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SCEC NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

THOMAS WATERS, a/a/a TOMMY WATERS,)	ORIGINAL PROCEEDINGS
)	
Petitioner,)	
)	
vs.)	
)	
SCOTT NAGO, Chief Elections Officer; STATE OF HAWAII OFFICE OF ELECTIONS; and GLEN TAKAHASHI, in his official capacity as the City Clerk of the City & County of Honolulu,)	
)	
Respondents.)	

COMPLAINT

DECLARATION OF THOMS WATERS

EXHIBITS "A" - "I"

CERTIFICATE OF SERVICE

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COMPLAINT

The Petitioner, Thomas Waters, also known as Tommy Waters (“Candidate Waters” or “Petitioner Waters” herein), hereby complains and avers as follows:

INTRODUCTION

1. This is an original action by Petitioner Waters before the Hawai`i Supreme Court to contest, for cause, against the Respondents – Scott Nago, in his capacity as the Chief Election Officer of the State of Hawai`i, City Clerk Glen Takahashi, and the State of Hawai`i Office of Elections – the manner in which they conducted the general election on November 6, 2018, including the reported results of said general election to determine who shall be the councilmember for the elective office of the City and County of Honolulu Council District 4 (“District 4 election”), wherein the respondents erroneously reported said election results to be that Candidate Trevor Ozawa prevailed over Candidate Waters by 22 valid ballots cast, when in fact respondents miscounted or misapplied 39,610 ballots thereby causing a situation that did cause a difference in the election results.

2. In summary, Candidate Waters avers that said results should not be certified, and either (1) a particular candidate won the election if after correcting the election abnormality that could have caused a difference in the election results, or (2) order a manual recount in an honest and fair manner by human beings to determine the actual the actual result of the District 4 election.

3. Count I of the Complaint avers that the respondents miscounted 1,286 late night absentee ballots in District 4 election when there were no Administrative Rules (HAR), nor Hawai`i Revised Statutes (HRS) allowing or authorizing such, with that said miscounting being a cause within the meaning of HRS 11-172 that could cause a difference in the outcome of the

District 4 election. The petitioner prays that the supreme court should order that the 1286 miscounted ballots be set aside, and Candidate Waters be declared the winner as reported by the office of elections in the 4th printout.

4. Count II of the Complaint avers that the respondents miscounted 39,603 ballots cast in the District 4 election when the difference between the amount of ballots counted for Candidate Waters and Candidate Ozawa is alleged to have been 22 votes. The difference of 22 votes is .0006 of 1 percent, and falls within the margin of error for the vote counting machines used in Hawai'i for the 2018 general election. With said miscounting being a cause, within the meaning of HRS 11-172, that could cause a difference in the outcome of the District 4 election. Candidate Waters prays that the Hawai'i Supreme Court should order that the 39,610 ballots as well as all spoiled and so called "invalidated" ballots be reviewed and counted manually in an honest and fair manner by human beings to determine the actual winner of the District 4 election.

HISTORICAL BACKGROUND

5. On November 6, 2018 the office of elections issued a total of four printouts as follows:

a. The first printout was released at approximately 6:09 p.m. In the first printout, Candidate Ozawa received 10,597 votes (46.4%), Candidate Waters received 10,529 votes (46.1%) and there were 1,686 blank votes. The margin between Candidate Ozawa and Candidate Waters was a difference of 0.3 percent, and represented 0 of 17 precincts reported. (See Exhibit "A")

b. The second printout was released at approximately 8:08 p.m. In the second printout, Candidate Waters was ahead by seven (7) votes where Candidate Waters received 11,616 votes (46.0%) and candidate Ozawa 11,609 votes

(46.0%). There were 2009 blank votes. The margin between Candidate Waters and Candidate Ozawa was now 0 percent. (See Exhibit "B")

6. The third printout was released at approximately 9:36 p.m. Candidate Waters was ahead by seventy-two (72) votes. Candidate Waters received 17,795 votes (46.4%) and Candidate Ozawa received 17,723 votes (46.2%), a difference of 0.02%. The Office of Elections reported that the result of the fourth printout was based on 100% of the precincts in District 4 (17 out of 17 precincts) reporting. (See Exhibit "C").

7. The fourth printout was released at approximately 11:23 p.m.. There was no change between the third and fourth printouts. The Office of Elections again reported that 17 of 17 precincts have reported. (See Exhibit "D").

8. On November 7, 2018, the day after the election, at 4:11 a.m., the Office of Elections reported an additional 1,286 votes in District 4 and a fifth printout was released. Due to the addition of these votes, Candidate Ozawa was now ahead by twenty-two (22) votes – Candidate Ozawa received 18,357 votes (46.3%) and Candidate Waters received 18,335 votes (46.3%). 2,908 blank votes were reported. Essentially, the result of the fifth printout was a statistical tie. (See Exhibit "E").

9. The difference between the fourth and fifth printout was 634 additional votes (53.9% of the 1,286 votes) for Candidate Ozawa and 541 additional votes (46.1% of the 1,286 votes) for Candidate Waters. The results from this particular subsection of votes, which represent only 3.3% of the total number of votes casted, was completely counterintuitive to the results of the other 35,518 votes casted and represented an 8% shift.

10. On November 16, 2018, Candidate Waters sent an email to Scott Nago of the Office of Elections and Glen Takahashi of the Honolulu City Clerk's Office, pursuant to HRS Chapter 91, requesting, *inter alia*, the following information:

- a. Where did the 5th printout ballots originate? Were they mailed, dropped off at Honolulu or Kapolei Hale, or State Capitol, polling places? How many ballots were dropped off at each site?
- b. What time were ballots dropped off or picked up?
- c. Were mailed ballots delivered to the county clerk, or did the clerk pick them up from the airport? What time did this occur?
- d. What Hawai'i Administrative Rules (HAR) or Hawai'i Revised Statutes (HRS) proscribes how these ballots are to be handled?
- e. What was the chain-of-custody for these ballots?
- f. How are signatures verified on the absentee ballots? Is it done by hand or by a person?
- g. What device was used to count the ballots? E-Slate, E-Scan, Ballot Now? What is the margin of error for each device? Where were the ballots counted?
- h. May we have a list of overages and underages?
- i. How do you determine the age of the voter if no ID is required?
- j. How many same day voters were allowed to vote in District 4?

(See Exhibit "F").

11. On November 21, 2018, Jaime Kataoka from the office of elections replied via email and provided "overages and underages," "AB-3 Walk and Mail Voted Ballots Summary," "Final Summary report of votes cast". (See Exhibit "G")

12. The “overages and underages” was the only response to Candidate Waters’ November 16, 2018 request. No answers to the other questions were provided. (*See* Exhibit “G”)

13. On November 23, 2018, Rex Quidilla, Elections Administrator of the Honolulu City Clerk’s Office, emailed a letter indicating that there were 616 invalidated absentee ballots in the City and County of Honolulu. 140 were invalidated for lack of signature on the voter affirmation statement, 433 absentee mail ballots were invalidated because the signature on the voter’s affirmation statement did not correspond with the voter’s signature on the absentee ballot request or voter registration database; and 43 mail ballots were invalidated because the voter mailed in a previously invalidated ballot or due to changes to an individual’s voter registration. He also indicated that his agency did not maintain the records and that the requested information was not readily available. (*See* Exhibit “H”).

14. Both the office of Elections and the City Clerk’s Election Administrator (Quidilla) could not say what HAR or HRS specifically authorized the collection and counting of 4:11 a.m. ballots.

15. On November 19, 2018, the Honolulu Star Advertiser (reporter Gordon Pang) reported that Quidilla stated that the 1,286 ballots (1,173 counted ballots and 113 blank ballots) were absentee ballots that had been collected on November 6, 2018, up to 9:00 p.m. The ballots were then stored at an offsite warehouse, verified by staff and taken back to the State Capitol and tabulated using the same vote-counting machines that were used to count ballots that were collected at the precincts. The last pickup of the ballots from the offsite warehouse occurred at 12:30 a.m. on November 7, 2018, the day after the general election, as such the ballots were not delivered to the capitol until the day after the general election after the polls had already closed

and 100 percent of the precincts had reported. The fifth printout including those ballots was released several hours later. (See Exhibit "I").

JURISDICTION AND TIMELINESS

16. The above entitled court has jurisdiction over this matter under HRS, §§11-172 and 11-174.5. Said statutory provisions provide, in pertinent part, that, *inter alia*, a contest to the results to the instant general election shall be for cause and shall be filed with the above entitled court not later than the twentieth day following the general election being contested.

17. In the present case, the general election being contested was conducted on Tuesday, November 6, 2018. Pursuant to HRS § 11-174.5, the deadline for filing of a complaint is Monday, November 26, 2018, the twentieth day following the general election. Thus, the instant complaint has been timely filed. See Tataii v. Cronin, 119 Hawai'i 337, 339, 198 P.3d 124, 126 (2008). The above entitled court has original jurisdiction over this matter under HRS §§ 11-172 and 11-174.5 because the instant cause of action concerns the contesting, for cause, of the results of the foregoing general election.

PARTIES

18. Petitioner Waters was a candidate in the foregoing general election for the elective office of councilmember for District 4 of the City and County of Honolulu Council, and resides within District 4.

19. Pursuant to HRS, Chapter 11, Respondents Scott Nago, in his capacity as the Chief Election Officer of the State of Hawai'i, City Clerk Glen Takahashi, and the State of Hawai'i Office of Elections are responsible for the conducting of all State of Hawai'i elections for all elective governmental offices. In addition, said Respondents are responsible to and/or have in practice or pursuant to an agreement materially aided the municipal and county

governments in the State of Hawai'i ("State") conduct their elections for elective offices in their respective governments, including but not limited to tallying the ballots cast in said municipal and/or county elections and reporting the election results thereof. Said respondents reside in and have their principal place of business in the State.

COUNT I:

20. On or about November 6, 2018, Respondents Chief Elections Officer Nago, Office of Elections, and City Clerk Takahashi conducted a general election to determine, *inter alia*, who shall be elected as the councilmember for District 4. Petitioner Waters and Mr. Trevor Ozawa were candidates in said general election contest for District 4.

21. Said Respondents tabulated the ballots cast and reported at 11:23 p.m.. on November 6, 2018 ("Fourth Printout"), that 100% of the precincts voting in District 4 had reported final ballot tabulations with the following results:

- a. 17,795 valid ballots were cast for Candidate/Petitioner Waters;
- b. 17,723 valid ballots were cast for Candidate Ozawa;
- c. 2,796 totally blank ballots were cast;
- d. 10 ballots were cast where the voter cast a vote for both Candidates

Waters and Ozawa.

22. Petitioner Waters led the vote tabulation by a margin of 72 ballots after the Fourth Printout.

23. Respondents transported approximately 7000 ballots to the Capitol after 12:00 a.m. on November 7, 2018. 1,286 (1,173 counted ballots and 113 blank ballots) of these ballots were cast in the District 4 election, and the results following the tabulation of these additional

ballots, reported on November 7, 2018 (“Fifth Printout”), were alleged to result in the following totals:

- a. 18,335 ballots were cast for Candidate/Petitioner Waters;
- b. 18,357 ballots were cast for Candidate Ozawa;
- c. 2,908 totally blank ballots were cast;
- d. 10 ballots were cast where the voter cast a vote for both Candidates

Waters and Ozawa.

24. The Fifth Printout ostensibly reflected a change in the result of the election, as Ozawa had made a net gain of 94 votes and secured him an alleged win by a margin of 22 votes.

25. The illegal manner in which the ballots included in the Fifth Printout were collected and tabulated constituted an error, mistake or irregularity that would change the outcome of the election.

26. HRS § 11-172 provides that a Petitioner successfully contests the results of an election if the Petitioner demonstrates that the Respondents engaged in improper conduct, the result of which could cause a difference in the election results. *See also* Waters v. Nago, 2014 Haw. LEXIS 371, citing Tataii v. Cronin, 119 Hawai'i 337, 339, 198 P.3d 124, 126 (2008); Akaka v. Yoshina, 84 Hawai'i 383, 387, 935 P.2d 98, 102 (1997); Funakoshi v. King, 65 Haw. 312, 317, 651 P.2d 912, 915 (1982); Elkins v. Ariyoshi, 56 Haw. 47, 48, 527 P.2d 236, 237 (1974). (holding that “[a] complaint challenging the results of a special general election pursuant to HRS § 11-172 fails to state a claim unless the plaintiff demonstrates errors, mistakes or irregularities that would change the outcome of the election.”)

27. The 1,174 District 4 ballots counted between the Fourth Printout and Fifth Printout were “absentee ballots” within the meaning of HAR 3-172-1, which defines the terms

used in that chapter. Pursuant to HAR 3-172-1, “**Absentee ballot**” means a ballot used in absentee voting or in an all mail election.” However, the 1,174 ballots counted between the Fourth Printout and the Fifth Printout were “*invalid* absentee ballots” within the meaning of HAR 3-172-1: “**Invalid absentee ballot**” means an absentee ballot which does not meet the requirements for a ballot to be counted as listed in HRS §15-9.

28. Pursuant to HRS §15-9(a), absentee ballots

[S]hall be:

- a. Mailed and must be received by the clerk issuing the absentee ballot *not later than the closing of the polls on any election day*;
- b. Delivered other than by mail to the clerk issuing the absentee ballot, or another election official designated by the clerk to act on the clerk’s behalf, *not later than the closing of the polls on any election day*; or
- c. Delivered other than by mail to any polling place within the county in which the voter is registered and deposited by a precinct official in the ballot box *before the closing of the polls on any election day*.

(Emphases added).

29. In all three provisions of HRS §15-9(a), the final disposition of absentee ballots requires delivery before the closing of the polls on any election day. Those absentee ballots received after the closing of the polls shall be deemed invalid under HRS §15-9(d), which states, “If any of the above requirements is not met or if the return or ballot envelope appears to be tampered with, the clerk or the absentee ballot team official shall mark across the face of the envelope “invalid” and it shall be kept in the custody of the clerk and disposed of as prescribed for ballots in section 11-154.”

30. The 1,174 invalid absentee ballots counted in the Fifth Printout were held in an offsite warehouse, separate and apart from the 20,693 valid absentee ballots that were present and counted within the confines of the Capitol for the Fourth Printout.

31. Pursuant to HRS § 15-9, the 1,174 Fifth Printout ballots were “invalid absentee ballots” as defined in HAR 3-172-1, as they were transported to and received in the Capitol by the clerk on November 7, 2018, nearly 6 hours after polls had already closed on November 6, 2018. Hence, said ballots were not received or delivered to the clerk before the closing of the polls on Election Day and they were “invalid absentee ballots” that did not meet the requirements of HRS § 15-9.

32. The counting of these 1,174 invalid absentee ballots was improperly performed in violation of the prescribed procedures for receiving and counting absentee ballots, pursuant to HRS § 15-9.

33. The improper inclusion and counting of the 1,174 invalid absentee ballots after 100 percent of the precincts in District 4 had reported their ballot tabulations directly changed the proper result of the election.

34. The applicable statutes and rules, HRS Chapters 10, 11, 12, 14, 15, 16 and HAR Chapter 3-170, 171 through 3-176 and Chapter 3-172, do not authorize the unusual method used to collect and count these 4:00 a.m. ballots.

35. HRS §11-174.5 provides that if the “mistake or fraud” of the Respondent which caused a difference in the election results is of such a nature that after it is corrected or remedied, “a certain candidate or certain candidates received a majority or plurality of the votes cast and were elected,” then a judgment shall be served upon the Chief Election Officer or County Clerk, who shall sign and deliver to the candidate or candidates certificates of election.

36. The only remedy in the case of Respondents’ mistake of including the 1,174 invalid absentee ballots is to invalidate their tabulation. Such a remedy would leave the court with an ascertainable winner of the election that is validated by the tabulation in the Fourth

Printout. WHEREFORE, Petitioner Tommy Waters prays that this court invalidate the inclusion of the 1,174 invalid absentee ballots counted in the Fifth Printout, and declare Petitioner Waters the prevailing candidate and winner of the election for Honolulu City Councilmember of District 4.

COUNT II:

37. Count II of the Complaint avers that the respondents miscounted 39,603 ballots cast in the District 4 election when the difference between the amount of ballots counted for Candidate Waters and Candidate Ozawa is alleged to have been 22 votes. The difference of 22 votes is 0.00055 of 1%, which manifestly falls within the margin of error for the vote-counting machines used in Hawai'i for the 2018 general election.

38. According to the State Respondents' Motion to Dismiss Complaint Filed on November 24, 2014, or In The Alternative for Summary Judgment, filed on December 5, 2014, in Waters v. Nago, 2014 Haw. LEXIS 371, and the polling place manual, the State of Hawai'i uses three counting machines: eScan, eSlate and Ballot Now. These machines have been used since approximately 2008. While the State provided a description of the method by which the three machines tabulated votes, the only indication as to the margin of error was the unsubstantiated claim that, "The Office of Elections was aware of no errors in the counting of votes by the voting system." Id. at 14. This self-serving statement is circular as the only way that error would have been discovered is by conducting a manual recount of the votes. As no recount was conducted, there was no error found but that was because there was no error looked for.

39. In this case, the reported margin of 22 votes (0.00055 of 1%) is within the margin of error of the counting machines used in the election and the failure to verify the accuracy of the

count, including the 2,908 “blank” votes and the 10 ballots which indicated votes for both candidates, and the invalidated and spoiled ballots, constituted an error, mistake or irregularity which would change the outcome of the election. Hence, Respondents engaged in improper conduct in failing to confirm the accuracy of the count.

40. Pursuant to HRS § 11-172, the aforementioned improper conduct by the Respondents constitutes “cause” that could cause a difference in the outcome of the District 4 election result.

With respect to any election, any candidate, or qualified political party directly interested, or any thirty voters of any election district, may file a complaint in the Supreme Court. The complaint shall set forth any cause or causes, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the election results. The complaint shall also set forth any reasons for reversing, correcting, or changing the decisions of the precinct officials or the officials at a counting center in an election using the electronic voting system. A copy of the complaint shall be delivered to the chief election officer or the clerk in the case of county elections.

41. “HRS § 11-172 provides that a Petitioner successfully contests the results of an election if the Petitioner demonstrates that the Respondents engaged in improper conduct, the result of which could cause a difference in the election results. See Waters v. Nago, 2014 Haw. LEXIS 371. Specifically, said “cause” is that given that the election resulted in a statistical tie and that the margin of error was within the margin of error for the vote-counting machines. Thus, Respondents engaged in improper conduct in failing to conduct a recount of the ballots to ascertain their validity.

42. In Akaka v. Yoshina, 84 Hawai‘i 383, 935 P.2d 98 (1997), the Hawai‘i Supreme Court held that a complaint challenging the results of an election pursuant to HRS § 11-172 fails to state a claim unless: (1) the plaintiffs demonstrate errors that would change the outcome of the

election; or (2) the plaintiffs demonstrate that the correct result cannot be ascertained because of a mistake or fraud on the part of the precinct officials. Id. at 387, 935 P.2d at 102.

Under the first circumstance, "the petitioner must 'show that he [or she] has actual information of mistakes or errors sufficient to change the result.'" *Funakoshi*, 65 Haw. at 316-17, 651 P.2d at 915 (quoting *Brown v. Iaukea*, 18 Haw. 131, 133 (1906)). The petitioner has the burden of demonstrating that the "specific acts and conduct of which they complain would have had the effect of changing the results[.]" *Elkins*, 56 Haw. at 49, 527 P.2d at 237. In the absence of facts showing that irregularities exceed the reported margin between the candidates, the complaint is legally insufficient because, even if its truth were assumed, the result of the election would not be affected. Id.

Alternatively, the petitioner must demonstrate that the fraud or mistake of precinct officials made it impossible to ascertain the correct result. HRS § 11-174.5; *Akizaki v. Fong*, 51 Haw. 354, 461 P.2d 221 (1969).

Akaka, 84 Hawai'i at 388, 935 P.2d at 103.

43. As to the first basis identified in Akaka, the 22 votes separating Candidate Ozawa and Candidate Waters fell within the margin of error of the vote-counting machines. Accordingly, the Respondents' failure to conduct a recount to ascertain the accuracy of the machine-count constituted an error that would change the outcome of the election (i.e. if the erroneous votes are corrected).

44. As to the second basis identified in Akaka, the failure of the Respondents to conduct a recount when the 22 votes fell within the margin of error of the vote-counting machines constituted a mistake that has made it impossible to ascertain the correct result of the election. Without correcting the margin of error by conducting a recount, it is impossible to confirm that the correct result has been reached.

45. Based on the showing of "cause," the Hawai'i Supreme Court should issue a judgment pursuant to HRS § 11-174.5.

The judgment may invalidate the general, special general, special, or runoff election on the grounds that a correct result cannot be ascertained because

of a mistake or fraud on the part of the precinct officials; or decide that a certain candidate, or certain candidates, received a majority or plurality of votes cast and were elected. If the judgment should be that the general, special general, special, or runoff election was invalid, a certified copy thereof shall be filed with the governor, and the governor shall duly call a new election to be held not later than one hundred twenty days after the judgment is filed. If the court shall decide which candidate or candidates have been elected, a copy of that judgment shall be served on the chief election officer or county clerk, who shall sign and deliver to the candidate or candidates certificates of election, and the same shall be conclusive of the right of the candidate or candidates to the offices.

46. The only remedies in the case of Respondents' failing to order a recount of the ballots is to invalidate their tabulation and (a) order that Respondents conduct a hand count and human inspection of the 39,603 ballots cast in District 4 and other invalidated ballots, or (b) invalidate the purported results of the general election for councilmember for District 4 and require that a new election be held. WHEREFORE, Petitioner prays that this court invalidate the results of the District 4 councilmember election and either (a) order that Respondents conduct a hand count of the 39,603 ballots cast in District 4 and human inspection of the invalidated ballots, or (b) invalidate the purported results of the general election for councilmember for District 4 and require that a new election be held.

THOMAS R. WATERS, ATTORNEY AT LAW

BY: /s/ Thomas Waters
THOMAS R. WATERS

ATTORNEY FOR DEFENDANT-APPELLANT

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