

1 THOMAS E. MONTGOMERY, County Counsel
County of San Diego
2 TIMOTHY M. BARRY, Senior Deputy (SBN 089019)
DENNIS I. FLOYD, Senior Deputy (SBN 111550)
3 1600 Pacific Highway, Room 355
San Diego, California 92101-2469
4 Telephone: (619) 531- 4860
5 Attorneys for Michael Vu, San Diego County Registrar of Voters

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO**
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11 RAYMOND LUTZ,) No. 37-2016-00023347-CU-PT-CTL
12 Contestant,)
13 v.) **ANSWER TO FIRST AMENDED**
14 MICHAEL VU, Registrar of Voters for the) **AFFIDAVIT OF CONTESTANT**
County of San Diego; HILLARY CLINTON,)
15 Democratic Presidential Party Candidate) Dept: C-46
16 named as Indispensable party, and DOES 1-) Judge: Lisa Schall
10,) Trial: Unassigned
17 Defendant(s).)
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19 San Diego County Registrar of Voters MICHAEL VU (erroneously named as a
20 Defendant in this contest) answers the procedurally defective First Amended Affidavit of
21 Contestant Raymond Lutz (“Affidavit”) with the following objections:

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23 (Lack of Subject Matter Jurisdiction)

24 “A proceeding to contest an election may be brought only when and as authorized by
25 statute.” (*Alden v. Superior Court* (1963) 212 Cal.App.2d 764, 768.) This Court lacks
26 jurisdiction over any contest arising from a Presidential Primary election. Contests challenging
27 elections for offices in which the candidates are certified by the Secretary of State must be
28 brought in the Superior Court of the County of Sacramento. (Elec. Code §16421.) Candidates

1 for Presidential Primary elections are certified for the ballot by the Secretary of State. (Elec.
2 Code §6180.)

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4 (Improperly Designating Election Official as Defendant)

5 Contestant has improperly designated the San Diego County Registrar of Voters as a
6 “Defendant” in this action. For purposes of contesting a primary election, the only party that
7 may be named as a Defendant is “that person whose nomination is contested.” (Elec. Code
8 §16002.) In this case, that would be HILLARY CLINTON, the candidate elected as the
9 Democratic Party’s nominee in the November 2016 Presidential Election.

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11 (Failure to Properly Serve Defendant(s))

12 Contestant failed to properly serve Defendant HILLARY CLINTON with his original
13 Affidavit of Contest, and he failed to file that original Affidavit with the Registrar of Voters.
14 (Elec. Code §16442.) The Original Affidavit of Contest, filed on July 11, 2016, does not
15 include a proof of service on Defendant HILLARY CLINTON or proof of filing with the
16 Registrar of Voters. In his Amended Affidavit, Contestant acknowledges that he did not provide
17 a copy of original Affidavit of Contest to the Registrar of Voters until February 2, 2017 – almost
18 seven months after it was filed with the Court – when he sent it in an email to the Registrar of
19 Voters. (Affidavit at p. 4, ¶15, and Affidavit Ex. 1.)

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21 (Failure to Prosecute)

22 An election contest is subject to dismissal for want of prosecution. Contestant first filed
23 this Contest on July 11, 2016. Contestant failed to serve the other parties to this action until 15
24 months later. He made no efforts to have the Court set a hearing date “forthwith” pursuant to
25 Elections Code §16520.

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(There is No Remedy for Contest)

Contestant delayed prosecuting this contest for almost 16 months. When hearing a contest of a primary election, a court has only one remedy— to confirm the nomination or to set the nomination aside. (Elec. Code §16720.) Because Contestant delayed prosecution beyond the November General Election, a court hearing this contest would be unable to pronounce judgment concerning the nomination of the Democratic Party’s nominee for president.

Contestant acknowledges that he does not seek the only remedy authorized under the Elections Code. He plainly admits his Affidavit was “not taken specifically to overturn an election, but rather . . . to determine malconduct of the election official, or to show that the voting machines were not working correctly, and therefore to affect elections in the future.” (Affidavit at p. 4, ¶16, emphasis added.) Contestant’s attempt to turn the Elections Code’s contest provisions into some sort of judicially supervised election audit process is not consistent with or supported by State election law. Oversight of the election process and enforcement of State election laws is the province of the Secretary of State. (Elec. Code §10; Gov. Code § 12172.5.) The contest provisions of the Elections Code exist for the sole purpose of contesting the results of an election.

Contestant acknowledges that he is not seeking to set aside the results of the June 2016 Democratic Primary Election. (Affidavit at p. 4, ¶¶ 17-18.) He even indicates that he is willing to stipulate that Hillary Clinton, the only proper Defendant in this action, may be dismissed from the case. (Affidavit at p. 1, ¶¶ 23-24.) By his own admission, this is not an actual contest, but an attempt by Contestant to gain access to the sealed ballots from the June 2016 Primary so that he can perform some sort of non-statutory audit of the Registrar of Voters processes. (Affidavit at pp. 12-13.) None of the 10 requests Contestant makes in his Affidavit are allowable under the contest provisions of the Elections Code. (Affidavit at pp. 12-13.)

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(This Election Contest is Moot)

This Court’s duty “is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.” (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132; *see also Finnie v. Town of Tiburon* (1988) 199 Cal. App. 3d 1, 11 [dismissing as moot appeal from trial court's denial of injunction to stop election where election had subsequently taken place].)

Contestant has brought an action contesting the June 2016 Presidential Primary Election. The Presidential General Election is now long over and it is impossible for this court, even if it should decide the case in favor of Contestant, to grant him any legally authorized and effectual relief. This action can no longer change the outcome of the election. (Elec. Code §16300.)

(No Verification)

Contestant’s First Amended Affidavit of Contest is not verified as required by the Elections Code.

WHEREFORE, said Defendant prays as follows:

- 1. That the Contest be dismissed with prejudice;
- 2. That Defendant recover its costs of suit incurred herein; and
- 4. For such other and further relief as the Court deems proper and just.

DATED: November 3, 2017

THOMAS E. MONTGOMERY, County Counsel

By

DENNIS I. FLOYD, Senior Deputy

Attorneys for Defendant MICHAEL VU, San Diego County Registrar of Voters