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ENDORSED
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MABEL TONKIN
Clerk, Municipal Court
County of Sonoma, State of California
BY JOSEPHINE A. JOHNSON

10 MUNICIPAL COURT OF CALIFORNIA, COUNTY OF SONOMA

11 COUNTY OF SONOMA,

No. 41291

12 Plaintiff,

13 vs.

14 DENNIS P. KEEGAN, et al.,

CLOSING ARGUMENT

15 Defendants.

16 I

17 INTRODUCTION

18 Plaintiff has filed two trial memoranda and each is
19 incorporated by reference. Plaintiff respectfully contends:

20 1. Plaintiff is entitled to bring this action under
21 Elections Code section 10012.

22 2. The complaint against the defendants requested
23 prejudgment interest and plaintiff is entitled to interest under
24 Civil Code section 3287(a).

25 3. The actions of the Elections Clerk in ordering the
26 ballot were proper. The clerk's acts may not be overturned in

1 the absence of a showing of abuse of the clerk's power.

2 4. Plaintiff is entitled to the costs of handling the
3 ballot, which costs include the expense incurred in preparing for
4 and mailing of the ballot.

5 This Brief supplements the earlier memoranda and
6 constitutes plaintiff's closing argument.

7 II

8 THE CHARGE FOR PUBLICATION OF THE CANDIDATE'S
9 STATEMENT OF QUALIFICATION MUST BE DETERMINED
10 BY REFERENCE TO THE COST OF PUBLICATION OF THE
11 BALLOT AND VOTER'S PAMPHLET: REFERENCE ONLY
12 TO THE COST OF PRINTING TWO PAGES OF THE BALLOT
13 CREATES ARTIFICIAL AND IMPROPER DISTINCTIONS.

14 Elections Code section 10012 (all section references are
15 to the Elections Code unless otherwise indicated) allows a
16 candidate for a nonpartisan office to prepare in his own words
17 and submit for publication a statement of qualifications which is
18 published in the voter's pamphlet and sent to all registered
19 voters. The voter's pamphlet is prepared along with a sample
20 ballot in accord with Division 8 of the Elections Code relating to
21 the manner and method of ballot preparation. This division states
22 in detail the requirements under which the ballot and voter's
23 pamphlet are prepared, and prescribes everything from the type size
24 and face of each page of the ballot, the type of paper to be used,
25 the size of each page border, the size of the voting box, the
26 spacing, the required statements to be made to the voter, the
order of the ballot, the type of binding to be used to, the
prescribed dates of mailing.

1 The Supreme Court in East Bay Mun. Util. Dist. v.
2 Appellate Dept., 23 Cal.3d 839, (1979) found that the candidate's
3 statement of qualifications is a vehicle by which a candidate may
4 publicize his personal qualifications and the cost of the statement
5 is a campaign expense, not an election expense to be borne by the
6 electorate. Failure to accept the opportunity to submit a
7 statement does not deny, restrict or cause a chilling effect upon
8 either the candidate or the electorate in the electoral process.
9 The candidate therefore has a choice--he may submit a statement of
10 qualifications for publication and incur the expense, or he may
11 forego use of that campaign device and its cost. If the candidate
12 submits a statement, he has chosen to participate in the
13 publication of this specialized booklet, the subject of Division 8,
14 and has willingly accepted that his statement page, along with
15 each other page of the pamphlet, will be subject to the technical
16 requirements, time pressures and other exigencies of ballot
17 preparation. The statement of qualifications page is one page
18 of the booklet and removing the statement from the booklet and
19 viewing its preparation differently from the others creates
20 artificial distinctions. All of the legislative requirements
21 imposed upon the printing and distribution of this booklet should
22 be fairly borne proportionately by each page of the booklet.

23 For these reasons, the testimony of the defendant's
24 printer is not very helpful to resolution of the case. The
25 printer looked at the completed ballot pamphlet after it was
26 printed and indicated that he could reproduce two pages of the

1 statement at a lesser cost than was billed to each candidate. By
2 viewing it this way, the printer's estimate did not account for
3 any of the work necessary to ascertain the requirements of
4 printing this document. The printer has never printed a ballot,
5 but in spite of that, he did not take the time to review the
6 Elections Code to determine what was entailed, he did not consult
7 an attorney about the specific printing requirements even though
8 he acknowledged that one would have to be hired if he were to
9 print a ballot, he did not check with any state or local officials
10 knowledgeable about printing ballots, nor with other printers who
11 had actual experience in the field. His source of cost estimating
12 was a national book that did not give a cost estimate for this
13 extra work. The printer looked only at the cost of printing two
14 pages and did not express an opinion about what he would charge to
15 print and assemble the 170 different ballots that were necessary
16 for the election. It takes no great printing expertise to realize
17 that viewing a completed two pages and then estimating the cost
18 to reproduce those pages is significantly different than the
19 cost entailed in ascertaining all legal requirements of the ballot
20 and then building, printing, and assembling it from scratch in
21 21 days. The defendant's printer's testimony was not based on
22 relevant facts concerning the sample ballot and voter's pamphlet.
23 The value of his opinion is no stronger than the facts upon which
24 it is based.

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1 A. Considering the Cost of Two Pages Alone
2 Would Lead to a Violation of Section 10012.

3 The defendant's printer indicated that he would charge
4 \$1,100.00 to print each page, \$29.00 to set each page and between
5 \$50.00 and \$150.00 for each plate change. The large difference in
6 cost for each plate change was not explained, and makes the
7 opinion suspect, but in any event, if we assume a cost of \$125.00
8 for each plate change, the additional cost of ten changes is
9 \$1,250.00 and the cost to print each page is about \$1,750.00.
10 Section 10012 provides that "each candidate using the services
11 shall be charged the same." The two candidates for Superior
12 Court Department Two ran for the same office, received the same
13 distribution and used the same services. Again, using the
14 printer's figures of \$1,100.00 to print each page and \$29.00 to
15 set it, we add \$250.00 for plate changes as there were only two
16 rotations and the printing cost for each page would be \$1,379.00.
17 Under this approach, the four candidates for Department One would
18 pay more than the candidates for Department Two.

19 Another criticism engendered by focusing on only two
20 pages of the pamphlet is that there were more than two pages of
21 statements of qualifications. All candidates for judgeship, all
22 candidates for supervisor and all candidates for local nonpartisan
23 positions were offered the opportunity to submit statements and
24 most accepted and had their statements printed. Each statement,
25 taken alone, adds nothing of significance to the size of the
26 voter's pamphlet, but when all the statements are considered in

1 the aggregate, they materially affect the size and bulk of the
2 ballot and increase the costs of handling and assembly.

3 B. Plaintiff's Computation of Determining the
4 Average Cost Per Page was Appropriate.

5 Plaintiff computed the charges to each defendant on the
6 basis of the cost of an average page and perhaps this was even
7 beneficial to these candidates for the following reasons. We
8 know now that the least expensive page of the ballot and voter's
9 pamphlet was the blank page because it required no printing. The
10 pages that required very little printing and no rotation would be
11 less expensive than the others. The next group of pages in order
12 of ascending cost would be those that involved some printing but
13 no plate changes. These would include the front page, instruction
14 page, each page stating a state or county measure, each page
15 containing a statement of analysis of county measures, the voter's
16 information page, the application for absentee ballot and mailing
17 page. The more expensive pages of the sample ballot were the ones
18 that involved substantial set up, printing and rotation. These
19 pages would include the statement of qualifications page and the
20 ballot pages. Many of the other operations associated with
21 printing and assembling the booklet would be approximately the
22 same. All the statements in the aggregate added bulk to the
23 booklet and increased assembly costs.

24 Plaintiff has not requested this increased cost, only
25 the average cost.

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III

PLAINTIFF'S ACTIONS HAVE BEEN PROPER.

The transaction under intense scrutiny here took place in April of 1976. In the interim, four and one-half years between the transaction and the trial, plaintiff's case has been weakened by the death of Eugene Williams, the Registrar of Voters, and the one most closely involved in incurring this expense, and by the disability and retirement of the other active participants to the transaction. Records that were once available years ago no longer exist. Nevertheless, plaintiff has supplied to the Court the actual cost of printing the ballot and the formula used to compute the billing of each defendant.

Approximately 176,000 ballots were ordered from the printer. The ballots were ordered before registration closed and without knowledge of how many voters there would ultimately be. The 1976 primary election was the first election to use postcard registration and there was no track record to determine how many persons would use this new method of registration. It was also a tumultuous election; there has been no other time in this counsel's memory that there were five candidates for a Superior Court seat. There were attempts at recall of incumbents and interest about local measures. In view of this, more ballots were ordered than there were registered voters, but one can easily imagine what would have happened if, in any of the 170 ballot styles, there were an insufficient number to be distributed.

In addition to the number of ballots mailed, ballots

1 were available over the Elections counter and for distribution if
2 a voter changed his party registration or if his ballot was lost,
3 misplaced or damaged in the mail. Plaintiff billed defendants
4 only for the number of booklets that were mailed. However,
5 there is no restriction in section 10012 that the candidate be
6 billed only for those which were mailed. The candidates received
7 the benefit of those extra booklets and should legitimately be
8 charged therefor.

9 Defendant Bell indicates that he should receive a price
10 break because the plaintiff's printer indicated that the County
11 was supplied a 5% overrun for no additional cost. However,
12 defendant's printer indicated that he would print an additional
13 10% and that perhaps as few as 1% would be delivered. This is in
14 accordance with good printing practices and no additional charge
15 would be made. Correspondingly, the candidate should not receive
16 a price break.

17 A. Plaintiff is Entitled to Interest in the Debt.

18 Before the election when each defendant picked up his
19 nomination papers, he received written notice in his official
20 nomination packet that he could request a candidate's statement
21 but that he would have to pay for the cost of that statement. When
22 it was originally thought that the statement of qualifications
23 would have to be printed in both English and Spanish, the
24 estimate was approximately \$6,500.00. After the Elections Clerk
25 was advised by the state that the Spanish publication was not
26 required, the estimated cost was reduced proportionately. What

1 is important is that each defendant was advised in writing that
2 he would have to pay for the statement and that the estimate in
3 each case was above the actual billing. Each candidate submitted
4 the statement with the expectation that he would incur a debt and
5 interest on that debt is therefore proper.

6 Only defendant Keegan would have us believe that in the
7 face of a written estimate of charges given in the nomination
8 packet, he believed different oral advice of a ministerial clerk
9 whose name he cannot now remember. Only defendant Keegan would
10 have us believe that where the estimate was clearly indicated to
11 be the total cost of the English and Spanish translation, he
12 reasonably interpolated it to mean that this would be the cost
13 to all candidates, regardless of whether there was one request
14 for a statement or seven and regardless of whether the actual
15 number of pages to be printed was one, two or three.

16 In the billing used by the plaintiff, plaintiff rounded
17 off its computation to the nearest one-half cent and this would
18 not conform with section 10012's provision that the "actual" cost
19 be billed. In addition, the integrity of the counting of the
20 pages of the ballot has been questioned, so the ballots are all in
21 evidence and available for counting. This does not affect the
22 claim for interest as there has always been an expectation of
23 payment. The defense of indigency has not been raised.

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IV

PLAINTIFF IS ENTITLED TO ITS HANDLING
COST AND THE HANDLING COST CHARGED IS
REASONABLE.

Each candidate was billed about \$40.00 for handling of his statement of qualifications. This charge includes the cost of receiving the statement, proofreading it for errors and to determine if it must be rejected because it is obscene, vulgar, profane, libelous, or incites hatred, abuse, violence or hostility, or casts ridicule or shame upon any person or group of persons by reason of sex, race, color, religion, or contains any language or matter circulation of which through the mail is prohibited by Congress. (Section 10012) The \$40.00 also includes the proportionate cost of getting the ballot to the printer, getting it back from the printer, proofreading it (and if an error is found, getting it back to the printer for correction and then proofreading it again) getting it back to the printer for final printing and back again, and then assembling it for distribution. There were no time records kept for this procedure, but it involved the participation of the clerk's office and an estimate of \$40.00 was made. The \$40.00 cost is less than each of these defendants would bill for an hour of his time and is appropriate.

In addition, plaintiff contends that the cost of mailing is one of the costs of handling. This is based upon the dicta of the Supreme Court that the handling charge includes the cost of distribution and the history of the Amendments to section 10012 to specifically delete the cost of mailing as a handling

1 charge. As an offer of proof, plaintiff would show that it spent
2 \$15,569.75 for postage and engaged extra help in the Elections
3 Office for the two week period during which the ballots were
4 mailed.

5 IV

6 PLAINTIFF IS NOT ENTITLED TO THE COST OF
7 THE SPANISH TRANSLATION.

8 Section 10012 provides that a charge be made for a
9 Spanish translation only where the translation was requested.
10 Plaintiff actually made a translation for distribution, but was
11 unable to establish that the candidates requested it. Plaintiff
12 withdraws its request for the charge of \$17.50.

13 VI

14 CONCLUSION

15 Plaintiff is entitled to judgment for the actual
16 prorated cost of printing and handling the statement, plus
17 interest on that amount from the date that the services were
18 provided, June 8, 1976, the date of the primary election.

19 Respectfully submitted,

20 JAMES P. BOTZ, County Counsel

21
22 Dated: March 6, 1981

By 

MARK FREED

23 Deputy County Counsel
24 Attorneys for Plaintiff
25
26

PROOF OF SERVICE BY MAIL
(CCP Secs. 1013a(1) and 2015.5)

I, the undersigned, state that I am a citizen of the United States and employed in the City of Santa Rosa, County of Sonoma; that I am over the age of 18 years and not a party to the within cause; that my business address is 2555 Mendocino Avenue, Santa Rosa, California; and that on the date set out below I deposited a true copy of CLOSING ARGUMENT

sealed in envelope(s) with postage thereon fully prepaid in a mail box regularly maintained by the Government of the United States in the said City and County, addressed as follows:

Dale M. Underwood, Esq.
1235 West Steele Lane
Santa Rosa, CA 95401

Dennis P. Keegan, Esq.
200 E Street
Santa Rosa, CA 95402

Robert Y. Bell, Esq.
858 Third Street
Santa Rosa, CA 95402

I certify under penalty of perjury that the foregoing is true and correct. Executed at 2555 Mendocino Avenue, Santa Rosa, California, on March 6, 1981.

Jill Wilson
Jill Wilson