

1 JOSEPH H. HUNT  
Assistant Attorney General  
2 CARLOTTA P. WELLS  
Assistant Director  
3 MARSHA STELSON EDNEY  
Senior Trial Counsel  
4 KATE BAILEY  
CAROL FEDERIGHI  
5 Trial Attorneys  
United States Department of Justice  
6 Civil Division, Federal Programs Branch  
1100 L Street, NW  
7 Washington, DC 20005  
Tel.: (202) 514-4520  
8 Email: marsha.edney@usdoj.gov

9 Attorneys for Defendants

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

12  
13 City of San Jose, et al.,

14 Plaintiffs,

15 v.

16 WILBUR L. ROSS, JR., *et al.*,

17 Defendants.  
18

Civil Action No. 3:18-cv-02279-RS

**DEFENDANTS' OBJECTIONS TO  
PLAINTIFFS' TRIAL DECLARATIONS**

Date: January 2, 2019  
Time: 10:00 am  
Judge: Hon. Richard Seeborg

1 Defendants United States Department of Commerce, Wilbur L. Ross, Jr., in his official  
2 capacity as Secretary of Commerce, Census Bureau, and Ron S. Jarmin, in his official capacity as  
3 performing the non-exclusive functions and duties of the Director of the Census Bureau, hereby  
4 submit objections to the following portions of Plaintiffs' trial declarations.

5 **Trial Affidavit of Margo Anderson**

6 ¶¶ 15-35. These paragraphs of Dr. Anderson's affidavit, which discuss the disclosure of  
7 census information about Japanese Americans during World War II, are new and outside scope of  
8 her expert report. Therefore, these paragraphs should be excluded.

9 Objections to Exhibits: Exhibit 1 is her expert report which should be excluded as hearsay  
10 under 802. Exhibits 2, 3 and 4 support her new testimony and therefore should be excluded. In  
11 addition, they should also be excluded as hearsay (802). Exhibit 4 should further be excluded for  
12 lack of authentication (901).

13 **Trial Affidavit of Jill Bourne**

14 ¶ 21. "*Because Branch Community Profiles are created using Census data, if the accuracy or quality of the*  
15 *Census data decline, the accuracy and quality of the Community Branch Profiles will likewise decline.*" Untimely  
16 disclosed expert opinion (702 and Rule 26(a)(2)(C)). Ms. Bourne purports to offer a predictive  
17 opinion based on her experience and personal observations as the Director of the San Jose Public  
18 Library. Ms. Bourne is not offering lay opinion testimony, but instead, based on her specialized  
19 knowledge she has developed by virtue of her job, an opinions about how census data is used and  
20 could be affected constitute Rule 702 testimony. Because Plaintiffs did not timely disclose this  
21 expert opinion, this testimony should be excluded.

22 Rule 701 precludes lay testimony based on specialized knowledge. *FiTeq INC v. Venture*  
23 *Corp.*, No. 13-CV-01946-BLF, 2016 WL 693256, at \*3 (N.D. Cal. Feb. 22, 2016 (agreeing that

1 defendants are correct to draw a line between lay and expert witness testimony). “Lay witness  
2 testimony is governed by Rule 701, which limits opinions to those 'rationally based on the  
3 perception of the witness.' Rule 702, on the other hand, governs admission of expert opinion  
4 testimony concerning ‘specialized knowledge.’” *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246  
5 (9th Cir. 1997) (citing Fed. R. Evid. 701). Rule 701 “expressly excludes lay opinion testimony ‘based  
6 on scientific, technical, or other specialized knowledge within the scope of Rule 702.’” *Synthes USA,  
7 LLC v. Spinal Kinetics, Inc.*, No. C-09-01201 RMW, 2011 WL 11709387, at \*10 (N.D. Cal. Aug. 19,  
8 2011) (citing Fed. R. Evid. 701(c)); *See also Calloway v. Contra Costa Cty. Jail Corr. Officers*, No. C 01-  
9 2689 SBA, 2007 WL 134581, at \*19 (N.D. Cal. Jan. 16, 2007), *aff’d*, 243 F. App’x 320 (9th Cir. 2007)  
10 (excluding declaration testimony describing medical condition as improper lay testimony under 701):  
11 *United States v. Tomasetta*, No. 10 CR 1205 PAC, 2012 WL 1080293, at \*4 (S.D.N.Y. Mar. 30,  
12 2012) (holding that testimony by research analysts about predictions about the effect of making  
13 different disclosures or opinions based on generalized knowledge about the industry constituted  
14 expert testimony); *In re: Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543 (JMF), 2016 WL  
15 4410008, at \*2 (S.D.N.Y. Aug. 18, 2016) (holding that testimony by an EMT and a state trooper  
16 about why air bags didn’t deploy in a crash required specialized or technical knowledge and thus  
17 constituted expert testimony).  
18

19  
20 ¶ 22. “*If the accuracy or quality of the Branch Community Profiles decline, I will be less able to make*  
21 *appropriate decisions regarding resource allocation, collection management, and program management for the SJPL,*  
22 *and less able to fulfill SJPL’s goal of serving all members of the San Jose community.*” Untimely disclosed expert  
23 opinion (702 and Rule 26(a)(2)(C)), for the same reasons noted above.  
24  
25  
26  
27

**Trial Affidavit of Kristen Clements**

¶ 1. *I believe that if the addition of a citizenship question on the 2020 Census leads to an undercount of the population of San Jose relative to other jurisdictions, the City will not receive the necessary level of federal funding necessary to effectively implement critical affordable housing programs for our community.* Lack of personal knowledge (602); improper lay testimony and undisclosed expert testimony (701/702; 26(a)(2)). Ms. Clements purports to offer testimony based on her experience and professional observations as the Division Manager for the City of San Jose's Department of Housing. Ms. Clements is not purporting to offer lay or expert opinion testimony. The foregoing statements offer a predictive opinion implicitly based on technical conclusions regarding the impact of future population counts on technical funding algorithms. Ms. Clements' declaration does not establish that she has personal knowledge of how these funding algorithms operate or experience in applying them (lack of personal knowledge) and, to the extent that these statements are based on specialized knowledge and calculations, Plaintiffs did not disclose her as a lay or expert witness (improper lay testimony and undisclosed expert testimony).

¶ 4. *Over the past decade, the growth of the technology sector has brought many well-paying jobs to San Jose, but has also made housing much more expensive. New apartments that are built are class A luxury units with very few affordable units included in the properties, as in-lieu fees are less expensive than reducing high rents down to required affordable levels.* Lack of personal knowledge (602); hearsay (802). Ms. Clements has not established that she has personal knowledge as to the job market in San Jose (Ms. Clements' area is housing) or as to the reasons that luxury units are built instead of affordable units.

¶ 11. *HUD uses Census and ACS data to make these allocations.* Lack of personal knowledge (602); hearsay (802). Ms. Clements has not established the source of this statement. (The same

1 objection applies to paragraph 14 of Ms. Clements' Nov. 2, 2018, Declaration (ECF No. 99-2), if the  
 2 Court admits that into the trial record.)

3 ¶ 15. *San Jose's funding is allocated pursuant to Formula A. The population element of Formula A is*  
 4 *calculated based on data reported by the United States Census Bureau (the "Bureau") based on the census conducted*  
 5 *every ten years (the "Decennial Census") and the subsequent American Community Survey ("ACS"). Lack of*  
 6 *personal knowledge (602); hearsay (802). Ms. Clements has not established the source of this*  
 7 *statement. (The same objection applies to paragraphs 11 and 12 of Ms. Clements' Nov. 2, 2018,*  
 8 *Declaration (ECF No. 99-2).)*

10 ¶ 20. *[I]f the Decennial Census underreports the population of San Jose relative to other participating*  
 11 *jurisdictions, the City will receive less CDBG funding. Lack of personal knowledge (602); improper lay*  
 12 *testimony and undisclosed expert testimony (701/702; 26(a)(2)(C))—See discussion of paragraph 1*  
 13 *above. (The same objection applies to paragraph 23 of Ms. Clements' Nov. 2, 2018, Declaration*  
 14 *(ECF No. 99-2).)*

16 ¶ 21. *[I]f the Decennial Census underreports the population of San Jose relative to other participating*  
 17 *jurisdictions, the City will receive less HOME funding. Lack of personal knowledge (602); improper lay*  
 18 *testimony and undisclosed expert testimony (701/702; 26(a)(2)(C))—See discussion of paragraph 1*  
 19 *above. (The same objection applies to paragraph 25 of Ms. Clements' Nov. 2, 2018, Declaration*  
 20 *(ECF No. 99-2).)*

### 21 **Trial Affidavit of Monique Melchor**

22 ¶ 20. *[I]f the Census Bureau were to provide lower-than-accurate population data for the City of San Jose*  
 23 *relative to other participating jurisdictions, the City of San Jose would receive less funding through WIOA than it*  
 24 *would if the data were accurate. Lack of personal knowledge (602); improper lay testimony and*  
 25 *undisclosed expert testimony (701/702; 26(a)(2)). Ms. Melchor purports to offer testimony based*  
 26

1 on her experience and professional observations as the Director of work2future, Workforce  
 2 Development Board, Office of Economic Development for the City of San Jose. Ms. Melchor is  
 3 not purporting to offer lay or expert opinion testimony. The foregoing statement offers a predictive  
 4 opinion implicitly based on technical conclusions regarding the impact of future population counts  
 5 on technical funding algorithms. Ms. Melchor's declaration does not establish that she has personal  
 6 knowledge of how these funding algorithms operate or experience in applying them (lack of  
 7 personal knowledge) and, to the extent that these statements are based on specialized knowledge  
 8 and calculations not acquired or performed in the course of her professional duties, Plaintiffs did  
 9 not disclosure her as a lay or expert witness (improper lay testimony and undisclosed expert  
 10 testimony).  
 11

#### 12 **Trial Declaration of Andrew Reamer**

13 ¶¶ 67-73. These paragraphs in Dr. Reamer's affidavit are new and outside scope of his  
 14 expert report and therefore should be excluded. These paragraphs discuss new programs not  
 15 previously analyzed as part of his expert report. At his deposition, he admitted that he had not  
 16 performed any additional calculations for programs beyond the five he analyzed in the New York  
 17 case. *See* Transcript of Deposition of Dr. Reamer at 71:25-72:2. Ex.1  
 18

19 Objection to Exhibits: Exhibits A and B are Dr. Reamer's expert report and curriculum vitae  
 20 which are hearsay and should not be admitted (802). Exhibit C is admissible only under Rule 703.  
 21 Exhibits D and E should be excluded because they are not relevant (401/403) and are hearsay (802)  
 22 if offered for the truth of the matter asserted.  
 23

#### 24 **Trial Affidavit of Raymond Riordan**

25 ¶ 11. *[A]ny net undercount of the population of the City of San Jose would negatively impact its ability to*  
 26 *obtain funding in the event of a disaster.* Lack of personal knowledge (602); improper lay testimony and  
 27

1 undisclosed expert testimony (701/702; 26(a)(2)). Mr. Riordan purports to offer testimony based on  
2 his experience and professional observations as the Director of the Office of Emergency  
3 Management for the City of San Jose. Mr. Riordan is not purporting to offer lay or expert opinion  
4 testimony. The foregoing statement offers a predictive opinion implicitly based on technical  
5 conclusions regarding the impact of future population counts on technical funding algorithms. Mr.  
6 Riordan's declaration does not establish that he has personal knowledge of how these funding  
7 algorithms operate or experience in applying them (lack of personal knowledge) and, to the extent  
8 that these statements are based on specialized knowledge and calculations not acquired or  
9 performed in the course of his professional duties, Plaintiffs did not disclose him as a lay or expert  
10 witness (improper lay testimony and undisclosed expert testimony).

#### 12 **Trial Affidavit of Jeff Ruster**

13 ¶ 9. Lack of Personal Knowledge. Foundation. Hearsay. The basis for Mr. Ruster's  
14 knowledge for the statement in this paragraph is information he obtained at a meeting, described in  
15 the preceding paragraph, "with over 100 representatives from a number of community-based,  
16 educational, government, and private sector organizations." The statements made by these  
17 representatives constitute inadmissible hearsay under Rule 802. To the extent Mr. Ruster is simply  
18 representing what the content of these statements and relying upon them for the truth of the matter  
19 asserted therein, Defendants object to this paragraph.

21 ¶ 12. Lack of foundation. (601, 602). The statement in this paragraph makes an  
22 unsupported assertion that "outreach programs designed to encourage hard-to-count populations to  
23 respond to the 2020 Census" will be required "to divert funds and use additional sources of City  
24 funding not currently designated for census-related outreach."  
25

1 ¶ 14. *“This consultant . . . likely will be required to divert some of that time and resources to facilitate*  
2 *participation in the 2020 Census, and likely will be required to divert some of that time and resources to address the*  
3 *effect of the addition of the citizenship question on hard-t-count populations.”* Lack of foundation and  
4 speculation (601, 602). The statements quoted above are not based on personal knowledge and  
5 contain Mr. Ruster’s speculative predictions about future events.

6 ¶ 15: Lack of foundation (601, 602). The statement in this paragraph makes an unsupported  
7 assertion that “the City of San Jose expects to allocate at least an additional \$300,00 in preparing and  
8 implementing outreach strategies for the 2020 Decennial Census.”  
9

10 Exhibit A: Hearsay (802) (if submitted for the truth of the statements contained in the  
11 documents); Lack of ability to sufficiently authenticate (901).

### 12 **Trial Affidavit of Opal Tometi**

13 ECF 94-4 Declaration of Opal Tometi (incorporated by reference)

14 ¶ 9: *“BAJI’s mission is harmed because the addition of the citizenship question to the 2020 Decennial*  
15 *Census creates a legitimate risk of a heightened undercount of immigrant populations. The impact of such an*  
16 *undercount, including a dilution of political power and a loss of federal funding, on the very immigrant communities*  
17 *that BAJI serves impedes its mission to advance these communities’ access to racial, social, and economic justice.”*  
18  
19 Untimely disclosed expert opinion (702 and Rule 26(a)(2)(C)). Ms. Tometi purports to offer a  
20 predictive opinion based on her knowledge, experience and personal observations as the Executive  
21 Director of the Black Alliance for Just Immigration ((BAJI). Ms. Tometi is not offering lay opinion  
22 testimony, but instead, based on her specialized knowledge she has developed by virtue of her job,  
23 predictive opinions about the outcome of the 2020 decennial census. Under these circumstances,  
24 Ms. Tometi’s opinions are subject to the relevance and reliability criteria of Rule 702, and Plaintiffs’  
25 failure to disclose this testimony under Rule 26(a)(2)(C) should result in its exclusion.  
26



1 ¶ 10. “Additionally, because BAJI’s members are typically concentrated in immigrant-rich metropolitan  
2 regions, the impact of an undercount will be disproportionately felt in these discrete locations.” Untimely disclosed  
3 expert opinion (702 and Rule 26(a)(2)(C)), for the same reasons noted above.

4 ¶ 11. To the extent the statements in this paragraph are offered for the truth of the matter  
5 asserted, Defendants object to them as hearsay (802).

6 ¶ 14. Lack of foundation and speculation (601, 602). The statements in this paragraph are  
7 not based on personal knowledge and contain Ms. Tometi’s speculative predictions about future  
8 events.

9 ¶¶ 15-17, 19. Untimely disclosed expert opinions (702 and Rule 26(a)(2)(C)), for the same  
10 reasons noted above.

11 Trial Affidavit

12 ¶¶ 5-6. Lack of Personal Knowledge; Foundation; Hearsay (601, 602, 802). As reflected in  
13 these paragraphs, the basis for Ms. Tometi’s knowledge are “news reports indicating that the  
14 government may try to change the law so as to allow the sharing of 2020 census information.”  
15 These news reports constitute inadmissible hearsay. ADD CITE To the extent Ms. Tometi is  
16 referring to and relying on these reports for the truth of the matters asserted therein, Defendants  
17 object to admission of these paragraphs.

18 Date: January 6, 2019

19 Respectfully submitted,

20 JOSEPH H. HUNT  
21 Acting Assistant Attorney General

22 BRETT A. SHUMATE  
23 Deputy Assistant Attorney General

24 JOHN R. GRIFFITHS  
25 Director, Federal Programs Branch

26 CARLOTTA P. WELLS

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

Assistant Director  
  
/s/ Marsha Stelson Edney  
MARSHA STELSON EDNEY  
Senior Trial Counsel  
KATE BAILEY  
CAROL FEDERIGHI  
Trial Attorneys  
United States Department of Justice  
Civil Division, Federal Programs Branch  
1100 L Street, NW  
Washington, DC 20005  
Tel.: (202) 514-4520  
Email: marsha.edney@usdoj.gov  
  
*Attorneys for Defendants*

**Exhibit 1**

1 poverty level.

2 BY MR. TOMLINSON:

3 Q. Right.

4 A. So the poverty level might seem funny,  
5 but the poverty level is itself census derived  
6 because it relies on the consumer price index. It  
7 gets adjusted every year, and the housing portion of  
8 the consumer price index is based on the American  
9 Community Survey.

10 So programs that rely on the inflation factor  
11 are not going to be as sensitive as ones that where  
12 -- particularly when that inflation factor is applied  
13 across the board, across the U.S., it will not be as  
14 sensitive as programs in which it is specifically  
15 saying this State gets this amount of money.

16 Q. Okay.

17 A. I want to add one thing. You know,  
18 we've been talking about the impact of a citizenship  
19 question on the distribution of federal funds.  
20 Census data get used for lots and lots of things  
21 beyond that.

22 So if the CPI gets screwed up, that has  
23 ramifications that go well beyond what we're talking  
24 about.

25 Q. Okay. So you've only done calculations

1 of these five specific programs. Correct?

2 A. Correct.

3 Q. And, as I understand it, your expert  
4 opinion is that those five specific programs are  
5 representative of the 24 total programs that use  
6 geographic allocation formulas; is that correct?

7 MS. MORGAN: Objection to form.

8 THE WITNESS: I would say they're  
9 representative of the principle that a differential  
10 -- that programs that rely on either FMAP or State  
11 share would be -- the grantees would differentially  
12 affected by a differential undercount, and so it is  
13 illustrative of the dynamic of the 24 programs, but  
14 the 24 programs themselves are representative of a  
15 larger group.

16 BY MR. TOMLINSON:

17 Q. But you have not conducted any specific  
18 analysis of any government program that does not use  
19 a geographic allocation formula. Correct?

20 A. Correct. All five of these use  
21 geographic allocation.

22 Q. So are you intending to offer expert  
23 testimony as to the impact the differential  
24 undercount in the decennial census would have on the  
25 government programs that do not use geographic