sections 336.5 and 15360. To this extent, the Court grants the relief sought by Plaintiffs to require Defendants to "to fully comply with the breadth of California Elections Code Section 15360." SAC, page 12.

     On the other hand, the Court defers, without prejudice, from ruling on the relief sought by Plaintiffs that Defendants be "stayed from certifying any future election." SAC, page 12. The Court is not satisfied that the parties have adequately briefed the issue of a stay much less the consequences that may flow from the issuance of a stay of the upcoming November election. The Court will entertain further discussion regarding a hearing and briefing schedule at the Status Conference.
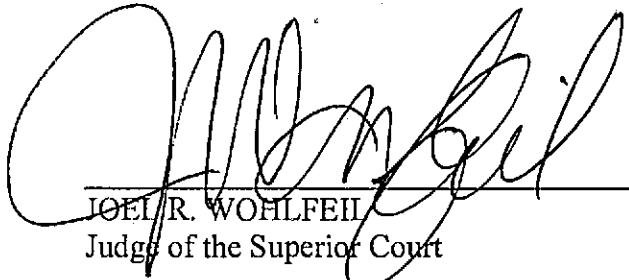
Conclusion

     The Court finds, as set forth above, in favor of Plaintiffs and against Defendants

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STATEMENT OF INTENDED DECISION

MICHAEL VU and COUNTY OF SAN DIEGO, and in favor of Defendant HELEN N.

ROBBINS-MEYER and against Plaintiffs, on Plaintiffs' claims against Defendants. The parties

are directed to serve their objections, if any, to the Court's SOID within the time required by law.

The Court sets a Status Conference on December 1, 2016 at 3:00 pm for the purpose of hearing the

objections, if any, to the Court's SOID.

IT IS SO ORDERED.

Dated: 10-26-16

JOEL R. WOHLFEIL
Judge of the Superior Court

STATEMENT OF INTENDED DECISION

I, certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s): Minute Order dated 10/26/16 with Statement of Intended Decision attached.

on the parties shown below by placing a true copy in a separate envelope, addressed as shown below; each envelope was then sealed and, with postage thereon fully prepaid, deposited in the United States Postal Service at: ☒ San Diego   ☐ Vista   ☐ El Cajon   ☐ Chula Vista   ☐ Ramona, California.
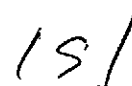
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CLERK OF THE SUPERIOR COURT

/S/

Date: October 26, 2016   by _____, Deputy
J. Cerda