

IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

|                            |   |                              |
|----------------------------|---|------------------------------|
| <b>ROBERT J. FITRAKIS,</b> | : |                              |
| Plaintiff,                 | : |                              |
|                            | : |                              |
| v.                         | : | Case No:12cv13888            |
|                            | : |                              |
| <b>JON HUSTED, et al.,</b> | : | Judge: Judge Mark A. Serrott |
| Defendants.                | : |                              |

**DEFENDANT ELECTION SYSTEMS & SOFTWARE, INC.’S  
MOTION TO DISMISS PLAINTIFF’S COMPLAINT FOR  
FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED**

Pursuant to Ohio Rule of Civil Procedure 12(B)(6), Defendant Election Systems & Software, Inc. (“ES&S”) requests the Court dismiss Plaintiff’s Complaint on the basis that the sole remaining Claim for Relief, entitled “Ohio Taxpayer’s Action,” does not assert any supportable claim or seek any relief from ES&S. This Motion is further supported by the attached Memorandum.

Respectfully submitted,

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 Software, Inc.*

**MEMORANDUM IN SUPPORT**

**I. Introduction.**

Plaintiff Robert Fitrakis (“Plaintiff” or “Mr. Fitrakis”) filed this lawsuit (and an identical, earlier-filed lawsuit in Federal Court) to prevent what he theorized to be potential abuses in electronic voting on Election Day. Plaintiff’s theories were unsupported and ultimately were proved to be meritless.

Subsequently, upon the demand of Defendant Election Systems & Software, Inc. (“ES&S”), Plaintiff voluntarily dismissed the entire Federal Court lawsuit on November 20, 2012. Upon ES&S’s further insistence, Plaintiff voluntarily dismissed his First Claim for Relief in this case, entitled “Violations of 42 U.S.C. §1983.”

However, Plaintiff has refused to dismiss his Second Claim for Relief in this case, entitled “Ohio Taxpayer’s Action.” Because the Second Claim for Relief – the only claim pending in this lawsuit – does not seek any relief against ES&S and cannot be pursued against ES&S, the Court should dismiss ES&S from this lawsuit for Plaintiff’s failure to state any claim upon which relief may be granted.

**II. Brief Factual Background.**

Mr. Fitrakis filed this lawsuit on November 5, 2012. The Complaint asserts two claims for relief: the First Claim for Relief entitled “Violations of 42 U.S.C. §1983,” and the Second Claim for Relief entitled “Ohio Taxpayer’s Action.” For the First Claim, Mr. Fitrakis sought a temporary restraining order enjoining the Ohio Secretary of State (the “Secretary”) and ES&S from utilizing a software add-on designed to format electronic voting reports. The Court convened a hearing on the motion on November 6, 2012. The Court denied Mr. Fitrakis any relief.

For the Second Claim, Mr. Fitrakis sought only “a writ of mandamus against defendant Husted” relative to the State’s contract with ES&S. [Complaint, “Wherefore” paragraph “a”]. The essence of the Second Claim is Mr. Fitrakis’ plea that “Defendant Husted has violated his duty not to expend public funds without authorization.” [Complaint, ¶ 25]. The remainder of the Second Claim describes Mr. Fitrakis’ vision of the Secretary’s responsibilities as a public official. [Complaint, ¶¶ 21-26]. There is neither an allegation nor a cause of action asserted against ES&S in the Second Claim.

This lawsuit was the same lawsuit Mr. Fitrakis filed in Federal Court the same day, and the motion for temporary restraining order was the same one for which the Federal Court held a hearing the morning of November 6, 2012. As this Court did, the Federal Court denied Mr. Fitrakis any relief on the motion. Upon ES&S’ insistence, Mr. Fitrakis voluntarily dismissed the Federal Court Lawsuit in its entirety on November 20, 2012. [See **Exhibit 1** hereto].

On November 20, 2012, again upon ES&S’ insistence, Mr. Fitrakis voluntarily dismissed his First Claim for Relief in this case. [See **Exhibit 2** hereto]. However, Mr. Fitrakis has refused to dismiss the Second Claim and refused to dismiss ES&S from the lawsuit, despite the absence of any supportable claim against ES&S.

### **III. Law and Argument.**

“In order to dismiss a complaint for a writ [of mandamus] under Civ.R. 12(B)(6), failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint, after presuming the truth of all material factual allegations and making all reasonable inferences in relator’s favor, that the relator can prove no set of facts warranting extraordinary relief.” State ex rel. Longacre v. Penton Publishing Company, 77 Ohio St.3d 266, 267, 673

N.E.2d 1297 (1997). Assuming the truth of the Complaint allegations, Plaintiff cannot prove any set of facts warranting relief against ES&S on the Second Claim.

The only claim pending is the Second Claim, seeking a writ of mandamus against the Secretary. There is no allegation against ES&S in the Second Claim, and no demand for relief against ES&S in the Second Claim. The absence of any claim or allegation asserted against ES&S is fatal to the Second Claim as against ES&S.

Moreover, there is no set of facts that Mr. Fitrakis could demonstrate that could support the Second Claim as against ES&S. It is axiomatic that a plaintiff may only pursue a mandamus claim against a *public official*. See, e.g., State ex rel. Longacre, 77 Ohio St.3d at 267-68 (affirming dismissal of complaint seeking a writ of mandamus against plaintiff's private employer, noting "Mandamus will not lie to enforce a private right against a private person" and surveying various authorities); State ex rel. Hill v. Geisler, 11th Dist. No. 2005-P-0048, 2005-Ohio-6903, 2005 WL 3528901, ¶ 11 (dismissing complaint for writ of mandamus against private entities because "many of the parties named under relator's petition were not individuals who held public offices" and, therefore, "would not owe any public duty to relator."); State ex rel. Bristow v. The Plain Dealer, 8th Dist. No. 80462, 2001 WL 1557520, \*1 (Dec. 6, 2001) (dismissing plaintiff's complaint for writ of mandamus against private parties, noting "[i]t is well settled that mandamus will not lie to enforce a private right against a private person," surveying authorities).

The allegations of the Complaint establish only that ES&S is a *private* vendor of election hardware and software. [See, e.g., Complaint ¶ 3 (alleging that ES&S is a business that entered into contracts to provide goods and services"); ¶ 7 (alleging that ES&S designs and sells election

hardware and software)]. Thus, Mr. Fitrakis may not pursue a claim for writ of mandamus against ES&S.

Because the Complaint does not assert any supportable claim for relief against ES&S, ES&S respectfully submits ES&S should be dismissed from the lawsuit, with prejudice.

Respectfully submitted,

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*Counsel for Defendant Election Systems & Software, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 27, 2012, I electronically filed the foregoing with the Court via the Court’s electronic filing system, which will provide notice to all counsel of record.

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