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7 TONI TABER, CITY CLERK FOR THE
CITY OF SAN JOSE, in her official capacity

8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF SANTA CLARA, UNLIMITED JURISDICTION

10 SHANNON BUSHEY, REGISTRAR OF
11 VOTERS FOR THE COUNTY OF SANTA
12 CLARA, in her official capacity

13 Petitioner/Plaintiff

14 v.

15 TONI TABER, CITY CLERK FOR THE CITY
OF SAN JOSE, in her official capacity; and
16 SALVADOR BUSTAMANTE, RICHARD
KONDA, and CAROL GARVEY, as
17 Proponents of the San Jose Fair Elections
Initiative,

18 Respondents/Defendants.
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Case Number: 20CV365450

**RESPONSE BRIEF BY TONI TABER,
CITY CLERK FOR THE CITY OF SAN
JOSE, TO THE REGISTRAR OF
VOTER'S AMENDED PETITION FOR
WRIT OF MANDATE AND
COMPLAINT**

Date: May 8, 2020

Time: 10:00 a.m.

Dept: 19

Judge: Hon. Peter Kirwan

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I. INTRODUCTION

The right of citizens to propose initiatives to be decided by the people has long been an important tradition in California. At the same time, the State Legislature has enacted mandatory timelines and criteria governing the number of signatures required to place a measure on the ballot. The integrity of the election process is critical.

The Santa Clara County Registrar of Voters (ROV) initially concluded and certified, based on its review of a random sampling of the signatures, that there were insufficient valid signatures for the measure to qualify for the ballot. The ROV now asserts that it made 87 errors in its review and, as a result, it seeks leave to review all the signatures, if the Court determines that it does not need to comply with the mandatory time limitations in the Elections Code. But the ROV incorrectly excludes one duplicate signature from its calculation. As a result, the 95% threshold that triggers the potential review of all the signatures submitted – which would cost city taxpayers approximately one million dollars -- has not been reached.

II. BACKGROUND

15 On July 31, 2019, the City Clerk received a notice of intent to file a petition to amend (1) the
16 City Charter regarding dates and terms of mayoral elections and (2) the Municipal Code to prohibit
17 those seeking large contracts from the City and those submitting applications for larger real estate
18 development from making campaign contributions. (Declaration of Toni Taber [Taber Dec.] ¶4.) On
19 February 12, 2020, the proponents of the initiative submitted petitions with the signatures they had
20 gathered to the City Clerk’s Office. (*Id.* ¶5.)

21 In order to place a charter amendment on the ballot, the number of signatures gathered must be
22 at least 15% of the total number of registered voters in San José. (Elec. Code §9255(c)(1).) According
23 to the Secretary of State, there were 460,161 registered voters at the time the proponents filed the
24 notice of intent. (Taber Dec. ¶6.) Based on that number, 69,024 valid signatures are needed for the
25 measure to be placed on the ballot. (*Id.*)

26 On February 13, 2020, the City Clerk’s Office conducted a rough count of the number of
27 signatures on the petitions to see if the number of total signatures submitted exceeded the minimum
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1 number of signatures needed to qualify the measure for the ballot.¹ (Taber Dec. ¶7.) The City Clerk’s
2 Office determined it did. (*Id.*) The petitions were secure from the time the City Clerk’s Office
3 received the petitions to the time it delivered them to the ROV. (*Id.* ¶5, 7-10; Declaration of Joy
4 Rodriguez ¶¶4-7.) On February 14, 2020, the Clerk’s Office delivered the petitions to the ROV and
5 asked the ROV to conduct a random verification of the signatures under Elections Code §9115(a).
6 (Taber Dec. ¶9; Rodriguez Dec. ¶7. *See* Elec. Code §9266.)

7 The City Clerk typically asks the ROV to conduct this review, given that the ROV has a larger
8 staff and has voter signatures on file; it is through a review of these signatures and other records that
9 the ROV conducts its signature verification process. (Taber Dec. ¶11.) The City Clerk typically
10 requests a random sample when evaluating the sufficiency of signatures for proposed initiatives. (*Id.*)
11 Random samples are much less costly than verification of all signatures gathered. (*Id.*) The Elections
12 Code requires that the evaluation of the number of valid signatures be completed within 30 working
13 days from the date of filing. (Elec. Code §9114; §9115.)

14 A random sampling is to include an examination of at least 500 or 3% of the signatures
15 received, whichever is greater. (Elec. Code §9115(a).) If the number of valid signatures from the
16 sample is under 95%, no further action is required and the measure is not placed on the ballot. (*See*
17 Elec. Code §9114, §9115(e).) If the number of valid signatures falls within the range of 95% to 110%
18 of the projected number of required signatures, then a full review of the submitted signatures is
19 required. (Elec. Code §9115(b).) That full count must be completed within 60 working days from the
20 date of filing. (*Id.*) The 30-day and 60-day time frames are mandatory.²

21 In late February to early March 2020, before the ROV had finished its review of the random
22 sampling, Toni Taber, the City Clerk for the City of San José, received approximately three or four
23 calls from Shannon Bushey, the Santa Clara County Registrar of Voters. (Taber Dec. ¶12.) During the
24 first of these calls, Ms. Bushey advised Ms. Taber that the ROV was projecting the number of valid
25 signatures would be approximately 93% and the ROV would be double-checking them. (*Id.*) Ms.
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27 ¹ Elections Code §9115(a) provides: “Within 30 days from the date of filing of the petition, excluding Saturdays, Sundays,
28 and holidays, if, from the examination of petitions pursuant to Section 9114 shows that more than 500 signatures have been
signed on the petition, the elections official may use a random sampling technique for verification of signatures.”

² Both Elections Code §9114 and §9115(b) use the word “shall”, which under Elections Code §354 is “mandatory.”

1 Bushey indicated that verification of the sampling did not appear to be reaching the 95% threshold and
2 asked if the City wanted a full count. (*Id.*) Ms. Taber confirmed that the City only wanted a random
3 sampling. (*Id.*)

4 In late February to early March 2020, Ms. Bushey called Ms. Taber again. (*Id.* ¶13.) Ms. Taber
5 reiterated that she did not authorize payment for a full verification, the City requested a random sample,
6 and she wanted to follow the regular process. (*Id.*) On March 5, 2020, Ms. Bushey again made the
7 request, asking words to the effect of: “Are you sure you do not want a full count? My boss is here.”
8 Ms. Taber reiterated that the City only wanted a random sampling. (*Id.* ¶14.) It was Ms. Taber’s
9 impression that Ms. Bushey was under pressure from her superiors to conduct a full review of the
10 signatures. (*Id.* ¶15.)

11 On March 11, 2020, the ROV certified that it received a total of 94,202 signatures. (Taber Dec.
12 ¶16, Ex. A.) According to the certificate, the ROV reviewed a random sample of 2,826 signatures,
13 verified 2,061 signatures as sufficient, and determined 765 were insufficient (which included 4 being
14 insufficient as duplicates). (*Id.*) Based on Elections Code §9115(b), the ROV concluded that the
15 estimated number of valid signatures was 64,390, which was under 95% of the number of signatures of
16 qualified voters needed to declare the petition sufficient. (*Id.*) The ROV certified that under Elections
17 Code §9115(e), no further action would be taken on the petition. (*Id.*) On March 11, 2020, the City
18 Clerk notified the San José City Council that no action would be taken, based on the ROV’s
19 certification. (*Id.* ¶17, Ex. B; Amended Petition for Writ of Mandate [AP] ¶14.)

20 On March 16, 2020, the proponents of the measure requested to inspect the petitions. (AP ¶15.)
21 That inspection must begin within 21 days of the date the petition was determined to be insufficient.
22 (Gov. Code §6253.5.) ROV staff was present during the inspection process. (Saenz Dec. ¶9.) During
23 that inspection process, the proponents apparently raised issues as to numerous signatures that the ROV
24 had previously found to be insufficient.

25 On or about April 2, 2020, Ms. Bushey called Ms. Tabor again. She indicated that the ROV
26 had found 25 errors in its verification of the sample, and they only needed 36 errors to overturn the
27 ROV’s March 11, 2020 certification. (Taber Dec. ¶17.)
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1 On April 20, 2020, the ROV estimated that a complete count of the petitions would cost
2 \$1,014,284 if overtime is used and \$917,695 if no overtime is used. (Declaration of Kathryn Zoglin ¶3,
3 Ex. A.) It is the City of San José that pays for the costs of conducting the signature verification. (Elec.
4 Code §9266.) The ROV has provided to the City only the certificate dated March 11, 2020, stating
5 there were insufficient signatures and no further action is required. (Taber Dec. ¶17.)

6 On or about April 13, 2020, the ROV filed a Petition for Alternative and Peremptory Writ of
7 Mandate against itself and Toni Taber the City Clerk for the City of San José, in her official capacity.
8 On or about April 17, 2020, the Registrar of Voters filed an Amended Petition for Writ of Mandate and
9 Complaint for Declaratory Relief against the City Clerk in her official capacity and the three
10 proponents of the proposed ballot initiative. (AP ¶7, ¶8.) It names no real parties in interest.

11 IV. DISCUSSION

12 A. Declaratory Relief Cause of Action

13 1. The ROV Fails to Demonstrate that the Proponents Submitted a 14 Sufficient Number of Verified Signatures to Meet the 95% Threshold

15 The request for declaratory relief should be denied because the ROV has failed to demonstrate
16 that the random sampling of verified signatures meets the 95% threshold that triggers a complete count.

17 a. The 95% Threshold Is Not Met Because ROV Incorrectly Omits 18 One Duplicate Signature

19 The ROV identifies a sixth signature but then omits it in its calculations. On page 3 of Exhibit
20 B to the Supplemental Saenz Declaration, for the entry identified as page number 8543, signature
21 number 4, the ROV notes: “This is the second ‘duplicate’. However, this signature is reg late,
22 therefore not an actual duplicate.” The ROV provides no authority for its statement that this duplicate
23 should be disregarded.

24 Under the plain language of the relevant regulations, *all* duplicate signatures are to be
25 considered. (Request for Judicial Notice, Ex. A [Cal. Code. Regs., tit. 2, §20531, §20540].) Section
26 20531 specifically addresses duplicate signatures; it refers to “each duplicate signature found in the
27 sample.” (*Id.*, §20531.) Section 20540 provides an example and counts the total number of duplicate
28 signatures found in the sample. There is nothing in the regulations that allows the ROV to exclude any

1 duplicate signature from the duplicate count. (*Id.*, §20540.) The City Clerk is not aware of any
2 authority for the ROV's position and the ROV cites none.

3 Paragraph 54 of the Supplemental Declaration of Saenz describes the methodology that should
4 be applied when a duplicate is found. Applying that methodology with this additional duplicate
5 (subtracting 1,078 signatures for each duplicate found in the random sample) and using the ROV's
6 number for valid signatures, the number of estimated verified signatures is less than the 95% threshold
7 of verified signatures needed to trigger a review of all the signatures submitted.

8 Assuming all the numbers and calculations in the Supplemental Saenz declaration paragraph 54
9 are correct -- other than those related to the number of duplicate signatures since there are six, not five,
10 duplicates -- the revised calculation of whether the 95% threshold number of 65,573 is met is:

11 66,214 [corrected total number of estimated signatures according to Saenz] minus 1,078
12 [number to be deducted for each duplicate signature according to Saenz, for the sixth duplicate that was
13 not previously included] = 65,136. The 65,136 estimated verified signatures fail to meet the 95%
14 threshold of verified signatures.

15 In sum, once the sixth duplicate signature is included, the number of valid signatures falls short
16 of the 95% threshold by 437 signatures. As a result, the trigger for a complete count is not reached.

17 The formula applied -- here, subtracting 1,078 for each duplicate signature--demonstrates that
18 duplicate signatures are significant in the random samples and are to be taken seriously.

19 And, as set forth in the objections to paragraphs 51 and 54 of the Supplemental Declaration of
20 Julia Saenz, it is unclear if there is yet another duplicate that has not been included in the ROV's
21 calculations. If so, the number of valid signatures would be reduced by another 1,078, and the
22 percentage of valid signatures would fall even further below the 95% threshold.

23 **b. The Number of Verified Signatures Is Overstated**

24 As set forth in the Objections to the Supplemental Declaration of Julia Saenz, statements in the
25 declaration lack foundation, are conclusory, and/or do not appear to be consistent with CACEO
26 guidelines. That declaration fails to support the validation of over ten of the signatures and raises the
27 question of an additional duplicate signature. (Objections to Supp. Saenz Dec. ¶¶2-13.)

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1 In addition, the ROV appears to have relied upon extrinsic evidence in its review of the
2 signatures, such as information from the proponents of the measure. (*See* Supp. Saenz Dec. ¶¶6, 22,
3 31, 45, 51.) But *Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 135,
4 explained that Elections Code §9114 and §9115 “bar[] clerks from considering extrinsic evidence.”

5 **2. The First Cause of Action Fails to State a Claim Against the City Clerk**

6 In the first cause of action, the ROV alleges declaratory relief against the City Clerk in her
7 official capacity and the three proponents of the proposed ballot measure. Declaratory relief under
8 §1060 of the Code of Civil Procedure may be brought by any person “who desires a declaration of his
9 or her rights or duties with respect to another” when there is an “actual controversy relating to the legal
10 rights and duties of the respective parties.” (Code Civ. Proc. §1060.)

11 The ROV has presented the City with a certificate that the number of signatures is insufficient
12 to qualify the measure for a ballot and no further action should be taken. Nothing else has been
13 provided to the Clerk. (Taber Dec. ¶17.) It consequently is unclear whether the controversy is ripe.

14 The Amended Petition alleges that the ROV is not authorized to correct its errors without a
15 court order but does not mention the City Clerk or indicate the basis of its claim against the City Clerk.
16 (AP ¶17, ¶22.) As such, there is no actual controversy relating to the rights of the respective parties.

17 Rather, the ROV seeks relief from the mandatory language in Elections Code §9115. It seeks a
18 declaration that Elections Code §9115(e) (“If the petition is found insufficient, no action shall be taken
19 on the petition”) does not prohibit it from conducting a full review of the signatures pursuant to
20 Elections Code §9115(b) (If the sampling of valid signatures is from 95% to 110% of signatures
21 needed, “the elections official shall within 60 [work] days of the filing of the petition. . . examine and
22 verify the signatures filed”).

23 **3. If the Court Grants Any Relief,** 24 **the Relief Sought by the ROV Should Be Amended**

25 The ROV seeks a declaration that, notwithstanding the mandatory language in Elections Code
26 §9115, it should be allowed to review all 94,202 signatures “to confirm their validity and, if
27 appropriate, certify the Fair Elections Initiative to the City Clerk as ‘sufficient.’” (AP ¶23.) If the
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1 Court grants relief, a more balanced order would be appropriate, such as the ROV be allowed to certify
2 that the number of valid signatures is sufficient or insufficient, depending on the results.

3 Second, the ROV asks that the Court declare that due to COVID-19, that the 60-day period,
4 which currently expires on May 12, 2020, be extended. (AP ¶24.) If the Court grants ROV relief, it is
5 not because of COVID-19 that the ROV would be unable to comply with the mandatory 60-day
6 statutory time limit, although certainly under the current circumstances it would take longer than
7 normal to verify signatures. Given the number of signatures and the estimated amount of time to
8 review the signatures, there is no evidence that the ROV could comply with the May 12, 2020 deadline
9 even if the COVID-19 crisis were not occurring. (Bushey Dec. ¶¶4-7; Zoglin Dec., Ex. A.)

10 The City is facing a budget crisis due to COVID-19. If the Court orders a complete review, the
11 City requests that the County pay the costs given that they are seeking relief from the mandatory
12 language of Elections Code §9115. In the alternative, no overtime should be charged to the City.

13 **B. The Writ Action Against the City Clerk Should Be Denied**

14 **1. The ROV Does Not Have Standing to Bring a Writ**
15 **Under Elections Code §13314**

16 The ROV brings this petition for writ of mandate under Elections Code §13314. (AP ¶26.)
17 Under Elections Code §13314(a)(1), an “elector” may bring a petition for writ of mandate.³ Elections
18 Code §321 defines an elector as a “person” who is at least 18 years old and “a resident of an election
19 precinct in this state” or someone who is eligible to vote and votes by mail.⁴ This action is brought by
20 the Registrar of Voters acting in her official capacity. (AP ¶6.) The ROV does not fall under the
21 definition of an “elector” who is authorized to bring a writ under Elections Code §13314. This cause of
22 action therefore fails as a matter of law.

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25 ³ Elections Code §13314(a)(1) states: “An elector may seek a writ of mandate alleging that an error or omission has
26 occurred, or is about to occur, in the placing of a name on, or in the printing of, a ballot, county voter information guide,
state voter information guide, or other official matter, or that any neglect of duty has occurred, or is about to occur.”

27 ⁴ Elections Code §321 states in part: (a) “Elector” means a person who is a United States citizen 18 years of age or older
28 and, except as specified in subdivision (b), is a resident of an election precinct in this state on or before the day of an
election. (b) “Elector” also means a person described in paragraph (2) of subdivision (b) of Section 300, who, except for the
residence requirement specified in subdivision (a), is eligible to vote in this state and meets either of the following
conditions . . .”

1 **2. The Writ Claim Fails Even If It Is Brought Pursuant to**
2 **§1085 of the Code of Civil Procedure**

3 **a. The ROV Has Failed to Show that the 95% Threshold Has Been**
4 **Met Sufficient to Potentially Trigger a Complete Count**

5 The City incorporates by reference its arguments set forth above regarding the ROV’s failure to
6 demonstrate that the 95% threshold of verified signatures that would potentially trigger a complete
7 count has been met.

8 **b. The Petition Fails to Allege that the City Clerk Failed to Comply**
9 **with a Ministerial Duty**

10 Section 1085 of the Code of Civil Procedure allows a writ to be brought “to compel the
11 performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or
12 station; or to compel the admission of a party to the used and enjoyment of a right or office to which he
13 is entitled. . .” (Code Civ. Proc. §1085.) A party bringing a writ has the burden of establishing two
14 elements: “(1) a clear, present and usually ministerial duty on the part of the respondent, and (2) a
15 clear, present and beneficial right in the petitioner to performance of that duty.” (*Barnes v. Wong*
16 (1995) 33 Cal.App.4th 390, 394.)

17 The action before this Court presents an unusual situation. Typically, it is the proponents of a
18 measure who file an action such as this one against the public entity that has purportedly failed to
19 conduct an accurate count. It is also unusual in that the ROV fails to allege any ministerial duty that
20 the Respondent City Clerk has not performed. On March 11, 2020, the ROV issued a certificate that
21 the number of verified signatures fails to meet the threshold required under Elections Code §9115. The
22 City Clerk, as the elections official, accepted that certificate. The ROV has presented the City Clerk
23 with nothing else. (Taber Dec. ¶17.)

24 The ROV next asserts that the Court should order the City Clerk to treat its own certificate as
25 null and void and to accept any future certificate that it might issue after it finishes a review under
26 Elections Code §9115(b). (AP ¶28.) Again, to the extent the Amended Petition is brought against the
27 City Clerk’s Office, the ROV fails to identify any ministerial duty that the City Clerk failed to perform.
28 The City Clerk does recognize the importance of accurate election counts.

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V. CONCLUSION

The Petition for Writ of Mandate and request for declaratory relief should be denied because the ROV has failed to show that the 95% threshold of valid signatures has been met. Further, it has failed to allege valid claims against the City Clerk. If the Court orders the ROV to amend its certificate and to conduct a review of all the signatures, the City Clerk requests that the ROV bear those costs.

Respectfully submitted,

Dated: May 1, 2020

RICHARD DOYLE, City Attorney

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