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ISB # 4784

Attorneys for Defendant City of Coeur d'Alene, Weathers, Council and Mayor

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JIM BRANNON,

Plaintiff,

vs.

CITY OF COEUR D'ALENE, et al,

Defendants.

Case No. CV-2009-10010

DEFENDANTS' ANSWER

COME NOW the Defendants City of Coeur d' Alene, Susan L. Weathers in her official capacity as City Clerk for the City of Coeur d' Alene, Loren Ron Edinger, Deanna Goodlander, Mike Kennedy, A.J. Al Hassell III, Woody McEvers and John Bruning, in their official capacity as members of the City Council for the City of Coeur d' Alene, and Sandi Bloem, in her capacity as Mayor of the City of Coeur d' Alene, by and through their counsel of record, and hereby answer the Plaintiff's Amended Complaint as follows:

FIRST DEFENSE

The Defendants denies each and every allegation, legal contention, characterization and conclusion of the Amended Complaint not herein expressly and specifically admitted.

I.

Concerning paragraph 1 of the Plaintiff's Amended Complaint, the Defendants are without sufficient information upon which to base either an admission or denial of the allegations of paragraph 1 of the Plaintiff's Amended Complaint.

II.

Concerning paragraph 2 of the Plaintiff's Amended Complaint, the Defendants admit the allegations in the first two sentences of paragraph 2 of the Plaintiff's Amended Complaint. The Defendants deny the remaining allegations of paragraph 2 of the Plaintiff's Amended Complaint, including the allegations in the third sentence of paragraph 2 of the Plaintiff's Amended Complaint.

III.

Concerning paragraphs 3 and 7 of the Plaintiff's Amended Complaint, the Defendants admit the allegations of paragraphs 3 and 7 of the Plaintiff's Amended Complaint.

IV.

Concerning paragraphs 8 and 9 of the Plaintiff's Amended Complaint, the Defendants admit the allegations of paragraphs 8 and 9 of the Plaintiff's Amended Complaint with the notation that the City Council and the Mayor meet for the purpose of canvassing the results of an election consistent with Idaho Code § 50-467. All other allegations of paragraphs 8 and 9 of the Plaintiff's Amended Complaint are denied.

V.

Concerning paragraphs 4 and 5 of the Plaintiff's Amended Complaint, the Defendants admit the allegations of paragraphs 4 and 5 of the Plaintiff's Amended Complaint.

VI.

Concerning paragraph 6 of the Plaintiff's Amended Complaint, the Defendants admit that Deedie Beard was the "Elections Manager" for and on behalf of Kootenai County, Idaho. The Defendants are without sufficient information upon which to base either an admission or denial of the remaining allegations of paragraph 6 of the Plaintiff's Amended Complaint, and therefore deny the same..

VII.

Concerning paragraph 11 of the Plaintiff's Amended Complaint, the Defendants admit that on or about August 18, 2009, the City of Coeur d' Alene entered into an Agreement with Kootenai County, Idaho, as reflected in Plaintiff's Exhibit A3-A6. The document speaks for itself and as such the Defendants deny any and all allegations of paragraph 11 of the Plaintiff's Amended Complaint that are inconsistent with said document

VIII.

Concerning paragraph 12 of the Plaintiff's Amended Complaint, the "Agreement" referenced in VII of this Answer speaks for itself and as such the Defendants deny any and all allegations of paragraph 12 of the Plaintiff's Amended Complaint that are inconsistent with said document.

IX.

Concerning paragraph 13 of the Plaintiff's Amended Complaint, the Defendants are without sufficient information upon which to base either an admission or denial of the allegations, as pled,

of paragraph 13 of the Plaintiff's Amended Complaint. Moreover, the Defendants dispute the relevance of Exhibit B to the Plaintiff's Amended Complaint.

X.

Concerning paragraph 15 of the Plaintiff's Amended Complaint, the Defendants admit the allegations of paragraph 15 of the Plaintiff's Amended Complaint but for the Plaintiff's vague use of the word "purported" as set forth in the Plaintiff's Amended Complaint.

XI.

Concerning paragraph 16 of the Plaintiff's Amended Complaint, Exhibit D to the Plaintiff's Complaint, i.e., the minutes of the Meeting of the November 9, 2009, City Council Meeting for the City of Coeur d' Alene, speaks for itself. As such, the Defendants deny any and all allegations of paragraph 16 of the Plaintiff's Amended Complaint that are inconsistent with said minutes. The Defendants are without sufficient information upon which to base either an admission or denial of the remaining allegations of paragraph 16 of the Plaintiff's Amended Complaint.

XII.

Concerning paragraph 17 of the Plaintiff's Amended Complaint, the Defendants admit the first sentence of paragraph 17 of the Plaintiff's Amended Complaint. The Defendants are without sufficient information upon which to base either an admission or denial of the allegations of the second sentence of paragraph 17 of the Plaintiff's Amended Complaint. The Defendant denies the remaining allegations of paragraph 17 of the Plaintiff's Amended Complaint.

XIII.

Concerning paragraph 18 of the Plaintiff's Amended Complaint, the Defendants admit that Exhibit E purports to be a copy of a form utilized for poll books, and that said document speaks

for itself. The Defendants deny the remaining allegations of paragraph 18 of the Plaintiff's Amended Complaint.

XIV.

Concerning paragraph 21 of the Plaintiff's Amended Complaint, and its subparts, the Defendants deny that the language set forth therein is a complete, accurate and exhaustive list of applicable legislation pertaining to elections. Otherwise, the legislation cited speaks for itself.

SECOND DEFENSE

The Plaintiff's Amended Complaint fails to state a claim or a cause upon which relief can be granted, and therefore should be dismissed as a matter of law.

THIRD DEFENSE

The Plaintiff lacks standing to pursue the claims as set forth in the Plaintiff's Amended Complaint. Moreover, Title 50, Chapter 4, Idaho Code, does not afford the remedies sought by the Plaintiff.

FOURTH DEFENSE

To the extent that the Plaintiff is seeking relief under Title 34, Chapter 20, the Plaintiff has failed to post an appropriate bond approved by the Clerk and/or the Court and therefore his claims should be dismissed. Moreover, the Plaintiff has failed to comply with the statutory time requirements set forth in Title 34, Chapter 20, and therefore to the extent he is contesting the subject election his claims should be dismissed.

FIFTH DEFENSE

The Plaintiff failed to request a recount as required under the Idaho Code and therefore some, or all, of his claims are moot. Moreover, in general the Plaintiff's claims and causes are moot.

SIXTH DEFENSE

The Plaintiff's alleged damages, if any, were proximately caused by the superceding, intervening negligence or actions of other third persons, and any negligence or breach of duty on the part of these answering Defendant, if any, was not a proximate cause of any alleged loss or damage to the Plaintiff. In asserting this defense, the Defendants do not admit any alleged negligence or other wrongful conduct and, to the contrary, deny all allegations of negligence or other blameworthy or wrongful conduct.

SEVENTH DEFENSE

The damages prayed for in the Plaintiff's Amended Complaint, and the causes of action therein against these Defendants, arise out of and stem from activities for which said Defendants are immune from liability under the common law and under Title 6, Chapter 9, Idaho Code. Therefore, the Plaintiff's causes of action are barred.

EIGHTH DEFENSE

Some or all of the Defendants are not subject to the provisions of Title 50, Chapter 4, Idaho Code, and to that extent some or all of the Plaintiff's claims and causes of action in his Amended Complaint are barred.

NINTH DEFENSE

The Plaintiff has failed to meet the notice requirements of Title 6, Chapter 9, Idaho Code, and as such the claims and causes of action set forth in the Plaintiff's Amended Complaint are barred.

TENTH DEFENSE

The Plaintiff is barred from recovery in whole or in part for failure to mitigate.

ELEVENTH DEFENSE

The Plaintiff has waived, or by his conduct is estopped from asserting, the causes of actions contained in the Amended Complaint.

TWELFTH DEFENSE

The actions by some or all of the Defendants in their official capacity and in connection with the subject election were carried out pursuant to, and in substantial compliance with, all applicable state and federal election legislation and/or applicable voting acts including but not limited to Uniform and Overseas Citizens Absentee Voting Act. Moreover, the Defendants allege that they have not taken any action, knowingly or otherwise, which violated any individual or citizen's right to vote and/or reject legal votes and/or count illegal votes. Moreover, the Defendants were not corrupt, did not commit fraud nor did they commit malconduct.

THIRTEENTH DEFENSE

The Plaintiff's Amended Complaint fails to allege a legally protected interest.

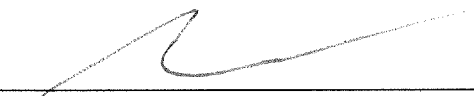
FOURTEENTH DEFENSE

The Plaintiff's Complaint as pled is frivolous because these Defendants complied with all applicable election laws and statutes.

WHEREFORE, these answering Defendants pray that the Plaintiff take nothing by his Amended Complaint, that the same be dismissed with prejudice, and that these answering Defendant recover their costs of suit, including statutory costs as provided for in Title 50, Chapter 4 and Title 34, Chapter 20, and such other and further fees, costs and relief as this Court deems just.

Dated this 15 day of December, 2009.

HAMAN LAW OFFICE


By 
Michael L. Haman
Attorneys for Defendants City of Coeur d'Alene,
Weathers, Council and Mayor

CERTIFICATE OF SERVING

I HEREBY CERTIFY that on this 15 day of December, 2009, I served a true and correct copy of the foregoing DEFENDANTS' ANSWER in the method described below to:

Starr Kelso
Attorney at Law
P.O. Box 1312
1621 N. Third Street, Ste. 600
Coeur d' Alene, Idaho 83816
Fax: 208 664-6261

U.S. First class mail
 Fax
 Hand Delivery


Michael L. Haman

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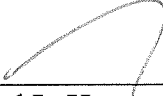
Case No. CV 09-10010

NOTICE OF HEARING

TO: THE ABOVE-ENTITLED PLAINTIFF, and his attorney of record, AND TO THE
CLERK OF THE ABOVE-ENTITLED COURT:

YOU WILL PLEASE TAKE NOTICE that on Tuesday, the 2nd day of March, 2010, at 3:30
p.m. of said day or as soon thereafter as counsel can be heard, in the courtroom of said Court, Coeur
d'Alene, Idaho, Kootenai County, the undersigned will call up for hearing before the Honorable
Judge Hosack, First Judicial District Judge, Defendants' Motion to Dismiss Per Rule 12(B)(6),
IRCP.

Dated this 15 day of December, 2009.

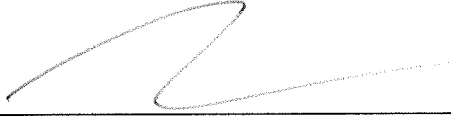
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Attorneys for Defendants

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JIM BRANNON,

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Defendants.

Case No. CV-2009-10010

DEFENDANTS' MOTION TO
DISMISS PER RULE 12(B)(6), IRCP

COMES NOW Defendants City of Coeur d' Alene, Susan L. Weathers in her official capacity as City Clerk for the City of Coeur d' Alene, Loren Ron Edinger, Deanna Goodlander, Mike Kennedy, A.J. Al Hassell III, Woody McEvers and John Bruning, in their official capacity as members of the City Council for the City of Coeur d' Alene, and Sandi Bloem, in her capacity as Mayor of the City of Coeur d' Alene, by and through their counsel of record, and hereby move this Court pursuant to Rule 12(b)(6), Idaho Rules of Civil Procedure, for its Order dismissing the Plaintiff's "Amended Complaint Pursuant to Title 50, Chapter 4, To Set Aside, Void, Annul, All or Part, City of Coeur d' Alene November 3, 2009 General Election," filed on December 10, 2009.

Said Motion is made for the reason that the subject Complaint fails to set forth a cause of action upon which relief can be granted against the aforementioned Defendants City of Coeur d' Alene, members of the Coeur d' Alene City Council and Mayor of the City of Coeur d' Alene; and, said Complaint fails to set forth facts sufficient to raise claims upon which relief can be granted against any of the aforementioned Defendants. The grounds are more particularly described below.

I. Standard of Review.

The standard for reviewing a motion to dismiss for failing to state a cause of action or a claim upon which relief can be granted is the same as the standard for reviewing a motion for summary judgment. *Idaho Schools for Equal Education Opportunity v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993). As the Idaho Supreme Court noted in *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157 (2002),

This is true insofar as the non-moving party is entitled to have all inferences from the record viewed in his favor. However, once such inferences are drawn, the motions are treated differently. A 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has been stated. A motion for summary judgment looks to the evidence to see if there are any issues of material fact and whether the moving party is entitled to a judgment as a matter of law.

* * * * *

When we review an order dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is entitled to have all inferences from the record viewed in his favor. *Orthman v. Idaho Power Co.*, 126 Idaho 960, 961, 895 P.2d 561, 562 (1995) (citing *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989)). After drawing all inferences in the non-moving party's favor, we then ask whether a claim for relief has been stated. *Id.* "The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Id.* (citations and internal quotations omitted). Thus, we must initially examine whether Plaintiffs have sufficiently alleged the requisite elements of standing in their complaint to survive a 12(b)(6) motion to dismiss.

Young, 137 Idaho at 104, 44 P.3d at 1159. In sum, it must appear from the complaint that a viable cause of action has been pled and that some relief can be granted. *See Orthman v. Idaho Power Co.*, 126 Idaho 960, 961, 895 P.2d 561, 562 (1995).

II. Background/Claims.

A. On August 18, 2009, the City Council for the City of Coeur d' Alene entered into an Agreement with Kootenai County whereby the Clerk of the District Court of Kootenai County would conduct the general municipal election for the City of Coeur d' Alene on November 3, 2009, under the supervision of the City Clerk for the City of Coeur d' Alene. Said agreement was authorized pursuant to Idaho Code §§ 67-2332, 67-2326, et. seq., and 34-1401. *See Exhibit A to Plaintiff's Complaint.*

B. The Plaintiff was a candidate for Coeur d' Alene City Council Seat No. 2, held by Defendant Mike Kennedy, incumbent.

C. On November 3, 2009, the general election in City of Coeur d' Alene was held which included election for the office of Mayor for the City of Coeur d' Alene, Council Seat No. 2 for the City of Coeur d' Alene, Council Seat No. 4 for the City of Coeur d' Alene, and Council Seat No. 6 for the City of Coeur d' Alene. There were also two issues pertaining to Kootenai County.

D. On November 9, 2009, the Elections Manager for the Office of Kootenai County Elections, under the supervision of Dan English, Clerk of the District Court of Kootenai County, prepared a report of the election results and presented the same to the City for the final canvass of votes for the November 3, 2009, general election for the City of Coeur d' Alene. *See Exhibit C to Plaintiff's Complaint.*

E. On November 9, 2009, the Mayor and Council for the City of Coeur d' Alene met per Idaho Code § 50-467 for the purpose of canvassing the results of the City of Coeur d' Alene general election. At said meeting, the Elections Manager for the Office of Kootenai County Elections, Deedie Beard, and the Clerk of the District Court of Kootenai County, Dan English, presented the final report of the election results of votes of the November 3, 2009, City of Coeur d' Alene general election to the Mayor and City Council. The City Council voted to accept the canvass of votes and authorize the City Clerk, Defendant Susan Weathers, to sign any and all necessary documents formalizing the election results as set forth in the canvass.

F. The statutory deadline for a candidate desiring a recount expired twenty days following the November 9, 2009, canvass of the City of Coeur d' Alene general election. See Idaho Code § 50-471. The Plaintiff did not apply to the attorney general for a recount.

G. On November 30, 2009, the Plaintiff filed his Complaint in this matter claiming:

1. That under Idaho Code § 50, Chapter 4, said municipal Defendants, among others, erred in the administration of the City of Coeur d' Alene general election by entering into an Agreement with Kootenai County to administer said election and conduct a canvass of the vote;
2. That under Idaho Code § 50, Chapter 4, said Defendants, among others, “failed to require that absent electors furnish timely and appropriate requests for absentee ballots” and used “outdated and inappropriate request forms for absentee ballots”;

3. That under Idaho Code § 50, Chapter 4, said Defendants, among others, failed to verify all applications for absentee ballots to determine whether said application was “registered and lawfully entitled to vote”;
4. That under Idaho Code § 50, Chapter 4, said Defendants, among others, failed to administer absentee ballots as prescribed by the Idaho Legislature;
5. That under Idaho Code § 50, Chapter 4, said Defendants, among others, failed to maintain a “poll book” for various precincts including Absentee Precinct 0073;
6. That under Idaho Code § 50, Chapter 4, said Defendants, among others, counted “at least two (2) more absentee ballots in the final vote tally than were actually documented”;
7. That under Idaho Code § 50, Chapter 4, said Defendants, among others, failed to maintain “poll books” for the “consolidated City of Coeur d’ Alene and Kootenai County precincts”;
8. That under Idaho Code § 50, Chapter 4, said Defendants, among others, “failed to prevent the receipt of illegal votes cast and counted in a number and amount in excess of five (5) ...”; and,
9. That under Idaho Code § 50, Chapter 4, said Defendants, among others, allowed one person who resided in the County, but not in the City, to vote in the City of Coeur d’ Alene general election.

H. On or about December 10, 2009, the Plaintiff filed his Amended Complaint basically asserting the same causes but eliminating claims against the County.

I. In sum, the Plaintiff claims that said municipal Defendants, among others, failed to administer and conduct the City of Coeur d' Alene general election in a manner consistent with Title 50, Chapter 4 of the Idaho Code, that said failure constitutes "malconduct", and that the entire City of Coeur d' Alene general election should be "set aside, voided, and or annulled."

III. Discussion.

A. Claims against City and arising under Title 50, Chapter 4 must be Dismissed.

The Plaintiff is proceeding under Title 50, Chapter 4, Idaho Code, which governs election proceedings in municipal elections, although it is not exclusive. *See also* Title 34, Chapter 20. Moreover, that section of the Idaho Code limits claims to the city clerk. Idaho Code § 50-406(1) provides:

(1) Any person adversely affected by any act or failure to act by the city clerk under any election law, or by any order, rule, regulation, directive of [or] instruction made under authority of the city clerk under any election law, may appeal therefrom to the district court for the county in which the act or failure to act occurred or in which the order, rule, regulation, directive or instruction was made or in which such person raises.

Thus, any cause of action under Title 50, Chapter 4 must be asserted against the City Clerk, and only the City Clerk.¹ Therefore, all municipal Defendants, save for the City Clerk, should, as a matter of law, be dismissed.²

With that, based on the Plaintiff's Amended Complaint, the Plaintiff has not alleged a cause of action against the Coeur d' Alene City Clerk. Rather, his causes pertain to alleged acts of the City

¹Idaho Code § 50402(e) defines Election official to include the city clerk.

²Idaho Code § 50-406 contemplates either a direct appeal of a city clerk's act or failure to act; or, an appeal of an order, rule, regulation, directive or instruction made under the authority of the City Clerk. The Plaintiff has not alleged that the other municipal Defendants implemented an order, rule., etc., made under the authority of the City Clerk.

Council for the City of Coeur d' Alene. Indeed, the Plaintiff claims that the entire City of Coeur d' Alene general election be declared void because the City Council for the City of Coeur d' Alene was not permitted to delegate oversight of the election to Kootenai County. The Plaintiff's remaining claims pertain to alleged irregularities in the conduct of the subject election that was under the direct oversight of the County Clerk for Kootenai County. As will be discussed below, the Plaintiff's Amended Complaint against all municipal Defendants should therefore be dismissed because the Plaintiff has not alleged a viable cause of action against the City Clerk for Coeur d' Alene; and, he has not set forth any order, rule, regulation promulgated by the City Clerk from which an appeal can be taken as required by Idaho Code § 50-406(1).

With regard to the Plaintiff's claim that the City Council for the City of Coeur d' Alene entered into an ultra vires agreement with Kootenai County for the oversight of the general election, the Plaintiff's claim is without legal merit. Idaho Code §§ 67-2326, et. seq., and 67-2332 allow municipalities to contract with their respective counties to conduct municipal elections. Moreover, Idaho Code § 34-1401 authorizes a political subdivision to contract with a county clerk to oversee and conduct an election. Indeed, that provision provides, in part:

A political subdivision may contract with the county clerk to conduct all or part of the elections for that political subdivision. In the event of such a contract, **the county clerk shall perform all necessary duties of the election official of a political subdivision** including, but not limited to, notice of the filing deadline, notice of the election, and preparation of the election calendar.

(Emphasis added.) In sum, the City of Coeur d' Alene was statutorily authorized to delegate oversight, supervision, etc., of the November 3, 2009, City of Coeur d' Alene general election to the Clerk for Kootenai County. If this were not permitted by the Idaho Legislature, nearly every

municipal election in the state of Idaho for the past several years, if not decades, would be void.³

With respect to the Plaintiff's remaining allegations regarding the manner in which the election was handled, his claims rest with the County Clerk for Kootenai County and not the City of Coeur d' Alene or its Clerk. Indeed, the claims, summarized above in section II, G, 2-9, *supra*, all pertain to oversight of the subject election and/or an election contest.⁴ That being the case, then all of the Plaintiff's remaining claims should be dismissed.

As noted above, the City lawfully delegated management of the general election to Kootenai County and its Clerk. In doing so, Kootenai County and its Clerk assumed responsibility for the management and conduct of the subject election; and, all decisions made in this regard stemmed from the Kootenai County Election Manager under the direct authority of the County Clerk, not the City of Coeur d' Alene or its Clerk. Indeed, Idaho Code § 34-1401 provides that when a political subdivision contracts with the county clerk, "the county clerk shall perform all necessary duties of the election official of a political subdivision including, but not limited to, notice of the filing deadline, notice of the election, and preparation of the election calendar." In fact, it appears that the Idaho Legislature has not only encouraged county administration of municipal elections, but has granted to the clerk of respective counties direct oversight of municipal elections. See Idaho Code § 34-214.⁵ In any event, the Clerk for Kootenai County was acting under a direct grant of statutory

³Further, as discussed, the decision to contract with Kootenai County was made by the City Council for Coeur d' Alene and not the City Clerk. As such, that decision is not subject to appeal under Idaho Code § 50-406.

⁴Election contests are governed under Title 34, Chapter 20, discussed below.

⁵The county clerk also has supervisory authority over municipal elections and can appeal to a court to enforce said authority over local election officials. See Idaho Code §§ 34-206, 208, 209 and 214.

authority to conduct the subject election, and had direct responsibility to ensure compliance with applicable election laws. Therefore, the Plaintiff's claims regarding election irregularities pertain to Kootenai County and its Clerk, not the Clerk for the City of Coeur d' Alene.

In sum, the Plaintiff is proceeding under Title 50, Chapter 4, and as such all claims against the municipal Defendants, save for the City Clerk, must be dismissed as a matter of law. Moreover, with regard to the City Clerk, the Plaintiff has not charged the Clerk with a breach of her responsibilities arising under Title 50, Chapter 4. Indeed, there is no allegation that the City Clerk acted or failed to act in a manner inconsistent with Title 50, Chapter 4 that would give rise to an appeal; and, finally, there is no claim that the City Clerk issued an order, rule, regulation, directive or instruction from which any County officer was acting. Absent more, the Plaintiff's Complaint against the City of Coeur d' Alene's Clerk should be dismissed.

B. To Extent Claims arise in Title 34, Chapter 20, they must be Dismissed.

To the extent that the Plaintiff is contesting the results of the November 3, 2009, general election due to misconduct of the City Clerk, or any municipal Defendant, said claims arise under Title 34, Chapter 20. In that regard, the Plaintiff has failed to comply with the statutory requirements set forth in Title 34, Chapter 20 pertaining to an election contest; and, moreover, there is an absence of any fact that would show or tend to show that the City Clerk, or any municipal Defendant, violated Idaho Code § 34-2001. As such, to the extent the Plaintiff's claims fall under the election contest provisions of the Idaho Code, said claims must be dismissed.

Initially, it is noted that the Plaintiff's Amended Complaint actually seeks to contest the subject election results and should be proceeding under Title 34, Chapter 20, Idaho Code. Indeed, the Plaintiff has filed his Amended Complaint against these Defendants seeking specific relief, i.e.,

to “set aside, void, and or annul” the City of Coeur d’ Alene general election. In other words, he is contesting the results of the election under Idaho Code § 34-2001, et. seq.⁶ This is relevant because when one seeks to contest the results of an election, as in the instant case, he or she must comply with the statutory bond requirement set forth in Title 34, Chapter 20. The Plaintiff has failed to

⁶Idaho Code § 34-2001 provides the basis for contesting the results of an election, as follows:

The election of any person to any public office, the location or relocation of a county seat, or any proposition submitted to a vote of the people may be contested:

1. For malconduct, fraud, or corruption on the part of the judges of election in any precinct, township or ward, or of any board of canvassers, or any member of either board sufficient to change the result.
2. When the incumbent was not eligible to the office at the time of the election.
3. When the incumbent has been convicted of felony, unless at the time of the election he shall have been restored to civil rights..
4. When the incumbent has given or offered to any elector, or any judge, clerk or canvasser of the election, any bribe or reward in money or property for the purpose of procuring his election, or has committed any violation as set out in chapter 23, title 18, Idaho Code.
5. When illegal votes have been received or legal votes rejected at the polls sufficient to change the result.
6. For any error in any board of canvassers in counting votes or in declaring the result of the election, if the error would change the result.
7. When the incumbent is in default as a collector and custodian of public money or property.
8. For any cause which shows that another person was legally elected.

Without question the Plaintiff seeks nullification of the election results based on his mistaken and unfounded belief that the City Clerk, among others, was corrupt, committed malconduct, counted illegal votes and/or discounted legal votes. In sum, the Plaintiff’s causes of action and claims for relief fall under the provisions of Title 34, Chapter 20, because he is contesting the results of the election.

comply with said requirements and therefore his Amended Complaint must be dismissed as a matter of law.

In particular, Idaho Code § 34-2008 provides, in part, “The contestant must also file a bond, with security **to be approved by the clerk of the court or district judge, as the case may be,** conditioned to pay all costs in case the election be confirmed, the complaint dismissed, or the prosecution fail.” (Emphasis added.) The Plaintiff has, at no time, filed a bond with security approved by the clerk or the District Court.

The Plaintiff will contend that he did in fact post a bond. However, the bond posted by the Plaintiff was inappropriate and not approved. Indeed, the Plaintiff posted a bond of only \$500.00 per Idaho Code § 34-2031. Setting aside for a moment the fact that there is nothing in the record showing that this was approved by the Clerk or the District Judge, the security required by that section is for a contest of a primary election, not a general election. Thus, it is improper. Moreover, said bond was not approved by the clerk or the district judge. Thus, the Plaintiff’s Amended Complaint must be dismissed.

It is well known that the requirement of a security bond for a general election is mandatory and the failure to file mandates dismissal. In *Horne v. Beaton*, 46 Idaho 541, 269 P. 89 (1928), the claimant contested the election results and presented a bond under the former statute which provided, “The contestant must also file a bond, with security to be approved by the clerk of the court or district judge, as the case may be, conditioned to pay all costs in case the election be confirmed, the complaint dismissed, or the prosecution fail.” *Id.* at 542-43. Later, the “bond was deemed by the clerk to be insufficient, and he suggested that it be presented to the district judge but appellant declined to do so. Thereafter, respondent filed a motion to dismiss the proceedings, claiming that no

good and sufficient bond had been filed as required by statute, and that the bond filed was not approved by anyone but was distinctly disapproved.” *Id.* Ultimately, the court dismissed the action due to the claimant’s failure to comply with the bond requirement.

Here, as noted the gravamen and tenor of the Plaintiff’s Amended Complaint is an election contest that seeks to nullify the results of the general election under Title 34, Chapter 20; and, the prayer for relief on page 16 of the Plaintiff’s Complaint is not available to the Plaintiff under Title 50, Chapter 4. Thus, the Plaintiff’s allegations and prayer for relief fall squarely within Title 34, Chapter 20 as opposed to Title 50, Chapter 4. As such, the Plaintiff was required to post a bond of a sufficient amount to be approved by the Clerk or the Court. The Plaintiff failed to do the same, and therefore the Complaint must be dismissed as a matter of law.

Finally, to the extent that the Plaintiff’s Amended Complaint survives, there simply is no basis in fact that would show or even suggest that the City Clerk, or any municipal Defendant for that matter, was corrupt, committed malconduct, committed fraud, allowed illegal votes to be cast, or discounted legal votes. As the Court knows, a 12(b)(6) motion focuses on the pleadings, and presumes that facts pled are true and that all reasonable inferences drawn from said facts must be weighed in favor of the non-moving party. *See* Section I, *infra*, at page 2. However, that does not mean that one can simply allege conclusory statements and claim them to be facts in order to avoid a dispositive motion.

Recently the federal courts, including the United States Supreme Court, reinforced the principle that the trial court must act as a gatekeeper to prevent unsupported and baseless claims from proceeding. Indeed, in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), the United States Supreme Court upheld a 12(b)(6) Motion to Dismiss generally stating that allegations in a complaint must be facially

plausible. In other words, a plaintiff must plead facts from which reasonable inference can be drawn that the defendant is liable. *Id.* at 556. In particular, the *Twombly* Court stated that plaintiffs must allege more than hope, but rather sufficient facts to raise the claim beyond mere possibility and into the realm of plausibility. *Id.* at 555. The *Twombly* Court stated that this a statement of such factual basis that takes the allegations beyond merely conceivable to plausible. *Id.* at 555. *See also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), where the United States Supreme Court upheld *Twombly*, stating:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Id.*, at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556. The plausibility standard is not akin to a “probability requirement” but it asks for *more than a sheer possibility that a defendant has acted unlawfully.* *Ibid.* Where a complaint pleads facts that are “merely consistent with” a defendant's liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.*, at 557 (brackets omitted).

Iqbal, *supra* at 1949 (emphasis added) (quoting *Twombly*, 550 U.S. 544). In sum, a pleading that “tenders naked assertion[s] devoid of further factual enhancement” is insufficient to overcome a Rule 12(b)(6) motion. *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 555, 557)).

As this pertains to the instant matter, the Plaintiff must allege facts that show or tend to show that it was more than merely possible that the City Clerk, or some other municipal Defendant, violated one of the enumerated grounds set forth in Idaho Code § 34-2001. In particular, under Title 34, Chapter 20, Idaho Code, the Plaintiff must show evidence which is tantamount to fraud as opposed to evidence that the election was not conducted in a precise manner. Indeed, as Plaintiff’s counsel well knows, “A showing that election officials failed to follow every election procedure precisely, without more, [i.e., evidence of malconduct], is insufficient” *See Noble v. Ada County Elections Board*, 135 Idaho 495, 504, 20 P.3d 679, 688 (2000). Here, the Plaintiff’s claims, as well as the facts, as pled, simply show, at best, that the subject election may not have been conducted in a precise manner.

Indeed, there are no facts that would show or even tend to show that the City Clerk, for example, was

corrupt, or that she allowed illegal votes to be cast or rejected legal votes. Simply pointing the finger and suggesting that some voters, i.e., members of the armed services or residents who have dual citizenship in this instance, should not have had the right to vote is, without more, a conclusory statement. Moreover, and more importantly, the Plaintiff has failed to present a factual basis showing that some or any of the ballots were cast by nonresident voters, i.e., they were illegal. And, there are no facts to any degree of plausibility that legal votes were rejected or that the City Clerk was corrupt. Rather, the Plaintiff simply has asserted without basis in fact or any affidavit that some ballots may have been cast by nonresidents.⁷ This is insufficient to withstand a 12(b)(6) Motion to Dismiss.

Setting aside for a moment the fact that there are no viable causes of action asserted against these Defendants regarding the manner in which the election was conducted, as discussed above, the Plaintiff's Amended Complaint simply alleges that the County's oversight of the election procedures was imprecise. As noted, this is an insufficient reason for contesting the City of Coeur d' Alene general election. Without more, this Court should dismiss the Plaintiff's claims against all municipal Defendants, for his failure to present facts that would support a plausible claim(s).

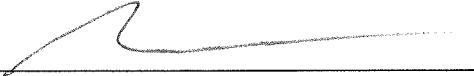
IV. CONCLUSION

The Court should, pursuant to Rule 12(b)(6), Idaho Rules of Civil Procedure, grant said Defendants' Motion to Dismiss in its entirety on the basis that there are no genuine issues of material fact pertaining to the Plaintiff's claims and causes of action as pled.

Dated this 15 day of December, 2009.

⁷It is the plaintiff's burden to establish that illegal votes were cast and who the votes were cast for in the contested election. *See Jaycox v. Varnum*, 39 Idaho 78, 226 P. 285 (1924).

HAMAN LAW OFFICE

By 
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CERTIFICATE OF SERVING

I HEREBY CERTIFY that on this 15 day of December, 2009, I served a true and correct copy of the foregoing DEFENDANTS' MOTION TO DISMISS by the method described below to:

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