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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

Michael Denny; Nicholas Smith; Contestants. vs. John Arntz, Director of Elections; Dennis Herrera, City Attorney; Defendants.	Case No.:CGC-19-575070 CONTESTANTS' REPLY TO DEFENDANTS' DEMURRER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF **Reservation No.: 04180521-04** Hearing Date: May 21, 2019 Time: 9:30 a.m. Place: Dept. 302 Date Action Filed: December 5, 2018 Trial Date: Not set

CONTESTANTS' REPLY TO DEFENDANTS' DEMURRER

The demurrer does not comply with Division 16 of the Elections Code in that is not an affidavit and may not be considered by the court.

In the alternative, objections I, II, and III should be overruled on the basis that they are without merit.

Contestants reply is based upon the supporting Memorandum of Points and Authorities set forth below, the pleadings and papers on file herein, and upon such other and further evidence as may be presented at the hearing of the demurrer.

Dated: May 9, 2019

Respectfully submitted,

By: _____
Michael Denny - Pro-Per
For Contestants

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MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION

The purpose of an election contest is to determine the will of the voters.

There is no common law right to an election contest. It is a remedy created by the legislature to provide a way to reach a quick resolution by a court.

As used herein, the present tense includes the past and future tenses, and the future the present; the masculine gender includes the feminine; the neuter gender includes the masculine and the feminine; and the singular includes the plural, and the plural, the singular. Statutory references are to the Elections Code unless a different code is specified. Counsel refers to the lawyer for the Defendant.

This election contest is about the knowing and willful deception of the voters by those who had been entrusted with the conduct of fair and impartial elections. Officials of the City and County of San Francisco ("City") originated most of the materials for the election. It was the City's decision to ignore the mandatory (not directory) substantive rules for getting a measure placed on the ballot. It was the City's decision to ignore the mandatory disclosure and fairness provisions newly imposed on it by the legislature. By invoking the consolidation provisions of Division 10, Part 3, the City appointed the Defendant as its election official, tasked with all the duties of carrying out the election in accordance with the law.

Counsel seeks to prevent this court from making a decision on the election contest by incorporating procedural niceties beyond the legislative constrictions designed to make an election contest a quick proceeding. In *Anderson v. County of Santa Barbara* (1976)

56 Cal.App.3d 780, the court rejected the application of a procedural remedy that was not provided for in Division 16. In *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, the court discussed that "Strict rules embodied in the Elections Code govern a court's review of a properly contested election."

Counsel seeks to mislead the court in the materials claiming to be a "demurrer."

II. DISCUSSION

Contestant will address the failure of Defendant to follow the procedures set out by Division 16. Then Contestant will address the objections raised in what Counsel claims to be a "demurrer."

A. Election Contest Procedure

1. Defendants have failed to file a demurrer in accordance with Division 16.

Division 16 sets out the rules for an election contest. Rules are set out for the parties, the court clerks, and the judges. When the legislature has set the rules, it is not for Counsel to expand the rules to turn an election contest into a general-purpose civil action. Cf: *Enterprise Residents Etc. Committee v. Brennan* (1978) 22 Cal.3d 767 ("no 'nicety of pleading' is required"); *Friends of Sierra Madre*, *supra* ("the grounds for an election contest ... were exclusive")

Division 16, Chapter 5, Article 3 applies to this contest under Section 16440(a) and (b). Section 16444 requires that "No special appearance, demurrer or objection may be taken other than by the affidavits which shall be considered a general appearance in the contest." Section 16443 requires that responsive pleadings must be filed within five days. The "demurrer" or answer is, therefore, procedurally barred.

Section 16443 and Section 16444 prohibits this court from considering the materials proffered by Defendant as a "demurrer" as the materials do not contain an affidavit of the Defendant. The "demurrer" is merely Counsel's objections. Counsel may not be a witness, offer testimony, or provide evidence in this Contest, except through witnesses, such as the Defendant.

For the purposes of the "demurrer," Contestant objects to all of Counsel's evidentiary materials that are not supported by the testimony of someone other than Counsel. For the sake of argument, herein, Contestant will presume that the evidentiary materials can be authenticated or stipulated to.

In the interests of judicial economy for the facts to be adduced at trial, Contestant is amenable to stipulating to documents that are, generally, public records, if Counsel is willing accommodate Contestant's documents as well.

2. Counsel's declaration of April 22, 2019 is a nullity.

The basis of Counsel's "Declaration Of Tara M. Steeley Re Meet And Confer ..." is the Code of Civil Procedure for other civil cases. Counsel has cited no section of Division 16 that supports the introduction of such a declaration or the wholesale incorporation of the Code of Civil Procedure into an election contest. See above.

B. "Demurrer" Objections

Section 16403 provides that "A statement of the grounds of contest shall not be rejected nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which the election is contested."

The fact that Counsel argues law relevant to the grounds for each of the objections appears to contradict Counsel's objection that the grounds are not stated sufficiently enough to advise Defendant of the basis of the Contest.

1. Pre-election remedies.

There is no "rule" in California that a contestant in an election contest must avail himself of a pre-election remedy. *McKinney*, *supra*, addressed a runoff election where McKinney claimed that votes for a runner-up, write-in candidate affected the outcome of the election, but abandoned that claim. McKinney's primary claim was that the City of San Diego charter prohibited write-in candidates in runoff elections. Counsel is misleading the court by taking its quote out of context. In addition, the *McKinney* holding was not based on election contest law, but on a writ of mandate.

McKinney specifically did not make any holding with respect to an election contest. "At oral argument counsel for McKinney specifically disavowed any reliance on Section 16100, and we take that as a formal withdrawal of his complaint to the degree that it requests relief in the form of an 'election contest.'"

The dicta was nicely summed up in the heading of the discussion -- "Post-Election Challenges Must Either Be Brought on Enumerated Statutory Grounds or Be Based on the Violation of Constitutional Rights."

This contest is based on enumerated statutory grounds -- Section 16100(c) -- which have been clearly stated.

As discussed below, Counsel further misleads the court by jumbling everything into amorphous "ballot materials" and "ballot errors" categories.

2. Causes of action are time-barred.

Counsel misleads the court that any of the grounds are time-barred. Counsel cites no provision of Division 16 that imposes a bar on the grounds allowable in Section 16100. In fact, Counsel puts forth a misleading legal argument that goes to the court's ultimate judgment of whether to grant Contestant's prayer for relief.

Counsel misleads the court with respect to the time constraints on election contests, which specify "six months" in Section 16401(a) for contests "brought on any of the grounds mentioned in subdivision (c) of Section 16100."

The misleading nature of Counsel's argument is that all "ballot materials" (a term that is nowhere defined in the Elections code and is also an oxymoron) are of a similar character. All of the grounds concern either the ballot itself or the acts or omissions of Defendants with respect to the contested election.

In *Friends of Sierra Madre*, *supra*, the court agreed with the Court of Appeal in recognizing that "It, too, rejected the argument that a challenge to ballot materials may be made only before the election, noting that several courts have considered such challenges postelection."

Contestant is entitled to have the law, as it has been determined by all the courts in California and nationwide, applied to the facts of this Contest. It is not proper for Counsel to seek what amounts to summary judgment based on its narrow, self-serving, and misleading representation of the law and the facts.

3. Fails to state facts sufficient to constitute a cause of action.

The Contest specifically alleges facts that correspond to each of the five requirements of Section 16100. Each individual ground alleges acts or failures to act that individually describe a substantive, not procedural and not directory, provision of the Elections Code that Defendant has violated.

At the time of the *Owens* opinion, local governing bodies could (and did) print any language they wished on the ballot to stack the deck in favor of the measure. AB-195 changed that. No court has addressed the consequences of violating the provisions of AB-195. AB-195 was the legislature's enactment to remedy the "the integrity of the election process" with respect to ballot statements written by local governing bodies and their advisors for the primary purpose of selling the measure (advocacy) to the voters.

At least since the revision to the Elections Code in 1994, the ballot label for statewide measures (Section 9051) and for local initiative (Section 9105, Section 9203, Section 13119) and local referendum (Section 9105, Section 9203, Section 13120) measures have been subject to independent review by an ostensibly independent government official. Local governing bodies had, prior to AB-195, never had a statutory constraint placed on measure language which they originated. Local initiative and referendum measures not to the liking of local government officials, however, regularly find themselves in a hostile environment, such as *Guthrie v. Bunting* (2018) Alameda County, *Committee Supporting Cupertino Citizens' Sensible Growth Initiative et al. v. City of Cupertino et al.* (2018) Santa Clara County. Until AB-195, the people have not been afforded any statutory protection from language that is argumentative, partial, biased, and prejudicially favorable to the proponent local governing body. Prior to AB-

195, there would have been no specific grounds for an election contest in a case like *Owens*.

Counsel misleads the court by limiting Section 16100(c) to "bribery and election offenses committed by a 'Defendant.'" Section 13119 is specifically within the scope of Section 18401's prohibition on printing and circulating non-conforming ballots.

Neither the policy nor the rule to uphold elections are invoked when illegalities affect the result. When the ballot language and official materials have been manipulated by the proponents, in the face of law prohibiting such manipulation, that manipulation has in fact prevented the fair expression of the popular will.

> The policy in favor of upholding elections appears in the cases in conjunction with the rule that "[t]echnical errors or irregularities arising in carrying out directory provisions which do not affect the result will not avoid the election." (Davis v. County of Los Angeles, supra, 12 Cal.2d at p. 426 (italics added); Rideout v. City of Los Angeles, supra, 185 Cal. at p. 430; People v. Prewett, supra, 124 Cal. at p. 10.) [6] Both the policy and the rule manifest the fact that "[c]ourts are reluctant to defeat the fair expression of popular will in elections...." (Simpson v. City of Los Angeles, supra, 40 Cal.2d at p. 277); neither has been invoked to uphold an election in the face of illegalities which affected the result--a situation in which the will of the people may be thwarted by upholding an election. Hence, respondents' invocation of the policy in favor of upholding elections begs the question whether irregularities were merely incidental to the result or in fact prevented "the fair expression of popular will." *Canales*, *supra*.

No one can say with any certainty what the will of the voters would have been if they had been given the whole truth, as mandated by the statutes, and had been presented with a ballot stating the chief purpose of the measure free from language that is untrue, misleading, partial and likely to create prejudice in favor of the measure.

In all the cases that Contestant is aware of, including all those cases cited by Counsel, none have addressed the situation where someone other than an attorney general, a county counsel, or a city attorney has written an impartial analysis. To the Contentant's knowledge, the issue arising in this contest has never been addressed by a court.

It is not clear what Counsel is trying to imply by the reference to the definition of defendant in Section 16002. It appears, however, that it is an attempt to reject any

election contest involving a measure. Counsel offers no holding to support that implication. Any such implication has been rejected by courts in California at all levels by the fact of the courts hearing and deciding election contests against measures. *Horwath*, *supra*, recognized that "the government's analysis is likely to carry greater weight with voters than partisan campaign literature simply because it is the government that prints and distributes the voter pamphlet to all registered voters." In the instant case, the "digest" is not even purported to be an impartial analysis. It carries the weight of the weight of a government-sanctioned statement, but is written by volunteer appointees selected from organizations with political influence and biases.

Stanson recognized that "[T]he use of public funds to purchase such items as bumper stickers, posters, advertising 'floats,' or television and radio 'spots' unquestionably constitutes improper campaign activity [citations], as does the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure."

The ballot and the voter information guide, but especially the ballot, are the items that those who actually vote are most certain to use in exercising their will. The legislature, however, belatedly, has finally weighed in on the unrestricted advocacy presented to the voters, printed and distributed at public expense.

The response to AB-195's substantive restrictions by the Defendants, along with local governing bodies and their advisors all over California, has been to pretend that AB-195 does not exist. Counsel attempts to pull out all the stops in preventing this new law from coming before a court. There is not even a hint of a willingness by the Defendants to follow the law. It is common knowledge that the words used on the ballot have been critical to the success of local measures, especially tax measures. A whole industry of lawyers and advisors have grown up around polling and fine-tuning ballot statements to advantage measure proponents, all relying on the expenditure of public resources.

Ultimately, *Stanson* recognized that "A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions."

As the court observed in *Lockyer*, "There is no justification for forcing private parties to go to Court in order to require agencies of government to perform the duties they have sworn to perform."

III. CONCLUSION

Defendant has not filed an affidavit. On that basis alone, the "demurrer" cannot even be recognized, let alone sustained.

The most distinguishing characteristic of counsel's "demurrer" is that the word "directory" does not occur anywhere in any of the filings, including the Memorandum of Points and Authorities. The distinction between mandatory and directory in the context of a post-election contest is critical for an understanding of the law of election contests.

Counsel does not deny any of the facts alleged in the Statement of Election Contest, therefore, all those facts should be admitted.

Contestant respectfully prays that the court not sustain the "demurrer" on any of the grounds of the Contest.

Dated: May 9, 2019

Respectfully submitted,
For Contestants

By: _____
Michael Denny - Pro-Per