MINUTE ORDER

DATE: 07/25/2016   TIME: 10:53:00 AM   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

After entertaining the arguments of counsel and taking the matter under submission, the Court now rules as follows:

The Application of Plaintiffs Citizens Oversight Inc. and Raymond Lutz ("Plaintiffs") for a Preliminary Injunction to direct Defendants MICHAEL VU, San Diego Registrar of Voters, HELEN N. ROBBINS-MEYER, San Diego County Chief Administrative Officer, and COUNTY OF SAN DIEGO ("Defendants") to comply with California Election Code Section 15360, in certifying the Primary Election results of June 7, 2016, is DENIED AS MOOT, without prejudice, as reflected below.

First, the Court takes judicial notice of the July 15, 2016 press release from the California Secretary of State certifying California's June statewide primary results. Evid. Code 452(c). (http://www.sos.ca.gov/administration/news-releases-and-advisories/2016-news-releases-and-advisories /secretary-state-padilla-certifies-election-results/). The Court infers that the state certification also entails the certification of the San Diego County primary results. As a result, the Application for preliminary injunction is MOOT as to Plaintiff's request for injunctive relief for the certification of the June 7, 2016 election. "In dismissing the appeal as moot...reversal of the judgment could not afford the plaintiffs relief because the issuance of an injunction restraining the defendant from doing that which he has already done, would be an idle and frivolous act, since such decision would have no binding authority and would not affect the legal rights of the parties." Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 581, 586. "... [A]lthough a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character it becomes a moot case or question which will not be considered by the court." Wilson v. Los Angeles County Civil Service Commission (1952) 112 Cal. App. 2d 450, 453.

However, the Court is cognizant of the importance and exigent circumstances in this action, thereby necessitating an expedited ruling in this matter. Although moot to the Primary Election results of June 7, 2016, when an issue of broad public interest is posed, the Court may exercise its inherent discretion to resolve the issue. Johnson v. Hamilton (1975) 15 Cal. 3d 461, 465.

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

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(FAC"), Plaintiff appears to seek a declaration regarding all future elections, which may recur as imminently as the upcoming November election. Therefore, the first cause of action is not moot.

The "1 percent manual tally is a procedure used in California to test whether there are any discrepancies between the electronic record generated by a voting machine and what is essentially a manual audit of that electronic record." Nguyen v. Nguyen (2008) 158 Cal. App. 4th 1636, 1643. In accordance with California law, the official canvas must include a manual tally as a means of verifying the accuracy of the system count. Elec. Code 15360. "This procedure is conducted during the official canvass to verify the accuracy of the automated count." Elec. Code 336.5.

Section 15360 provides two alternative methods to conduct this manual tally, using section 15360(a) (1) or 15360(a) (2). Initially, Defendants opted to conduct the 1 percent manual tally under section 15360(a) (2). A public notice was subsequently posted on the San Diego County Registrar's website. Thereafter, Defendants' chose to conduct the 1 percent manual tally utilizing section 15360(a) (1). Declaration of Vu, pg. 6, 1-2.

California Elections Code 15360(a) (1), reads in relevant part:

(a) During the official canvass ... 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 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 1percent 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.

Plaintiffs' argue they 1) will be deprived of the verification required by law and 2) the integrity of the election results will be compromised if Defendants are not in compliance with section 15360. Section 15360 was enacted to serve as a check on the election process by means of a manual audit. Notwithstanding the fact that San Diego County Registrar does not include provisional ballots in their manual tally procedure, a practice consistent with other counties (ROA #'s 36 – 42), it does not follow that Defendants are therefore in compliance with section 15360. The San Diego County Registrar of Voters has a legal obligation to comply with section 15360. It is imperative that auditing requirements are followed completely in order to ensure the continued public confidence of election results. The San Diego County Registrar of Voters is obligated to allocate its resources appropriately in order to comply with the law. If Defendants are unable to do so, they must seek redress with the legislative or executive branches of government, not the Court.

Defendants' Request (ROA # 32) for judicial notice is GRANTED.

Defendants' evidentiary objections (ROA # 33) are SUSTAINED IN PART AND OVERRULED IN PART. Nos. 1, 3 and 5 are SUSTAINED. Nos. 2, 4, 6, 7 and Exh "3" are OVERRULED.

Plaintiff's request (ROA # 51) for judicial notice, is DENIED.

Defendants' evidentiary objections (ROA # 56) to the Declaration of Ben D. Cooper, are OVERRULED.

Defendants' evidentiary objections (ROA # 57) to Plaintiff's supplemental request for judicial notice are SUSTAINED.

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Judge Joel R. Wohlfeil

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO ☐ COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101-3814 ☒ HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827 ☐ FAMILY COURT, 1555 6TH AVE, SAN DIEGO, CA 92101-3294 ☐ MADGE BRADLEY BLDG., 1409 4TH AVE., SAN DIEGO, CA 92101-3105 ☐ KEARNY MESA BRANCH, 8950 CLAIREMONT MESA BLVD., SAN DIEGO, CA 92123-1187 ☐ NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92083-6643 ☐ EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941 ☐ RAMONA BRANCH, 1428 MONTECITO RD., RAMONA, CA 92065-5200 ☐ SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910-5649 ☐ JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792 ☐ JUVENILE COURT, 325 S. MELROSE DR., VISTA, CA 92083-6634	**FOR COURT USE ONLY** **F I L E D** Clerk of the Superior Court **JUL 25 2016** By: J. CERDA

PLAINTIFF(S)/PETITIONER(S) CITIZENS OVERSIGHT INC, et al	
DEFENDANT(S)/RESPONDENT(S) MICHAEL VU, et al	JUDGE: Joel R. Wohlfeil DEPT: 73
CLERK'S CERTIFICATE OF SERVICE BY MAIL **(CCP 1013a(4))**	CASE NUMBER 37-2016-00020273-CL-MC-CTL

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 7/25/16

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.
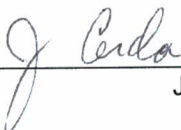
<u>NAME & ADDRESS</u>

TIMOTHY BARRY, ESQ.
County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101

<u>NAME & ADDRESS</u>

ALAN GERACI, ESQ.
CARE Law Group PC
817 W. San Marcos Blvd.
San Marcos, CA 92078

CLERK OF THE SUPERIOR COURT

Date: July 25, 2016   by _____ *J. Cerda* _____, Deputy
                                       J. Cerda

SDSC CIV-286(Rev. 12-02)   **CLERK'S CERTIFICATE OF SERVICE BY MAIL**