

IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY

<b>ROBERT J. FITRAKIS,</b>	:	
	:	
Plaintiff,	:	Case No. 12CV013888
	:	
v.	:	Judge Mark A. Serrott
	:	
<b>OHIO SECRETARY OF STATE</b>	:	
<b>JON HUSTED, et al.</b>	:	
	:	
Defendants.	:	

---

**MOTION OF DEFENDANT SECRETARY OF  
STATE JON HUSTED TO DISMISS**

---

Pursuant to Ohio Rules of Civil Procedure 12(b)(1) and 12(b)(6) and R.C. 2731.04, Defendant Ohio Secretary of State Jon Husted respectfully moves this Court to dismiss this action with prejudice on the grounds that: (1) Plaintiff lacks standing to pursue his claims; (2) Plaintiff's claims are moot; (3) Plaintiff's complaint fails to comply with the caption requirements set forth in R.C. 2731.04; and (4) Plaintiff's complaint fails to state a claim on which relief may be granted. The Secretary's Memorandum in Support of this motion is attached.

Respectfully submitted,

MIKE DEWINE  
Ohio Attorney General

*/s/ Richard N. Coglianesse*  
Richard N. Coglianesse (0066830)  
Assistant Attorney General  
Constitutional Offices Section  
30 East Broad Street, 16th Floor  
Columbus, Ohio 43215  
Tel: (614) 466-2872; Fax: (614) 728-7592  
richard.coglianesse@ohioattorneygeneral.gov

*Counsel for Defendant  
Secretary of State Jon Husted*

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

**I. INTRODUCTION**

This lawsuit hinges on Plaintiff's theories regarding the harm he imagined would result if the Secretary of State utilized new software to increase the speed and accuracy of election-night reporting following the November 6, 2012 election. Seeking to prevent this speculative harm, Plaintiff tried twice to obtain emergency relief preventing Defendant from using the software for the election. Both the Federal District Court and this Court denied Plaintiff's requested relief, recognizing that Plaintiff could not demonstrate a likelihood of success on the merits. Indeed, as the Federal Court aptly observed, Plaintiff demonstrated "zero likelihood of success." *Fitrakis v. Husted*, No. 2:12-cv-01015, PAGEID # 111 (S.D. Ohio Nov. 6, 2012). Election Day came and went; the Secretary of State used the software at issue; and Plaintiff's theoretical harms did not materialize. Nonetheless, Plaintiff persists in seeking the extraordinary relief of a writ of mandamus against the Secretary "ordering him to cancel any and all contracts that he entered into with defendant ES&S under which ES&S provided him with hardware and software designed to record and tabulate the votes cast by Ohio voters in the General Election on November 6, 2012" and mandating that he "open all such contracts to public bidding, public review, and approval of the technology review board." Complaint for Mandatory and Injunctive Relief ("Complaint") Prayer for Relief, ¶ a. As explained below, Plaintiff's complaint suffers from numerous deficiencies, each one sufficient by itself to require dismissal of Plaintiff's action. Accordingly, the Secretary requests that the Court dismiss Plaintiff's claims with prejudice.

## II. BACKGROUND

On November 5, 2012, just one day prior to Election Day, Plaintiff initiated parallel actions in this Court and in the United States District Court for the Southern District of Ohio alleging that the Secretary entered into a contract with Defendant ES&S for software that created an “imminent risk” that people would be able to “access the recording and tabulation of votes cast by Ohio voters.” Complaint ¶ 11; Complaint for Injunctive and Mandatory Relief, 2:12-cv-01015 PAGEID #: 3 (“Federal Complaint”) ¶ 11. Both the federal and state complaints alleged two claims for relief: (1) violations of 42 U.S.C. § 1983 and (2) an “Ohio Taxpayer’s Action.” Complaint; Federal Complaint. Insisting that “there is no objective proof that the new software will not adversely affect the existing software in an unforeseen way,” Plaintiff sought a temporary restraining order preventing the Secretary from utilizing the software for the November 6, 2012 election. Memorandum in Support of Motion for Temporary Restraining Order at 3; Memorandum in Support of Motion for Temporary Restraining Order, 2:12-cv-01015, PAGEID # 14.

On Election Day, the Federal Court held a hearing at which both Plaintiff and Defendants presented evidence. Following the hearing, the Federal Court issued an opinion and order concluding that Plaintiff “demonstrated zero likelihood of success based on the evidence presented,” and denying Plaintiff’s request for emergency relief. *Fittrakis v. Husted*, No. 2:12-cv-01015, PAGEID # 111 (S.D. Ohio Nov. 6, 2012).

Later the same day, Plaintiff tried again, raising precisely the same claims in this Court. Like the Federal Court, this Court denied Plaintiff’s requested relief. Entry Denying Plaintiff’s Motion for Temporary Restraining Order.

On November 20, 2012, Plaintiff voluntarily dismissed his Federal Court lawsuit in its entirety and dismissed his claim under 42 U.S.C. § 1983 in this state action. Plaintiff’s Notice of

Dismissal, 2:12-cv-01015, PAGEID #: 116; Notice of Dismissal of 42 U.S.C. § 1983 Federal Cause of Action. All that remains, then, is Plaintiff's "Ohio Taxpayer Action" and corresponding request for a writ of mandamus against the Secretary. *See* Complaint. Because Plaintiff can show no set of facts that would entitle him to the relief he seeks, this Court should dismiss Plaintiff's remaining claim with prejudice. *See, e.g., Progress Ohio.org, Inc. v. JobsOhio et al.*, 2012-Ohio-2655, 973 N.E.2d 307, ¶ 8 (10th Dist.).

## **LAW AND ARGUMENT**

### **I. Plaintiff Lacks Standing To Pursue His Ohio Taxpayer Action**

As a threshold matter, Plaintiff lacks standing to pursue his sole remaining claim, which he styles as an Ohio taxpayer action. *See* Complaint at pp. 4-5 ("Second Claim for Relief: Ohio Taxpayer's Action."). Plaintiff claims his status as an Ohio taxpayer suffices to establish standing. But the law is clear: "a taxpayer can not bring an action to prevent the carrying out of a public contract or the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are put in jeopardy." *State ex rel. Masterson v. Ohio State Racing Comm'n*, 162 Ohio St. 366, 368, 123 N.E.2d 1 (1954). Simply paying taxes does not confer standing except in the rare case in which a plaintiff contributed to a special fund and thus can demonstrate some special interest in that fund because his own property rights are placed in jeopardy. *Id.* at 368. "In other words, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally." *Id.* (citation omitted.); *see also State ex rel. Dann v. Taft*, 110 Ohio St. 3d 1, 2006-Ohio-2947, 850 N.E.2d 27, ¶ 13 ("[A] taxpayer lacks legal capacity to institute a taxpayer action unless he has some special interest in the public funds at issue."); *State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 2006-Ohio-3677, 853 N.E.2d 263, ¶ 9 ("Ohio law does

not authorize a private Ohio citizen, acting individually and without official authority, to prosecute government officials suspected of misconduct based on the citizen's status as a taxpayer of general taxes, including the gasoline tax."); *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm'n*, 28 Ohio St.3d 317, 324, 503 N.E.2d 1025 (1986) (Wright, J., concurring in part, dissenting in part) ("Without question, *Masterson* requires at the very least that in a taxpayer's suit it must be demonstrated that the party initiating the action has a special interest whereby his own property rights are placed in jeopardy, *and* furthermore, it must be alleged that the taxpayer will sustain damage different in character from that suffered by the general public.") (Emphasis in original).

The Tenth District Court of Appeals recently reiterated these principles in *Gildner v. Accenture, L.L.P.*, 10th Dist. No. 09AP-167, 2009-Ohio-5335. There, the plaintiffs, Ohio citizens and taxpayers, sought to invalidate a settlement agreement between the Ohio Department of Job and Family Services ("ODJFS") and Accenture, L.L.P. arising from a "series of unbid contracts from ODJFS to create and implement a statewide computerized information system known as 'Ohio Works.'" *Id.* at ¶ 3. The plaintiffs contended they had standing because the contracts at issue involved the expenditure of general funds, to which they contributed as taxpayers. *Id.* at ¶ 5. The court disagreed. After reviewing the Ohio case law concerning taxpayer standing, the court concluded that "when the only fund involved is the state's general revenue fund to which a plaintiff contributes as a taxpayer" the plaintiff lacks a sufficient "special interest" to establish standing. *Id.* at ¶ 24. Thus, the plaintiffs lacked standing to pursue the action.

Plaintiff in this case seeks to invalidate contracts between the Secretary and Defendant ES&S. But he has not alleged that the contracts involved the spending of any type of special

fund to which he contributed or otherwise alleged that he has any special interest apart from that sustained by the public generally. Rather, like the plaintiffs in *Gildner*, Plaintiff's sole allegation is that "the plaintiff has a clear legal right, as an Ohio taxpayer, to procure the enforcement of a public duty that is applicable to defendant Husted." Complaint ¶ 24; *see also id.* ¶ 26 ("The plaintiff has a clear legal right to enforce the duty of a public official not to expend public funds without authorization against defendant Husted."). As the cases just discussed make clear, Plaintiff's contribution to the general fund as a taxpayer does not suffice to establish standing. Because Plaintiff does not meet the requirements for taxpayer standing and Plaintiff has alleged no other basis for standing to pursue his "Ohio Taxpayer's Action," Plaintiff's action must be dismissed with prejudice.

## **II. Plaintiff's Claims Are Moot**

Plaintiff's action should be dismissed with prejudice for the independent reason that his claims are moot. The remedy Plaintiff seeks in this lawsuit relates expressly to the November 6, 2012 election. Specifically, Plaintiff requests a writ of mandamus against the Secretary "ordering him to cancel any and all contracts that he entered into with defendant ES&S under which ES&S provided him with hardware and software designed to record and tabulate the votes cast by Ohio voters *in the General Election on November 6, 2012*, and further ordering him to open *all such contracts* to public bidding, public review, and approval of the technology review board." Complaint, Prayer for Relief, ¶ a. (Emphasis added). The November 6, 2012 Election has come and gone. The Secretary implemented and utilized the ES&S software at issue in this litigation, and no harm resulted. As a result, there is no justiciable controversy for the Court to resolve. *See, e.g., State ex rel. White v. Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, 775 N.E.2d 508, ¶ 11 ("When the election has passed, as it has here, the action for extraordinary relief or an

appeal from a judgment in the extraordinary-writ action is moot.” (Citation omitted.); *James A. Keller, Inc. v. Flaherty*, 74 Ohio App.3d 788, 791-793, 600 N.E.2d 736 (10th Dist. 1991) (action was moot where “[a]ny decision that [the] court might render” would be “academic and ineffectual” and there was no relief the court could afford as a result of events that took place subsequent to the filing of the lawsuit); *Ashtabula County Joint Vocational Sch. v. O’Brien*, 11th Dist. No. 2004-A-0092, 2006-Ohio-1794, ¶ 31 (“In general, ‘a moot case arises \*\*\* where a judgment is sought, upon a matter which when it is rendered, cannot have any practical effect upon the issues raised by the pleadings.’” (Citation omitted.)).

Because Plaintiff’s claims are moot, this Court lacks jurisdiction to hear them and must dismiss the action with prejudice. *White Consol. Indus. v. Nichols*, 15 Ohio St.3d 7, 9, 471 N.E.2d 1375 (1984) (“Until the parties can come forward with a specific factual setting, without strictly resorting to hypotheticals and speculation, this cause does not present a justiciable controversy.”); *James A. Keller, Inc.*, 74 Ohio App.3d at 791-793 (“[T]he courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question. It is not the duty of a court to decide purely academic or abstract questions.”).

### **III. Plaintiff’s Complaint Is Procedurally Deficient**

Defects in Plaintiff’s complaint for mandamus further require dismissal. According to R.C. 2731.04, “application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying.” R.C. 2731.04; *see also Maloney v. Court of Common Pleas*, 173 Ohio St. 226, 227, 181 N.E.2d 270 (1962). The requirements in R.C. 2731.04 are mandatory, and failure to follow them requires dismissal of the action. *Maloney*, 173 Ohio St. at 227; *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 574-575, 817 N.E.2d 382 (2004); *Adrovet v. Kroger Co.*, 10th Dist. No. 93 APD05-625, 1994 Ohio App. LEXIS 2126 (May 17, 1994);

*Howell v. Rintala*, 11th Dist. No. 2011-T-0102, 2012-Ohio-1464, ¶¶ 14-19; *Hill v. Kelly*, 11th Dist. No. 2011-T-0094, 2011-Ohio-6341. Plaintiff here improperly brought this action in his individual capacity instead of bringing it in the name of the state on his relation. This too requires dismissal of his action.

#### **IV. Plaintiff's Complaint Fails To State A Claim On Which Relief Can Be Granted**

Even if Plaintiff could overcome the fatal deficiencies outlined above, his complaint fails on the merits. To establish a right to mandamus, Plaintiff “has the burden of establishing that he has a clear legal right to the relief prayed for, that respondent has a clear legal duty to perform the requested act, and that relator has no plain and adequate remedy at law.” *State ex rel. Fain v. Summit County Adult Prob. Dep't*, 71 Ohio St.3d 658, 658-659, 646 N.E.2d 1113 (1995) citing *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 639 N.E.2d 1189, 1192 (1994); *State ex rel. Carter v. Wilkinson*, 70 Ohio St.3d 65, 637 N.E.2d 1 (1994). Where it appears “beyond doubt from the complaint that the plaintiff can prove no set of facts warranting relief,” Rule 12(b)(6) requires dismissal. *Id.*; *ProgressOhio.org, Inc.*, 2012-Ohio-2655 at ¶8.

The Supreme Court discussed the standards for evaluating a mandamus petition in the face of a motion to dismiss in *State ex rel. Fain v. Summit County Adult Prob. Dep't*. In that case, the plaintiff sought a writ of mandamus compelling the county probation department to correct alleged mistakes in the plaintiff's record. *State ex rel. Fain*, 71 Ohio St.3d at 659. Although the plaintiff's “pleading contained the conclusory statement that “[the county probation board] has the clear legal duty and responsibility under the law, to provide the aforementioned corrected information within a reasonable length of time,” the plaintiff failed to cite any authority that supported this proposition. *Id.* at 658. Stressing that “unsupported conclusions of



a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss” the court affirmed dismissal of the action. *Id.* at 659.

The Court’s reasoning in *State ex. Rel. Fain* applies with equal force here. Plaintiff’s complaint in this case similarly fails to offer anything more than “unsupported conclusions” that the Secretary “has a duty to comply with Ohio law and not expend public funds without authorization” and “has violated his duty not expend [sic] public funds without authorization by contracting with defendant ES&S as described above without opening such contracts to public bidding, without public review, and without approval of the technology review board that must approve such contracts, all of which is required by Ohio law.” Complaint at ¶¶ 23, 25. Plaintiff does not offer a single authority to support his assertion of this duty.<sup>1</sup> His bare allegations cannot overcome a motion to dismiss. *State ex. Rel. Fain, supra*, at 659; *see also State ex rel. Bell v. Pfeiffer*, 10th Dist. No. 10AP-490, 2011-Ohio-2539, ¶ 13 (“[Un]supported legal conclusions are not considered admitted when determining whether to grant extraordinary relief and are insufficient to withstand a motion to dismiss.”); *State ex rel. Boccuzzi v. Cuyahoga County Comm’rs*, 8th Dist. No. 86333, 2006-Ohio-1835, ¶ 12 (“[I]n mandamus, a relator must plead specific facts in order to withstand a motion to dismiss” . . . . “The relators’ conclusory allegations of bad faith, etc. do not rise to the level of sufficiency to withstand a motion to

---

<sup>1</sup> Indeed, Plaintiff neglected even to attach to his complaint the underlying contract he attacks in this lawsuit. Plaintiff’s failure to attach the contract of which he complains violates Rule 10(d)(1), which requires that “[w]hen any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading” or that the reason for the omission be stated in the pleading. Although the remedy for failure to comply with 10(d) is generally to seek a motion for a more definite statement, there is no need to pursue this course of action here because, as explained in this memorandum, it is evident from the face of the pleadings that Plaintiff can prove no set of facts that would entitle him to relief.

dismiss”). Because Plaintiff’s allegations fail to state a claim on which relief could be granted, his claims must be dismissed with prejudice.

**CONCLUSION**

For the foregoing reasons, Defendant Secretary of State Jon Husted respectfully requests that this Court dismiss this action with prejudice.

Respectfully submitted,

MIKE DEWINE  
Ohio Attorney General

*/s/ Richard N. Coglianesse*

---

Richard N. Coglianesse (0066830)  
Assistant Attorney General  
Constitutional Offices Section  
30 East Broad Street, 16th Floor  
Columbus, Ohio 43215  
Tel: (614) 466-2872; Fax: (614) 728-7592  
richard.coglianesse@ohioattorneygeneral.gov

*Counsel for Defendant  
Secretary of State Jon Husted*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing *Motion to Dismiss* and *Memorandum in Support* were filed electronically on December 3, 2012. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system and via U.S. Mail, postage prepaid.

*/s/ Richard N. Coglianes*

Richard N. Coglianes (0066830)

Assistant Attorney General