IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

CENTRAL DIVISION

RAYMOND LUTZ, Contestant, v. MICHAEL VU, Registrar of Voters for the County of San Diego; HILARY CLINTON, Democratic Presidential Party candidate names as an indispensable party, and DOES 1-10, Defendants.	) No. 37-2016-00023347-CU-PT-CTL) Action Filed: July 11, 2016)) **MEMORANDUM OF POINTS AND**) **AUTHORITIES IN SUPPORT OF MOTION**) **FOR JUDGMENT ON THE PLEADINGS**) **AND DISMISSAL OF SECOND AMENDED**) **AFFIDAVIT OF CONTESTANT**)) **IMAGED FILE**)) Date: June 7, 2018) Time: 1:30 p.m.) Dept.: 903) ICJ: Hon. Laura H. Parsky)) **[IMAGED FILE]**

Michael Vu, in his official capacity as the Registrar of Voters for the County of San Diego (the "Registrar"), respectfully submits the following memorandum of points and authorities in support of his motion for judgment on the pleadings in his favor and request to dismiss the second amended affidavit of contestant Raymond Lutz.

STATEMENT OF FACTS

Contestant filed his original "Affidavit of Contestant Raymond Lutz re: Democratic Party Presidential Primary Election" contesting the results of the June 6, 2016 Presidential Primary Election between Hillary Clinton and Bernie Sanders on July 11, 2016. The original Affidavit named Raymond Lutz as the contestant; Michael Vu as the defendant, and Hillary Clinton as an

1 indispensable party. (Affidavit of Contestant, p. 2, ll. 2-6.) Contestant never served the original

2 Affidavit of Contestant on defendant Vu or Hillary Clinton.

3 Without leave of court, contestant filed his First Amended Affidavit of Contestant ("FA

4 Affidavit") on October 26, 2017, 15 months after the filing of the original affidavit. Contestant

5 caused a copy of the FA Affidavit to be mailed to the Registrar, Hillary Clinton and Bernie

6 Sanders on October 26, 2017. The Registrar filed his answer to the FA Affidavit on November

7 3, 2017.

8 Without leave of court, contestant filed his Second Amended Affidavit of Contestant

9 ("SA Affidavit") on December 27, 2017. A copy of the SA Affidavit was mailed to the

10 Registrar and Hillary Clinton on December 27, 2017. Contestant deleted any reference to the

11 Registrar from the caption of the SA Affidavit and affirmatively alleged that "**San Diego**

12 **County and San Diego County Registrar of Voters Michael Vu**, are not defendants [*Sic*]

13 have no standing in the contest although as the county of jurisdiction and the election official in

14 charge of the election, they are required to perform ministerial duties to implement the

15 CONTEST process." (SA Affidavit, p. 2:7-10, emphasis in original.) Contestant further alleges

16 the basis for his "contest is focused specifically on [Election Code] Section 16100 (a) and

17 (g) …." (SA Affidavit, p. 2:22.)

18 On March 7, 2018, contestant mailed a "Request for Production of Documents to Real

19 Party of Interest Michael Vu and the County of San Diego." The RFP contains two requests one

20 of which is for the production of the ballots from the June 2016 Presidential Primary for

21 inspection and audit by Contestant. (RFP, p. 5:14 – 6:4.)

22 **GROUNDS FOR JUDGMENT ON THE PLEADINGS**

23 A.   **This Court Lacks Jurisdiction to Decide this Election Contest.**

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

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1 brought in the Superior Court of the County of Sacramento. (Elections Code[1] § 16421.)

2 Candidates for Presidential Primary elections are certified for the ballot by the Secretary of

3 State. (Section 6180.)

4   **B.**   **The Affidavit of Contest of the June 2016 Presidential Primary is**

5   **Moot.**

6   This court's duty "is to decide actual controversies by a judgment which can be carried

7 into effect, and not to give opinions upon moot questions or abstract propositions, or to declare

8 principles or rules of law which cannot affect the matter in issue in the case before it." (*Paul v.*

9 *Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132; *see also Finnie v. Town of Tiburon* (1988) 199

10 Cal.App.3d 1, 11 [dismissing as moot appeal from trial court's denial of injunction to stop

11 election where election had subsequently taken place].) Section 16003 provides that the final

12 determination and judgment in a contest of presidential electors "shall be rendered at least six

13 days before the first Monday after the second Wednesday in December." December 12, 2016,

14 was the last day for any court to make a final determination and judgment on the merits of

15 contestant's contest. Contestant did not serve his Affidavit of Contestant until October 26,

16 2017. The Presidential General Election is now long over and it is impossible for this court to

17 grant contestant any legally authorized and effectual relief.

18   **C.**   **The Ballots Contestant Seeks to "Audit" have been Sealed and Cannot**

19   **be Unsealed without an Order of a Court with Proper Jurisdiction.**

20   For elections involving federal offices the Elections Code provides that the packages

21 containing ballots and identification envelopes "shall be kept by the elections official, unopened

22 and unaltered for 22 months from the date of the election . . . ." (Section 17301(b).) This statute

23 goes on to state that if an elections contest or criminal prosecution for voter related fraud or

24 forgery "is not commenced within the 22-month period . . ., then the elections official shall have

25 the ballots destroyed or recycled." (Section 17301(c).) Section 15370 provides that "[a]fter

26 ballots are counted and sealed, the elections official may not open any ballots *nor permit any*

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[1] Unless otherwise noted all references are to the Elections Code.

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ballots to be opened except as permitted in Sections 15303[2] and 15304[3], or in the event of a recount."[4] (Emphasis added.) Lest there be any doubt as to when else the ballots may be accessed by anyone, the last sentence of Section 17301(c) expressly states: "***The packages shall otherwise remain unopened until the ballots are destroyed or recycled***." Clearly, unless the circumstances set forth in the Elections Code are satisfied, the Registrar has ***no discretion or duty*** to unseal the ballots and make them available to plaintiffs.

D.   Contestant has Failed to Allege or Demonstrate that the Allegations, if True, would Change the Results of the June 2016 Presidential Primary.

"An irregularity or improper conduct of a primary election shall annul the results or set aside a nomination only if it appears that illegal votes have been given to the defendant, which if taken away, would reduce the number of legal votes below the number of votes given to the contestant." (Section 16300.) Hillary Clinton received 215,655 or 51.43% of the votes cast in San Diego County in the 2016 Democratic Presidential Primary. (See, http://www2.sdcounty.ca.gov/rov/Eng/Past.html.) Bernie Sanders received 199,716 votes or 47.63% of the votes. (*Id*.) Hillary Clinton beat Bernie Sanders by 363,580 votes in the statewide tally – 53.1% to 46% of the ballots cast. (See, http://elections.cdn.sos.ca.gov/sov/2016-primary/2016-complete-sov.pdf.)

Contestant would have to show that 181,791 illegal votes were cast for Hillary Clinton in San Diego County and that those votes should have been counted for Bernie Sanders in order for

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[2] Section 15303 provides that if during the official canvass of an election, it appears that the returns from any precinct "are incomplete, ambiguous, not properly authenticated, or otherwise defective, the elections official may issue and serve subpoenas requiring members of the precinct board to appear and be examined under oath concerning the manner in which votes were counted and the result of the count in their precinct." Section 15303 only applies when ballots are tabulated at the polls. San Diego does not tabulated ballots at the polls.

[3] Section 15304 relates to jurisdictions using a central counting place and provides that during the official canvass an "elections official may appoint not less than three deputies to open the envelopes or containers with the materials returned from the precincts. If, after examination, any of the materials are incomplete, ambiguous, not properly authenticated, or otherwise defective, the precinct officers may be summoned before the elections official and examined under oath to describe polling place procedures and to correct errors and omissions."

[4] A request for a recount must be made within 5 days of the completion of the official canvass. (Sections 15620 and 15621.)

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him to prevail on the merits of his contest. If this were true, Hillary Clinton only received 8.08% of the votes, while Bern Sanders received 90.99% of the votes cast in San Diego County. Contestant has neither alleged nor can he demonstrate that such an egregious error occurred.

E.   Contestant Unduly delayed in Prosecuting his Contest and the Action Should be Dismissed with Prejudice.

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. (Section 16720.) Because contestant delayed prosecuting his contest 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 is not seeking to set aside the results of the June 2016 Democratic Primary Election. (FA Affidavit at p. 4, ¶¶ 17-18.) 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." (FA Affidavit at p. 4, ¶16, emphasis added.) 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. (FA 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. (FA Affidavit at pp. 12-13; SA Affidavit at 5-6.) None of the many demands contestant makes in his Affidavit are allowable under the contest provisions of the Elections Code. (FA Affidavit at pp. 12-13; SA Affidavit at 5-6.) Oversight of the election process and enforcement of state election laws is the province of the Secretary of State. (Section 10; Gov. Code § 12172.5.) The contest provisions of the Elections Code exist for the sole purpose of contesting the results of an election. This action can no longer change the outcome of the election and must be dismissed. (Section 16300.)

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CONCLUSION

For the forgoing reasons, defendant requests that the court grant this motion for judgment on the pleadings and dismiss the affidavit of contestant with prejudice, and that the Registrar be awarded costs for having to defend this contest.

Dated: May 9, 2018

THOMAS E. MONTGOMERY,
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