



complaint fails to allege facts that would entitle the Plaintiff to relief and DISMISSES the complaint.

### Facts and Proceedings

On November 3, 2020 the general election for Alaska State House District 27 took place with both Lance Pruitt (Plaintiff) and Elizabeth A. Hodges Snyder (Intervenor) running for office.<sup>1</sup> On November 30, 2020 the Division of Elections (“the Division”) certified the results, calling Dr. Snyder the winning candidate by 13 votes.<sup>2</sup> A recount application was filed and the votes were recounted on December 4, 2020.<sup>3</sup> After the final count occurred, Mr. Pruitt was behind Dr. Snyder by eleven votes. On December 9, 2020 Mr. Pruitt and other plaintiffs filed this election contest and a recount appeal in the Alaska Supreme Court.<sup>4</sup>

#### *I. The Complaint*

In this matter, Plaintiff alleges that several errors in the conduct of the election were sufficient to change the outcome of the election.<sup>5</sup>

The first count alleges a violation of AS 15.20.203 which provides that absentee ballots shall be examined to ensure the ballots have been properly cast.<sup>6</sup> Mr. Pruitt argues there was an unconstitutional elimination of the witness signature requirement by the courts and that the Division failed to develop a procedure for

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<sup>1</sup> *Complaint* at ¶3, ¶7 (Dec. 9, 2020).

<sup>2</sup> *Intervenor’s Motion to Dismiss* at 4. (Dec. 15, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> S-17951. This judge has been appointed Special Master in the recount appeal to consider factual questions raised in Appellant’s Statement of Points on Appeal and to make a report of those findings to the Alaska Supreme Court. The recount appeal and any appeal in this matter have been consolidated for decision before the Supreme Court. All plaintiffs except Mr. Pruitt have been dismissed in this election contest.

<sup>5</sup> *Complaint* at ¶8.

<sup>6</sup> *Id.* at ¶15.

review of signatures to ensure that the person casting the ballot properly signed the certificate, and to ensure that the same person didn't sign more than one certificate.<sup>7</sup> Mr. Pruitt alleges that the integrity of the election is at question due to the Division's failure to properly review the signatures.<sup>8</sup>

The second count alleges a violation of AS 15.10.090 which states that the Director shall give public notice if the location of a polling place is changed.<sup>9</sup> Under the statute, public notice must include (1) whenever possible, sending written notice of the change to each affected registered voter in the precinct; (2) providing notice of the change by publication in a local newspaper of general circulation; (3) posting notice of the change on the internet website of the division of elections; (4) providing notification of the change to the appropriate municipal clerks, community councils, tribal groups, Native villages, and village regional corporations; and (5) inclusion in the official election pamphlet.<sup>10</sup> Mr. Pruitt alleges that in the 27<sup>th</sup> District the polling location was changed without notice pursuant to state law.<sup>11</sup> The complaint alleges that this change in location resulted in voter confusion due to the failure to give proper notice, and that voters were disenfranchised.<sup>12</sup>

The third count was added in the amended complaint. It alleges a violation of AS 15.05.101 which provides that a person may vote in an election if they have been

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<sup>7</sup> *Id.* at ¶16.

<sup>8</sup> *Id.* at ¶17.

<sup>9</sup> *Id.* at ¶19.

<sup>10</sup> *Id.* at ¶20.

<sup>11</sup> *Id.* at ¶21.

<sup>12</sup> *Id.* at ¶22-23.

a resident of that district for at least 30 days prior to the election.<sup>13</sup> Mr. Pruitt alleges that there were several voters in the November election who cast ballots in House District 27 who did not live in House District 27 for the required 30 days prior.<sup>14</sup> Mr. Pruitt argues that because there were unqualified voters who voted in the election, qualified voters were disenfranchised and the integrity of the election is at stake.<sup>15</sup>

The fourth count alleged a violation of voters' right to equal protection pursuant to the 14<sup>th</sup> Amendment to the United States Constitution.<sup>16</sup>

### Legal Standard

#### A. Motions to Dismiss

Under Civil Rule 8(a) a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Civil Rule 12(b)(6) permits the dismissal of a complaint for “failure of the pleading to state a claim upon which relief can be granted.”<sup>17</sup> To survive a motion to dismiss a plaintiff need not prove the facts alleged in the complaint; it is enough that the complaint states “all the necessary elements constituting a claim for relief.”<sup>18</sup> In determining the sufficiency of a claim “it is enough that the complaint sets forth allegations of fact consistent with and appropriate to some enforceable cause of action.”<sup>19</sup> On a motion to dismiss the court may only consider the material contained in the pleadings.<sup>20</sup>

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<sup>13</sup> *First Amended Complaint* at ¶25. (Dec. 14, 2020).

<sup>14</sup> *Id.* at ¶27.

<sup>15</sup> *Id.* at ¶29.

<sup>16</sup> *Complaint* at ¶34.

<sup>17</sup> Alaska R. Civ. P. 12(b)(6).

<sup>18</sup> *Linck v. Barokas & Martin*, 667 P.2d 171, 173 (Alaska 1983).

<sup>19</sup> *Id.*

<sup>20</sup> *Caudle v. Mendel*, 994 P.2d 372, 374 (Alaska 1999).

In evaluating a motion to dismiss, a court must liberally construe the complaint and treat as true all factual allegations.<sup>21</sup> However, a court is not required to accept a plaintiff's "unwarranted factual inference and conclusions of law."<sup>22</sup>

### Election Contest

Alaska Statute 15.20.540 provides that "[a] defeated candidate or 10 qualified voters" may contest an election on the following grounds:

- (1) Malconduct, fraud, or corruption on the part of an election official sufficient to change the results of the election;
- (2) When the person certified as elected or nominated is not qualified as required by law;
- (3) Any corrupt practice as defined by law sufficient to change the results of the election.

The public has an important interest in the stability and finality of election results, so a court must indulge "every reasonable presumption" in favor of the validity of an election."<sup>23</sup> There is a "well established policy favoring the stability of election results in the face of technical errors or irregularities not affecting election results."<sup>24</sup>

### B. Malconduct

If a party proves that malconduct occurred and that it was sufficient to change the results of the election, a court may vitiate the election or determine which candidate was elected.<sup>25</sup> Alaska Statute 15.20.540 "parallels the 'directory' view that

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<sup>21</sup> *DeRemer v. Turnbull*, 453 P.3d 193, 197 (Alaska 2019).

<sup>22</sup> See *Ferrer v. State*, 471 P.3d 569, 585&n. 160 (Alaska 2020).

<sup>23</sup> *Dansereau v. Ulmer*, 903 P.3d 555, 559 (Alaska 1995) (citing *Dale v. Greater Anchorage Area Borough*, 439 P.2d 790, 792 (Alaska 1968) and *Turkington v. City of Kachemak*, 380 P.2d 593, 595 (Alaska 1963)).

<sup>24</sup> *Grimm v. Wagoner*, 77 P.3d 423, 432 (Alaska 2003).

<sup>25</sup> *Id.*

statutes prescribing election procedures are directory and that they therefore establish a desirable rather than mandatory norm.”<sup>26</sup> To contest an election a party must “show more than lack of total and exact compliance with the constitutionally and statutorily prescribed form of ballot” and “has the dual burden of showing a significant deviation from the prescribed form and that such departure was of a significant magnitude to change the result.”<sup>27</sup>

Within the meaning of AS 15.20.540(1), malconduct is “a significant deviation from statutorily or constitutionally prescribed norms.”<sup>28</sup> Where the significant deviation injects a bias into the vote, a court will find malconduct if the bias is shown to be the result of the significant deviation.<sup>29</sup> But significant deviations which impact randomly on voter behavior will constitute malconduct only if the significant deviations are imbued with “scienter, a knowing noncompliance with the law or a reckless indifference to norms established by law.”<sup>30</sup> Each alleged deviation must be separately evaluated to determine whether it is “significant” and whether it involves an element of scienter.<sup>31</sup>

A “corrupt practice” as used in AS 15.20.540(3) concerns third-party, rather than official, conduct, and is specifically defined in Alaska law.<sup>32</sup> Corrupt practices include Campaign Misconduct in the First, Second, and Third Degrees, Telephone

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<sup>26</sup> *Nageak v. Mallot*, 426 P.3d 930, 943-40 (Alaska 2020) (citing *Boucher v. Bomhof*, 495 P.2d 77, 80 (1972)).

<sup>27</sup> *Id.*

<sup>28</sup> *Boucher*, 495 P.2d at 80-81; see also *Hammond v. Hickel*, 588 P.2d 256, 258 (Alaska 1978) .

<sup>29</sup> *Id.*

<sup>30</sup> *Hammond*, 588 P.2d at 259.

<sup>31</sup> *Id.*

<sup>32</sup> AS 15.56.012-035.

Campaign Misconduct, and Unlawful Interference with Voting in the First and Second Degrees.<sup>33</sup>

C. Sufficient to Change the Results of the Election

The party contesting the election bears the burden of proving that any malconduct was “sufficient to change the results of the election.”<sup>34</sup> Here, Plaintiff alleges in the complaint that “there were several errors in the conduct of the election sufficient to change the result of the election.”<sup>35</sup> In the individual counts contained in the complaint, Plaintiff does not assert that any one alleged act of malconduct was sufficient to change the results of the election. Instead, in the individual counts, Plaintiff alleges that as a result of the individual violation, “the integrity of the election is in question.” In other words, the complaint argues that, collectively, the alleged errors were sufficient to change the results of the election.

Discussion

A. This Court Has Jurisdiction

According to Alaska Statute 15.20.540, election contests may be brought in the superior court. Intervenor argues that this court does not have jurisdiction to consider Plaintiffs’ claims because Plaintiff’s allegations do not strictly comport with the statutes governing election contests.<sup>36</sup> Intervenor argues that Plaintiff’s claims are an impermissible independent action, not an election contest, and that this court

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<sup>33</sup> AS 15.56.012-035.

<sup>34</sup> *Nageak*, 426 P.3d at 947, n. 73; *Grimm*, 77 P.3d at 432; *Boucher*, 495 P.2d at 80 n. 5.

<sup>35</sup> *Complaint* ¶ 8.

<sup>36</sup> *Intervenor Motion to Dismiss* at 7-9.

therefore lacks jurisdiction.<sup>37</sup> This is incorrect. Whether an action is an election contest depends upon the relief sought; “[i]f granting the remedy would defeat the public interest in the stability and finality of election results, it is appropriate to deem the cause of action an election contest and to require compliance with the procedures for such contest.”<sup>38</sup> Given the remedy Plaintiff seeks, this action is an election contest and this court has jurisdiction over the matter.

B. Plaintiff's First Amended Complaint is Untimely.

Election contests are time-sensitive. An election contest may be brought in superior court within 10 days after the completion of the state review (certification).<sup>39</sup> Certification of the election at issue occurred on November 30, 2020; any election contest therefore had to be filed by December 10, 2020.<sup>40</sup> Plaintiff filed the complaint at 4:32 p.m. on December 9, 2020, one day before the expiration of the deadline. The following day, Plaintiff filed a stipulated request for a hearing to address future proceedings, asserting that the Alaska Supreme Court would be required to review any decision in early January, 2021.<sup>41</sup> At a hearing on December 11, 2020, the court offered to conduct trial on December 15<sup>th</sup> and 17<sup>th</sup>; Plaintiff asserted that he would not be ready for trial and would be ready for trial the week of December 21, 2020. The case was reassigned to this judge who held a hearing on Monday, December 14<sup>th</sup> and scheduled trial for December 22<sup>nd</sup> and 23<sup>rd</sup> (the following Tuesday and Wednesday).

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<sup>37</sup> *Id.*

<sup>38</sup> *Walleri v. Fairbanks*, 964 P. 2d 463, 466 (Alaska 1998).

<sup>39</sup> AS 15.20.550.

<sup>40</sup> Alaska R. Evid. 201.

<sup>41</sup> *Unopposed Stipulated Expedited Request for a Status Hearing* (filed 12/10/2020).



Plaintiff filed a First Amended Complaint later that day, adding an additional count alleging that unqualified voters voted in the election in violation of AS 15.05.010 because “several voters who cast ballots in House District 27 did not reside in House District 27 for at least 30 days just before the election.”<sup>42</sup> Defendant and Intervenor have argued in their motions to dismiss that the First Amended Complaint was untimely filed and that the court should dismiss the First Amended Complaint as untimely or, at a minimum, dismiss the new count as untimely.<sup>43</sup> Defendants argue that the First Amended Complaint relates back to the original complaint and the court should freely give leave to amend pleadings.<sup>44</sup>

Generally, Plaintiff is correct that courts should freely permit amendment of the pleadings.<sup>45</sup> There is a general preference for liberal amendment early in litigation. Given the extraordinarily compressed timing of litigation in election contests,<sup>46</sup> December 14<sup>th</sup> was not early in the litigation. Plaintiff amended the complaint fourteen days after the election was certified, outside the time permitted to bring an election contest, one week before trial. Moreover, the new claim is based on completely different facts than those alleged in the original complaint and alleged that an unspecified number of voters were not qualified because they did not reside in the district. Litigation of these new, very general, allegations would require substantial investigation and discovery. Amendment of the complaint would cause undue

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<sup>42</sup> *First Amended Complaint* at ¶¶ 26-29.

<sup>43</sup> *Motion to dismiss* at 6-8 (filed 12/15/2020); *Memorandum in support of Intervenor’s Motion to Dismiss* at 15-16 (filed 12/15/2020).

<sup>44</sup> *Consolidated Opposition to Defendant’s Motion to Dismiss* at 7.

<sup>45</sup> *O’Callaghan v. Rue*, 996 P.2d 88, 100 (Alaska 2000); *see also* Alaska R. Civ. P. 15(a).

<sup>46</sup> S-17951 (*Order Appointment of Special Master, Briefing Schedule, Oral Argument Date*) (issued 12/15/2020).

prejudice to the Defendant and Intervenor and undermine the strict timelines established by AS 15.20.540.<sup>47</sup> Accordingly, Plaintiff's First Amended Complaint is DISMISSED as untimely.

C. Count I Fails to State a Claim for Which Relief May be Granted.

Count I of Plaintiff's complaint alleges that the Division of Elections violated Alaska Statute 15.20.203 by failing to develop a procedure for review of signatures of absentee ballots. According to the complaint, the Alaska Supreme Court violated the constitution by upholding the superior court's preliminary injunction suspending the witness signature requirement for absentee ballots in *Arctic Village Council et al. v. State*.<sup>48</sup> The complaint alleges that by failing to develop a procedure to review absentee ballot signatures after the courts' decisions in *Arctic Village Council*, the Division violated its statutory obligation to review the voter signature.

AS 15.20.203(a) requires the district absentee ballot counting board to "examine each absentee ballot envelope and [ ] determine whether the absentee voter is qualified to vote at the election and whether the absentee ballot has been properly cast." AS 15.20.203(b) sets forth several grounds for rejecting an absenting ballot, including if the certificate is not executed.<sup>49</sup> An absentee ballot may also be rejected if "an official or the witnesses authorized by law to attest the voter's certificate fail to

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<sup>47</sup> Cf. *Walleri v. Fairbanks*, 964 P. 2d 463, 466 (Alaska 1998) ("If granting the remedy would defeat the public interest in the stability and finality of election results, it is appropriate to deem the cause of action an election contest and to require compliance with the procedures for such contest)."

<sup>48</sup> S-17902; 3AN-20-07858CI.

<sup>49</sup> AS 15.20.203(b)(1)

execute the certificate.”<sup>50</sup> Alaska Statutes 15.20.066(b) and 15.20.081(d) both require that an absentee ballot be accompanied by a witness’ signature.

In *Arctic Village Council et al. v. State*,<sup>51</sup> the superior court vacated the witness signature requirement for the 2020 General Election after concluding that the requirement unconstitutionally burdened the right to vote during the COVID-19 pandemic.<sup>52</sup> On petition for review, the Alaska Supreme Court upheld the preliminary injunction.<sup>53</sup> Because the witness signature requirement was vacated for the 2020 General Election, the absence of a witness signature did not provide grounds for rejecting an absentee ballot under AS 15.20.203(b).

Nothing in AS 15.20.203 required (or authorized) the Division of Elections to develop a substitute procedure for the witness signature requirement that includes a review of signatures. The Division was enjoined from rejecting ballots pursuant to AS 15.20.203(b)(2) by the Alaska Supreme Court’s decision. The Division’s compliance with the Court’s decision does not constitute a violation of AS 15.20.203(a), malconduct or corrupt practices.<sup>54</sup> Moreover, the Division has no authority to reject ballots for reasons not authorized by law.

The complaint alleges in Count I (and in all the other counts) that, as a result of the Division’s failure to review voter signatures for absentee ballots, the integrity

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<sup>50</sup> AS 15.20.203(b)(2)

<sup>51</sup> 3AN-20-07858CI.

<sup>52</sup> 3AN-20-07858CI (*Preliminary Injunction Order* entered 10/13/2020).

<sup>53</sup> S-17902.

<sup>54</sup> Plaintiffs allege in their *Opposition* that a data breach occurred at the Division involving 113,000 voter names and signatures. *Opposition* at 8-9. This allegation does not establish that the Division failed to comply with AS 15.20.203(a). Moreover, to the extent that this fact was essential to the Plaintiffs’ claim that the Division was required by AS 15.20.203 to reject ballots on grounds not included in the statute, it should have been pled in the complaint.

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of the election is at question and Plaintiffs are entitled to relief. But in an election contest, a generalized claim that “the integrity of the election is as question” is insufficient to warrant relief. Instead, a plaintiff must allege that the malconduct was sufficient to change the outcome of the election.<sup>55</sup> Defendants and Intervenor argue that the claim must be dismissed for this omission.<sup>56</sup> But the complaint alleges that cumulatively, the errors were sufficient to change the result of the election.<sup>57</sup> That allegation is sufficient to survive a motion to dismiss so long as the other counts remain.<sup>58</sup> Once a count is dismissed, the complaint is no longer sufficient with respect to this element and a plaintiff should be given an opportunity to amend the complaint to allege that the remaining counts involve a sufficient number of votes to change the outcome of the election. Because the court dismisses the remaining counts, this issue is moot.

Because the allegations in the complaint that the Division violated AS 15.20.203 by failing to develop a signature review procedure following the Alaska Supreme Court’s decision in S-17902 do not, if true, establish that the Plaintiff is entitled to relief under AS 15.20.540, Count I of the complaint is DISMISSED.

D. Count II

The complaint alleges in Count II that the Division violated AS 15.10.090 when it changed the polling place 27-915 from Muldoon Town Center to Begich

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<sup>55</sup> AS 15.20.540(b)(1).

<sup>56</sup> *Motion to Dismiss* at 11-12; *Intervenor’s Motion to Dismiss* at 11-12.

<sup>57</sup> *Complaint* at ¶ 8.

<sup>58</sup> *Cf. Nageak v. Mallot*, 426 P.3d 930, 946-47 (Alaska 2018) (acknowledging that cumulative error could result in finding of cumulative malconduct) (citing *Hammond v. Hickey*, 588 P.2d 256, 259 (Alaska 1978).

Middle School without providing proper notice.<sup>59</sup> According to the complaint, there was voter confusion, voters were disenfranchised, and the integrity of the election is in question.

Defendants and Intervenors ask the court to dismiss Count II because the alleged failure to comply with the notice requirements did not introduce bias into the vote and the complaint fails to allege that any violation of AS 15.10.090 was knowing or reckless.<sup>60</sup> Plaintiffs oppose, arguing that because Republicans outnumbered Democrats voting in 27-215 on Election Day, failure to comply with AS 15.10.090 did introduce bias into the vote.<sup>61</sup> But as the Alaska Supreme Court recently explained in *Nageak v. Mallot*,<sup>62</sup> an act of malconduct does not introduce bias into a vote because it affects an area that favors a particular candidate or party.<sup>63</sup> Instead, an act of malconduct introduces bias into a vote if “conduct of election officials influences voters to vote a certain way.”<sup>64</sup> Here, the complaint does not allege that the purported violation of AS 15.10.090 influenced voters to vote a certain way, nor are the facts in the complaint reasonably susceptible to such an inference. Accordingly, for the failure to comply with AS 15.10.090 to constitute malconduct under AS 15.20.540(1), any violation must be knowing or recklessly indifferent to the law’s requirements. The complaint alleges neither.

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<sup>59</sup> *Complaint* at ¶¶18-23.

<sup>60</sup> *Defendant’s Motion to Dismiss* at 12.

<sup>61</sup> *Opposition* at 10-11.

<sup>62</sup> 426 P.3d 930 (Alaska 2018).

<sup>63</sup> *Id.* at n. 60

<sup>64</sup> *Id.*

In his Opposition, Plaintiff sets forth facts in support of Count II, including that “there is indication that the Division was dilatory in its conduct in securing the polling location and willfully disregarded its obligations pursuant to law to provide certain public notice to voters in the precinct of the change.”<sup>65</sup> Plaintiff alleges in the Opposition that the polling place was changed the Sunday before the Tuesday General Election from the Muldoon Town Center to Begich Middle School, there was a sign placed at the Muldoon Town Center, the polling center was misidentified on one page of the Division’s website, and to view the accurate location on the website it was necessary to click on a hyperlink.<sup>66</sup> Plaintiff alleges that the Division did not take other “reasonable steps” like notifying the candidates or providing notice on the Division’s Facebook page.<sup>67</sup> Plaintiff describes the Division’s actions as “willful disregard” and asserts that “some people” voted at the wrong location and “others” were not able to vote at all.<sup>68</sup>

As previously noted, in evaluating the sufficiency of a complaint, the court does not consider unpled factual assertions.<sup>69</sup> Accordingly, the court considers the sufficiency of the complaint based on the complaint itself, not unpled and uncited facts asserted in an opposition to a motion to dismiss.

The failure to allege a knowing or reckless violation of AS 15.10.090 at the pleading stage requires dismissal of the indictment. Because election contests are created by statute, a contestant must strictly comply with the statutory requirements

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<sup>65</sup> *Opposition* at 2.

<sup>66</sup> *Id.* at 2-3.

<sup>67</sup> *Id.* at 3.

<sup>68</sup> *Id.*

<sup>69</sup> *Caudle v. Mendel*, 994 P.2d 372, 374 (Alaska 1999).

in bringing a claim.<sup>70</sup> To plead malconduct as used in AS 15.20.540(1), a contestant must allege more than a statutory violation. Instead, a contestant must allege “a significant deviation from statutorily or constitutionally prescribed norms”<sup>71</sup> that injects bias into the vote or that is accompanied by scienter.<sup>72</sup> Here, because the complaint alleges only a violation of AS 15.10.090 but does not allege that the violation was knowing or reckless, or allege facts that would support a finding of knowing or reckless conduct, the facts alleged in the complaint, taken as true, are insufficient to entitle the Plaintiff to relief under Count II. This pleading requirement is not a mere technicality.<sup>73</sup> Given the interest in the stability and finality of election results,<sup>74</sup> and the expedited nature of the proceedings which requires parties to respond rapidly to allegations, the failure to allege an essential element of an election contest, or to allege facts that could support the finding of an essential element, must result in dismissal.<sup>75</sup>

Accordingly, Count II is DISMISSED.

E. Even if Count III of the Amended Complaint Was Not Dismissed as Untimely, the Facts Alleged Do Not Establish that Plaintiff Is Entitled to Relief.

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<sup>70</sup> *Dale v. Greater Anchorage Area Borough*, 439 P.2d 790, 793 (Alaska 1968).

<sup>71</sup> Defendants argue in their reply that the complaint is insufficient because it alleges only a technical, not a significant, violation of AS 15.10.090. Because the State raises this argument for the first time on reply, and because the argument is based on facts alleged in the Opposition which the court did not consider, the court does not resolve this argument.

<sup>72</sup> *Boucher*, 495 P.2d at 80-81; *see also Hammond v. Hickel*, 588 P.2d 256, 258 (Alaska 1978).

<sup>73</sup> *Miller v. Treadwell*, 245 P.3d 867, 877 (Alaska 2010) (to pursue an election contest, a contestant “must allege and prove the necessary elements of an election contest claim, including the level of misconduct necessary to support the claim and that the votes in question are sufficient to change the result of the election.”).

<sup>74</sup> *See Dale v. Greater Anchorage Area Borough*, 439 P.2d 790, 792 (Alaska 1968).

<sup>75</sup> For the reasons explained in the preceding section, the court does not dismiss Count II because Plaintiff failed to allege that the violation of AS 15.10.090 was sufficient to change the results of the elections.

As explained in Section B, *supra*, Plaintiff's First Amended Complaint is untimely and Count III is dismissed for that reason. But even had Count III been timely alleged, it would still be subject to dismissal because the facts alleged in Count III (that some voters did not reside in the district for 30 days preceding the election) do not give rise to an election contest. A challenge to voter qualifications that fails to allege malconduct, fraud, or corruption of election officials, ineligibility of a candidate, or a corrupt practice sufficient to change an election result must be brought in a recount appeal, not an election contest.<sup>76</sup>

Alaska law provides for a procedure to question the qualifications of a voter, for the voter to cast a questioned ballot upon such a challenge, and for the Division to resolve the question and determine whether to count the questioned ballot, which is segregated so if the determination is overturned the ballot may simply be removed from the count.<sup>77</sup> An election contest does not provide an end-run around this process.<sup>78</sup> A recount appeal is the proper avenue for a court to conduct an inquiry into whether a specific vote was properly counted or rejected.<sup>79</sup> It also permits improperly counted votes to be subtracted from the total—a remedy unavailable if Plaintiff's claims are heard through an election contest.<sup>80</sup>

Plaintiff argues that challenges to voter qualifications should be considered in an election contest if a contestant asserts “residency issues” and alleges that enough

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<sup>76</sup> *Nageak v. Mallot*, 426 P.3d 930, 940-41 (Alaska 2018); *Willis v. Thomas*, 600 P.2d 1079, 1081 (Alaska 1979)

<sup>77</sup> AS 15.15.210-430; AS 15.20.430-510.

<sup>78</sup> *Miller v. Treadwell*, 245 P.3d 867, 876-77 (Alaska 2010).

<sup>79</sup> *Nageak*, 426 P.3d at 940.

<sup>80</sup> *See, e.g., Dodge v. Meyer*, 444 P.3d 159, 161 (Alaska 2019).



votes are affected to call into question the validity of the election.<sup>81</sup> Plaintiff argues that the recount appeal procedure is inadequate because the court only considers the information available to the Director at the time of the recount.<sup>82</sup> But this is precisely the point. The public's interest in the stability and finality of elections is served by the procedure established by law, which allows a voter's qualifications to be challenged at the polls. If Plaintiff failed to follow the statutory procedures established to question a voter's qualification, he waived the right to have that ballot rejected on those grounds and cannot avoid the effect of that waiver by bringing an election contest on those grounds..

Plaintiff also argues that the recount appeal procedure is inadequate because the Director "benefits from the presumption that a voter's address is valid unless the voter provides written notice of the change."<sup>83</sup> But it is the voter, subject to disenfranchisement, not the Director, who "benefits" from the statutory presumption established by AS 15.05.020(8). And the presumption would carry as much force in an election contest as in a recount appeal even if a contestant could question a voter's qualification though AS 15.20.540. The court has rejected Plaintiff's request to take judicial notice of the residency of particular voter's based on records of property transactions because residency is not a fact susceptible to judicial notice. Selling real property does not divest a voter of residency, or even give rise to an inference that a

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<sup>81</sup> *Opposition*, at 12.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; see AS 15.05.020(8).

voter is no longer a resident.<sup>84</sup> Plaintiff's withdrawal of the names of fifteen of the 21 voters he publicly accused, without any basis, improperly voted in the election, demonstrates the danger of allowing contestants to question voter qualifications after an election through election contests.

F. Count IV

Count IV alleges that the federal equal protection<sup>85</sup> rights of voters in District 27 were violated by the "disenfranchisement of certain voters" and because the Division allowed one voter to vote twice.<sup>86</sup> Plaintiff has withdrawn the allegation that any voter was permitted to vote twice.<sup>87</sup> This claim therefore is based on the general allegation that there was "disenfranchisement of certain voters."

In his Consolidated Opposition to Dismiss, Plaintiff argues that "all the errors together provided so that voters within House District 27 were not afforded the opportunity to participate in the General Election in an equal fashion due to malconduct and corrupt practices by the Division and some individuals as set forth in the foregoing."<sup>88</sup>

Because the court has dismissed the claims upon which Plaintiff relies, this claim must also fail. In addition, a generalized claim of disenfranchisement without allegation of more specific facts does not properly plead a claim for a violation of the

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<sup>84</sup> AS 15.05.020.

<sup>85</sup> U.S. CONST. Amend. XIV.

<sup>86</sup> *Complaint* at ¶ 34

<sup>87</sup> *Notice of Withdrawal of Allegation* (filed 12/17/2020).

<sup>88</sup> *Opposition* at 13.

federal guarantee of equal protection.<sup>89</sup> None of the factual allegations contained in the complaint give rise to an inference that voters were actually disenfranchised. That is, the complaint does not allege that the Division deprived any voter of their right to vote. Nor does the complaint allege facts giving rise to a reasonable inference that similarly situated voters were treated differently, a necessary component of an equal protection violation.<sup>90</sup>

### Conclusion

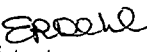
For the forgoing reasons this court GRANTS the Motions to Dismiss.

DATED at Anchorage, Alaska, the 22<sup>nd</sup> day of December 2020.

  
\_\_\_\_\_  
JOSIE GARTON  
Superior Court Judge

I certify that on 12/22/2020  
a copy of the above was mailed to  
each of the following at their  
addresses of record:

Stacy Stone; Thomas Flynn; Laura Fox;  
Margaret Paton-Walsh; Jennifer Alexander;  
Holly Wells

Elsie Roehl   
Judicial Assistant

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<sup>89</sup> See *Bush v. Gore*, 531 U.S. 98, 105 (2000) (state's requirements for counting votes may not be arbitrary or subject voters to disparate treatment); see also *Treadwell v. Miller*, 245 P.3d 867, 871-72 (Alaska 2010) .

<sup>90</sup> See generally, *Reynolds v. Sims*, 377 U.S. 533 (1964).