

1 Raymond Lutz
1010 Old Chase Ave
El Cajon, CA 92020
2 Telephone: 619-820-5321
3 Email: raylutz@citizenoversight.org

4 RAYMOND LUTZ, IN PRO PER

5
6
7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **FOR THE COUNTY OF SAN DIEGO**
9

10 RAYMOND LUTZ

11 Contestant,

12 vs.

13 MICHAEL VU, Registrar of Voters for the
County of San Diego; (Respondent) and
14 HILLARY CLINTON, Democratic Presidential
Party candidate named as an indispensable party,
15 and DOES 1-10

16 Defendant(s)/Respondent(s).
17
18

) Case No.: 37-2016-00023347-CU-PT-CTL

) **REPLY TO COUNTY'S ANSWER TO**
) **AMENDED AFFIDAVIT OF CONTEST RE**
) **DEMOCRATIC PARTY PRESIDENTIAL**
) **PRIMARY ELECTION**

) **(Elections Code Section 16000 et seq.)**

) Judge: Lisa Schall
) Dept: C-46
) Action Filed: 07/11/2016
) Trial Date: Unassigned

19
20 I, Raymond Lutz, provide this REPLY to the "ANSWER TO FIRST AMENDED
21 AFFIDAVIT OF CONTESTANT" filed by the County of San Diego and Michael Vu
22 (RESPONDENT), Dated November 3, 2017, so as to correct and clarify the affidavit with regard to
23 the issues raised by the RESPONDENT. I appreciate the help the RESPONDENT is providing in
24 getting the Affidavit of Contest to be in every detail in compliance with the California Election
25 Code.

26
27 1. **"Lack of Subject Matter Jurisdiction" Claim** – The RESPONDENT claims that the
28 California Superior Court lacks jurisdiction over such a contest, and they cite *Alden v. Superior*

1 *Court* (1963) 212 Cal.App.2d 764, 768. That case regarded the formation of a water district, and
2 plaintiffs in that case argued that the election approving the formation of the water district had to be
3 redone because ballots were too thin and it was possible for election officials to discern the vote of a
4 voter by looking through the thin paper, thus violating their privacy. The lower court held in favor
5 of plaintiffs agreeing with that argument, but on appeal, the court referred to the WATER CODE,
6 section 30324, which states: "No informality in any proceeding, including informality in the
7 conduct of any election, not substantially affecting adversely the legal rights of any citizen shall
8 invalidate the incorporation of any county water district." And, therefore, the ruling was reversed.

9 The referenced case is specific to the formation of a water district and has no relevance to
10 the present contest affidavit. Clearly, the presidential primary is within the jurisdiction of the
11 California Superior Court. Therefore, the claim by the County lacks merit.

12 2. Under the election code, any elector, may file a contest to an election if specifically stated,
13 and then review the evidence --- which the RESPONDENT does have have in the form of voted
14 paper ballots -- to confirm their certification. So the CONTEST is not like a lawsuit where there is a
15 defendant and plaintiff. I am not claiming a crime or tort occurred (yet), even though I have defined
16 exactly what we want to review. Except to oversee the process, until any claim can be substantiated
17 during the actual review of the ballots, the duties of the court are simply to insure the ministerial
18 duties of the RESPONDENT are performed.

19 3. The RESPONDENT further claims that the affidavit should have been filed in
20 Sacramento County according to the election code regarding a contest to a presidential primary.
21 This makes logical sense so as to challenge the entirety of the presidential primary in the state.
22 However, it is clear that the election code regarding election contests (16000 et seq) is applicable for
23 various diverse causes. Since our interest in filing the contest (at this juncture) is restricted to the
24 processing of the vote in San Diego County, it will reduce the overall cost to the court and to all
25 parties in the case, to file it and process it here in San Diego County. I have offered to stipulate with
26 the RESPONDENT that we agree that the appropriate venue is San Diego County to reduce overall
27 cost and further delay.

1 4. Furthermore, the counties each conduct the canvass and certify their results to the
2 California Secretary of State, who combines the results to produce a statewide certified result based
3 on the certifications from each of the counties. Thus, filing it in Sacramento County could deal with
4 only the results of Sacramento County itself and the overall processing by the Secretary of State.
5 We would still need to inform the RESPONDENT and review the ballots here. If the court advises
6 us to do so, we have no problem filing with the Supreme Court in Sacramento County if that is
7 regarded as a legal roadblock to comply with our contest investigation.

8
9 **5. “Improperly Designating Election Official as Defendant” Claim - The**
10 RESPONDENT points out that they believe it is improper to refer to San Diego County and
11 Michael Vu as “Defendants.” We accept this point as valid at this juncture, and suggest that they
12 should perhaps be referred to as “RESPONDENT,” which we are doing in this document, although
13 this is hardly of much importance.

14 6. My filing of an Affidavit of Contest should allow me to review the ballots in the election,
15 which are hard evidence which the RESPONDENT has in their possession. The RESPONDENT is
16 legally obligated to provide ministerial duties which includes accurately tabulating the vote,
17 certifying the results of the election, and to allow any elector, who files an affidavit of contest, to
18 review that evidence to confirm or deny the result.

19 7. The State of California does NOT mandate that counties must conduct any recount if the
20 margin of victory is “very close,” say within 0.5%. Other states, such as Florida, DO have such a
21 mandate. Instead, California relies on the mechanism of the “contest,” wherein any elector can – at
22 their own cost – review the ballots of the election to confirm the certified result. If the contestant
23 discovers that the certified result was incorrect such that the results could be overturned, then the
24 RESPONDENT would not charge the contestant for the activity related to the contest.

25 8. Interestingly, the Secretary of State in California attempted to institute such a mandatory
26 escalation after the top-to-bottom review of 2007¹. In the case of a close race, the Post-Election

27
28 ¹<http://www.sos.ca.gov/elections/voting-systems/oversight/top-bottom-review/>

1 Manual Tally (PEMT) requires that election officials manually tally 10% of the ballots. San Diego
2 County and Registrar of Voters Debora Seiler sued Secretary of State Debra Bowen (County of San
3 Diego v. Bowen, Cal: Court of Appeal, 4th Appellate Dist., 1st Div. 2008) to avoid the cost, and it
4 was ruled in the appeal that the counties were not required to do the PEMT according to the
5 procedure defined by Bowen. So we are left is no mandatory escalation and thus further emphasizes
6 the importance of the availability of the contest process.

7 9. The Affidavit, paragraph 6, refers to Election Code Section 16100, which lists a number
8 of causes which are valid reasons for any elector to contest an election. In this case, we are
9 concerned with the possibility of mistakes or errors by the election equipment such that the certified
10 result does not match the actual voted ballots. If indeed such occurred, then it may be appropriate to
11 regard RESPONDENT as defendants, as that may be considered wrongdoing.

12 10. In other cases of action which we are not concerned about, the candidate may have made
13 improper statements, may be unqualified to run, or other similar causes that will invalidate the
14 results based on those facts. In such cases, the RESPONDENT is involved only as a respondent
15 because it is required to provide services to and cooperate with the contestant to execute the contest,
16 but the only wrongdoing is by the candidate, who is very properly considered the defendant.

17 11. In other cases, a candidate who is named as a “defendant” has done nothing wrong and
18 really has nothing to defend, only to be informed that the contestant will be reviewing the ballots to
19 determine the true outcome of the election and if there has been some other error. In such as case,
20 the RESPONDENT should then perform the ministerial duty to provide the evidence to the
21 Contestant or possibly to perform other services, as appropriate, to validate the certified result, as in
22 this case.

23 12. Thus, we submit that the terminology of Contestant and Defendant are arbitrary and
24 should not invalidate the Affidavit of Contest. I am not accusing the RESPONDENT of any
25 malfeasance in my Affidavit of Contest, even though I do provide some specificity in the request
26 only as a basis to understand the basis of the contest and that it is not frivolous.

1 **13. “Failure to Properly Serve Defendant(s)”** – We agree with RESPONDENT that it
2 would have been optimal to serve Defendant(s) immediately when we originally filed the Affidavit
3 of Contest. However, that did not occur. Now, the Defendant(s) have been properly served, so that
4 objection should not invalidate the Affidavit of Contest. I will remind the RESPONDENT that
5 According to Election Code section 16403, “A statement of the grounds of contest shall not be
6 rejected nor the proceedings dismissed by any court for want of form, if the grounds of contest are
7 alleged with such certainty as will advise the defendant of the particular proceeding or cause for
8 which the election is contested.”

9 I am attempting to comply with the requirements of the Election Code in every possible
10 way, but request that the court not dismiss our affidavit of contest for want of form, per this section.
11 The original contest was filed by an attorney firm which is no longer handling the case, and I have
12 found that it is an area of law with almost no solid expertise due to the rarity of the cases.

13
14 **14. “Failure to Prosecute” Claim** – California Elections Code Section 17301 is perhaps the
15 most important single provision regarding the disposition of the ballots and other materials for this
16 contest, as well as implications for the limit to commencing a contest. Please note that the election
17 code section quoted below states clearly that a contest may be commenced “within the 22-month
18 period.”

19
20 17301. (a) The following provisions shall apply to those
21 elections where candidates for one or more of the following
22 offices are voted upon: President, Vice President, United
23 States Senator, and United States Representative.

24 (b) The packages containing the following ballots and
25 identification envelope shall be kept by the elections
26 official, unopened and unaltered, for 22 months from the date
27 of the election:

28 (1) Voted polling place ballots.

1 (2) Paper record copies, as defined by Section 19251, if
2 any, of voted polling place ballots.

3 (3) Voted vote by mail voter ballots.

4 (4) Vote by mail voter identification envelopes.

5 (5) Voted provisional voter ballots.

6 (6) Provisional ballot voter identification envelopes.

7 (7) Spoiled ballots.

8 (8) Canceled ballots.

9 (9) Unused vote by mail ballots surrendered by the voter
10 pursuant to Section 3015.

11 (10) Ballot receipts.

12 (c) **If a contest is not commenced within the 22-month period,**
13 or if a criminal prosecution involving fraudulent use, marking
14 or falsification of ballots, or forgery of vote by mail
15 voters' signatures is not commenced within the 22-month
16 period, either of which may involve the vote of the precinct
17 from which voted ballots were received, the elections official
18 shall have the ballots destroyed or recycled. The packages
19 shall otherwise remain unopened until the ballots are
20 destroyed or recycled.

21
22 15. Furthermore, California Rule of the Court, Rule 3.1340.

23 **Rule 3.1340. Motion for discretionary dismissal after two**
24 **years for delay in prosecution**

25 (a) Discretionary dismissal two years after filing

26 The court on its own motion or on motion of the
27 defendant may dismiss an action under Code of Civil

1 Procedure sections 583.410–583.430 for delay in
2 prosecution if the action has not been brought to trial
3 or conditionally settled **within two years** after the
4 action was commenced against the defendant.

5 Therefore, any motion to dismiss based on delay in prosecution is premature.

6 Furthermore, I have been engaged in related cases, as mentioned in the Affidavit paragraphs
7 20, 29, and 39, with the intent of performing our election oversight without the need for using the
8 mechanism of the CONTEST. Having exhausted those other remedies, this contest is being
9 activated and we wish to commence review of the evidence in the election.

10
11 **16. “There is No Remedy for Contest”** – We believe it is premature, and not the duty of
12 the RESPONDENT, to attempt to invalidate our Affidavit of Contest based on their notion of our
13 options for remedy. First, if we do find egregious errors or malfeasance by the RESPONDENT, then
14 we have a right, under Election Code Section 2300 paragraph 10 to “Report any illegal or fraudulent
15 activity to a local elections official or to the Secretary of State's office.” We also have the right (and
16 legal obligation) to report fraudulent activity to law enforcement agencies, as well.

17 Furthermore, if we do find egregious malfeasance in San Diego County, then it may be
18 appropriate to look into the possibility of similar malfeasance in other counties. A number of other
19 affidavits of contest were filed in those counties which RESPONDENT is unaware.

20 We do not believe it is the duty of the RESPONDENT to attempt to invalidate the affidavit
21 of contest based on their perception of our options for remedies, nor is it necessary for us to prove
22 we have options for remedy to proceed with reviewing the ballot evidence at our cost.²

23
24 **17. “This Election Contest is Moot”** – The RESPONDENT attempts to invalidate my
25 Affidavit of CONTEST again based on their theory that since the election is now over, we should
26 have no recourse. When in fact, Election Code section 16000 et seq on such contest never does

27
28 ²California Elections Code Section 16800

1 mention the term “moot,” nor does it state that the elections officials have a duty to challenge the
2 Affidavit of Contest.

3 We have attempted to gain the information about this election through other means, and the
4 RESPONDENT has been uncooperative. Under election code section 2300 paragraphs 9 A & B, I
5 have the right to ask questions and the elections official are obligated to answer them. However,
6 during the election, we understand the RESPONDENT has a tight schedule and we sometimes defer
7 our requests to a quieter time. Unfortunately, then the RESPONDENT argues that they don’t need to
8 answer our questions because they are then moot.

9 The procedures used by the RESPONDENT to perform the official canvass are used
10 periodically at each and every election, and it is our intention to perform our duty as citizens to
11 provide adequate oversight so as to correct mistakes or identify hacking by outsiders, and perhaps
12 other malfeasance. Even if we cannot correct the past election, we wish to make corrections for the
13 upcoming elections, as they occur on a regular basis using the same procedures. Thus, the contest is
14 not moot.

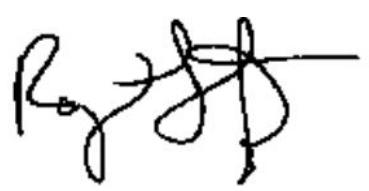
15
16 **18. Prior Verification.** The RESPONDENT Correctly pointed out that we were lacking the
17 “**Verification**” required on the First Amended Affidavit of Contest. – I appreciate this correction by
18 the RESPONDENT, as it appears I omitted the verification on the First Amended Affidavit due to
19 my inexperience, even though it was present on the originally filed affidavit.

20 Therefore, I hereby add the verification as follows, to be incorporated in the First Amended
21 Affidavit of Contest, as if it were executed when first submitted (and dated accordingly):
22
23
24
25
26
27
28

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

VERIFICATION (FOR FIRST AMENDED AFFIDAVIT)

I am a party to this action. I declare under penalty of perjury that the matters in this document are true of my own personal knowledge, except those matters alleged on information and belief, and as for those matters, I believe them to be true. Executed on October 26, 2017.



Raymond Lutz

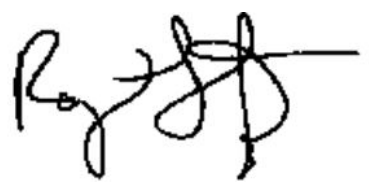
19. Other Communications. It is our preference that all communications be filed appropriately to create a complete record. Therefore, I am attaching two additional documents, which were not otherwise filed as part of the court record.

- EXHIBIT 1. A letter from the RESPONDENT to LUTZ regarding this case, and
- EXHIBIT 2. My (emailed) response to that letter by the RESPONDENT.

THIS DOCUMENT IS DATED: November 9, 2017

VERIFICATION (FOR THIS DOCUMENT)

I am a party to this action. I declare under penalty of perjury that the matters in this document are true of my own personal knowledge, except those matters alleged on information and belief, and as for those matters, I believe them to be true. Executed on November 9, 2017.



Raymond Lutz
In Pro Per

EXHIBIT 1



County of San Diego

THOMAS E. MONTGOMERY
COUNTY COUNSEL

OFFICE OF COUNTY COUNSEL
1600 PACIFIC HIGHWAY, ROOM 355, SAN DIEGO, CA 92101
(619) 531-4860 Fax (619) 531-6005

DENNIS I. FLOYD
Senior Deputy County Counsel
E-Mail: dennis.floyd@sdcounty.ca.gov

October 31, 2017

Raymond Lutz
1010 Old Chase Ave.
El Cajon, CA 92020

Re: Petition of Lutz to Contest Election

Dear Mr. Lutz:

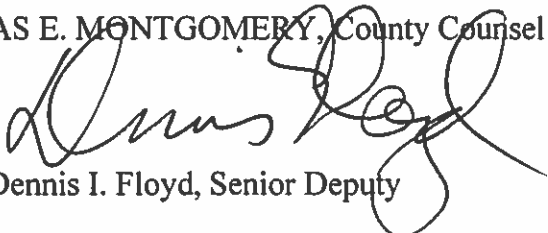
Your "First Amended Affidavit of Contestant re Democratic Party Presidential Primary Election" has been forwarded to me for response. Before the County prepares and submits a formal response, I wanted to give you the opportunity to withdraw the Affidavit voluntarily – rather than having it set aside by the Court, with an award of costs. There are a number of fatal flaws in your filing that cannot be overcome. Paramount among those flaws is the fact that you have chosen the wrong the court to bring this contest of a Presidential Primary. San Diego County Superior Court does not have jurisdiction over contests of Presidential Primaries. Elections Code §16421 clearly states that "[i]n the case of an office for which candidates are certified for the ballot by the Secretary of State . . . the superior court having jurisdiction shall be the Superior Court for the County of Sacramento." The Secretary of State certifies candidates for presidential primaries. (Elections Code §6180.) Your Affidavit of Contest should have been filed in Sacramento.

If the County is required to appear and oppose your Affidavit, we will be seeking costs pursuant to Elections Code §§16800 & 16803. Please let me know by Thursday, November 2nd whether you will agree to a voluntary dismissal of your contest.

Very truly yours,

THOMAS E. MONTGOMERY, County Counsel

By


Dennis I. Floyd, Senior Deputy

16-90305

Cc: Michael Vu, Registrar of Voters (O34)

EXHIBIT 2

Ray Lutz
771 Jamacha Rd #148
El Cajon, CA 92019
raylutz@CitizensOversight.org
619-820-5321

November 2, 2017

Thomas Montgomery, County Counsel
Dennis Floyd, Senior Deputy
Office of County Counsel
1600 Pacific Highway, Room 355
San Diego, CA 92101
619.531.6219
Dennis.Floyd@sdcounty.ca.gov

CC: Timothy.Barry@sdcounty.ca.gov, Stephanie.Karnavas@sdcounty.ca.gov

This is a response to your initial letter regarding the filing of CONTEST Affidavit for the 2016, Primary election, dated, Oct 31, 2017.

Thank you for pointing out that the text in the election code states that such a contest regarding a presidential primary should be filed in the venue of Sacramento County. I apologize for not covering that detail in the affidavit, as it was a point we actually were not certain of when it was initially filed.

However, this contest is not intended as a challenge to the results of the state-wide race, but in an effort to investigate election official malfeasance in San Diego County because of the alarming manner in which the one percent manual tally was conducted on the Early VBM ballots, as thoroughly described in the affidavit. Therefore, the real party of interest is Michael Vu, and the appropriate venue is San Diego County.

I appreciate that you recognize this as a roadblock to granting the request outright. My proposal is that we confer and rectify any trivial deficiencies in the affidavit and get past any road blocks you believe you need to respect up front rather than engaging in any extended litigation.

I believe I have a plan that will accommodate my need to perform our inspection of the ballots while rectifying any issues, reducing your legal costs and respecting the desire to reduce court overhead. I am therefore willing to join with you in a stipulation stating that given the fact that Vu is the real party of interest, and the ballots to be inspected are only in San Diego County, the appropriate venue is indeed San Diego County. This should get us past that roadblock, and if there are any other issues, now is the time to bring them up.

We are ready to resolve any other issues that need to be resolved before you can feel comfortable that you are following the law appropriately, so we can proceed with our request to perform an independent audit as described in the Affidavit of Contest in a timely manner.

Otherwise, switching venue to Sacramento and then back to San Diego is a worthless exercise which does not embrace the realities of the case. But it does delay our access, if that is your actual agenda.

Similarly, if there is any other defects in the affidavit, please provide the full list so we can also include that in our mutual stipulation, rather than a piecemeal review of any deficiencies you may find.

To facilitate this process, we are also willing to delay any necessary court appearances until we have resolved any issues through the meet and confer process.

The election code regarding election contest is poorly worded and contains many inconsistencies, so I think you will recognize that it is difficult to get it all right. This is not an area of law that has many attorneys who are well versed in it. Almost no one really knows the exact process, is what I have found.

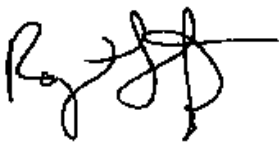
Your threat that you will be asking me to cover your expenses for the legal action you apparently envision, falls in the category of a SLAPP action, as you are attempting to stop our participation and our right to proceed with the contest. Since we are willing to join with you in a stipulated action to avoid these costs, if you refuse to stipulate in that manner, then any costs you incur are your own responsibility, and I refuse to be responsible for any costs you may incur to delay or distract by “throwing the book” at this legitimate contest affidavit request.

Vu certified the election. Therefore, he has stated there is no problem. Do you doubt the validity of his certification? If we review the ballots, and certification was legitimate, then we will only validate that result and provide additional public confidence in the elections department in San Diego County. What exactly are you worried about? That I might actually find malfeasance in the department?

As stated in the Affidavit, we of course are willing to cooperate with reasonable costs to implement the inspection of the ballots, but not in your attempt to thwart our access.

Please feel free to contact me by telephone to resolve any other minor details in the affidavit through a stipulation process.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ray Lutz', with a long horizontal line extending to the right.

Raymond Lutz
Elector in San Diego County