IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY

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

MOTION OF DEFENDANT SECRETARY OF STATE JON HUSTED TO DISMISS PLAINTIFF FITRAKIS' FIRST AMENDED COMPLAINT FOR MANDATORY OR INJUNCTIVE RELIEF

Pursuant to Ohio Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendant Ohio Secretary of State Jon Husted respectfully moves this Court to dismiss this action with prejudice on the ground that Plaintiff's Amended Complaint does not cure fatal defects highlighted in Defendant's Motion to Dismiss the original complaint, namely: (1) Plaintiff's claims are moot; (2) Plaintiff lacks standing to pursue his claims; and (3) 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,

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

On December 3, 2012, Defendant Secretary of State Jon Husted filed a motion to dismiss, highlighting procedural and substantive flaws in Plaintiff's complaint that require dismissal of this action with prejudice. Unable to dispute the deficiencies in the original complaint, Plaintiff responded by filing his First Amended Complaint for Mandatory or Injunctive relief on January 25, 2013 – the same day the Secretary filed his Reply in support of his motion to dismiss. But Plaintiff's Amended Complaint does not and cannot cure the defects in this case. The arguments set forth in the Secretary's prior briefing in support of his motion to dismiss, which the Secretary incorporates here by reference, apply in full force to and require dismissal of Plaintiff's First Amended Complaint. Indeed, the additional details provided in Plaintiff's Amended Complaint only confirm that Plaintiff is *not* entitled to the relief he seeks in this action. The fact remains: Plaintiff's claims are moot; Plaintiff lacks standing; and Plaintiff fails to state a claim on which relief can be granted. Accordingly, the Secretary respectfully requests that this Court dismiss this case with prejudice.

LAW AND ARGUMENT

I. Plaintiff's Amended Complaint Confirms That Plaintiff Is Not Entitled To The Relief He Seeks

To establish a right to mandamus, Plaintiff must "establish a clear legal right to the requested relief, a corresponding clear legal duty on the part of the secretary of state to provide it, and the lack of an adequate remedy in the ordinary course of the law." *State ex rel. Heffelfinger v. Brunner*, 116 Ohio St. 3d 172, 175, 2007-Ohio-5838, 876 N.E.2d 1231; *see also State ex rel. Fain v. Summit County Adult Prob. Dep't*, 71 Ohio St.3d 658, 658-659, 646 N.E.2d 1113 (1995). 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. *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St. 2d 242, 245, 327 N.E.2d 753 (1975).

In his Amended Complaint, Plaintiff specifies for the first time the purported legal basis for his requested relief. Specifically, Plaintiff alleges: (1) the Secretary entered into the challenged contract with ES&S[1] without complying with the competitive bidding and selection procedures outlined in R.C. 125.05, First Amended Complaint ¶ 7; (2) the Secretary "failed to afford the Office of Information Technology an opportunity to evaluate the technology he purchased from ES&S" in violation of R.C. 125.18, *id.* ¶¶ 8-9; and (3) the Secretary failed to obtain certification under R.C. 3506.05 for the ES&S technology, *id.* ¶¶ 15-16. Plaintiff claims these alleged violations entitle him to a writ of mandamus (or alternatively a mandatory injunction) ordering the Secretary to cancel the challenged contract with ES&S, and a permanent injunction prohibiting the Secretary from entering into future contracts for election software or hardware without complying with R.C. 125.18 and R.C. 3506.05. The statutory provisions on which Plaintiff relies, however, are facially inapplicable and do not, as a matter of law, support Plaintiff's requested relief.

The Secretary of State is *expressly excluded* from the requirements outlined in the provisions of R.C. 125.05 and 125.18. R.C. 125.041, entitled "Purchases by state elected officials" provides in pertinent part:

> Noting in sections 125.02, **125.03 to 125.08**, 125.12, to 125.16, **125.18**, 125.31 to 125.76, or 125.831 of the Revised Code shall be construed as limiting the attorney general, auditor of state **secretary of state**, or treasurer of state in any of the following:

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[1] Plaintiff once again neglects to attach the contract on which his complaint relies, in violation of Civil Rule 10(D). Plaintiff however submitted the challenged contract in his parallel federal court proceeding. That contract is attached here as Exhibit 1 ("Contract").

> (A) Purchases for less than the dollar amounts for the purchase of supplies or services determined pursuant to division (E) of section 125.05 [$25,000];
>
> . . .
>
> (G) Activities related to information technology development and use.

R.C. 125.041 (emphases added). Each of these sections independently operates to exempt the contract at issue here. The Contract not only pertains to "information technology development and use" but also involves a purchase price less than $25,000. *See* Contract at 23,¶ 8.1 ("The fees for the work set forth in this [Statement of Work] shall be a maximum of $19,899"). Thus, these provisions impose no obligation on the Secretary to follow the competitive bidding and selection procedures of R.C. 125.05.

R.C. 125.18, which sets forth the duties of the office of information technology with respect to "state agencies," is also inapplicable as a matter of law because R.C. 125.18 expressly *excludes the secretary of state* from the definition of state agencies covered under the provision. R.C. 125.18(I) states: "As used in this section: . . . (2)'State Agency' means every organized body, office, or agency established by the laws of the state for the exercise of any function of state government, **other than . . . secretary of state**." (emphasis added).

Plaintiff's citation to RC 3506.05 similarly fails to support his claimed relief. R.C. 3506.05 requires the certification of any "voting machine" "marking device" or "automatic tabulating equipment" or "software for the purpose of casting or tabulating votes or for communications among systems involved in the tabulation, storage, or casting of votes." R.C. 3506.05; *see also* R.C. 3506.01 (defining terms). As the plain language of the Contract makes clear, the ES&S software at issue is not a voting machine or marking device and does not impact the voting process or the tabulation of votes. Rather, it merely provides a method for affected counties to *report* the vote totals to the Secretary of State. *See, e.g.*, Contract at 17,¶ 1.1

(describing ES&S activities and deliverables as "High-level enhancements to ES&S' election *reporting* software") (emphasis added); *id.*,¶ 1.2 ("The ES&S Election Reporting Manager's (ERM) Results Expert Program (EXP) is a stand-alone singularly focused application designed to enable users the ability to enter custom codes and interface with the ERM results database to produce a precinct-level, candidate, election results file for all state requested offices. EXP transforms the county election night results stored in the ERM database into pre-defined file formats not supported in ERM."); *id.* at 19, ¶ 2 ("Project Scope. 2.1 Customer Request. ES&S shall deliver a solution for the creation of a file that contains election results data that can be processed by Customer's State Election Results Reporting System."). As such, the ES&S software does not fall within the scope of R.C. 3506.05. Moreover, as the District Court noted in denying Plaintiff's Motion for a temporary restraining order in Plaintiff's parallel federal proceeding, the United States Election Assistance Commission has expressly concluded that the software at issue does not need to be certified by them. *See* Opinion and Order, *Fitrakis v. Husted*, No. 2:12-cv-1015 (S.D. OH Nov. 6, 2012), Doc. # 13, PageID # 106-115, at 9 n.1.

In short, far from establishing "that respondent has a clear legal duty to perform the requested act," the authorities Plaintiff cites in his First Amended Complaint make clear beyond doubt that the Secretary has *no duty* to follow the procedures outlined in R.C. 125 or R.C. 3506.05 for the contract at issue in this case. Because Plaintiff "can prove no set of facts warranting relief," this Court should dismiss this action with prejudice. *O'Brien*, 42 Ohio St. 2d at 245.

II. Plaintiff's Amended Complaint Does Not Cure The Jurisdictional Defects

As the Secretary has previously explained, Plaintiff's case must be dismissed for the independent reasons that his claims are moot and Plaintiff lacks standing. Plaintiff's

amendments to his complaint do not cure these jurisdictional defects.

A. Plaintiff's Claims Are Moot

In an attempt to avoid dismissal for mootness, Plaintiff's Amended Complaint (1) omits the references to the November 6, 2012 Election from his request for relief and (2) adds a request for a permanent injunction prohibiting the Secretary from entering into any future contract for software or hardware to be used in the conduct of Ohio elections without compliance with the requirements of R.C. 3506.05 and 125.18. First Amended Complaint, Request for Relief. These changes do not revive Plaintiff's moot claims.

First, a review of the amended request for relief reveals that Plaintiff's alterations are largely semantic. His amended complaint asks the Court to issue a writ of mandamus or mandatory injunction ordering the Secretary to "cancel the contract he entered into with ES&S in September 2012." The substance of this requested relief is identical to that contained in the original complaint and relates directly to the November 6, 2012 election. As previously explained, that election has come and gone. These claims are moot.

Plaintiff cannot transform moot claims into active ones by merely adding a request for a permanent injunction applicable to "any future contract." As a preliminary matter, such a vague, abstract injunction would fall far short of the specificity requirements of Civ.R.65 (D). As the Ohio Supreme Court has noted, "Civ.R. 65(D) requires that 'every order granting an injunction shall be specific in terms; shall describe in reasonable detail the act or acts sought to be restrained." *Derolph v. State*, 78 Ohio St. 3d 419, 423n.1, 678 N.E.2d 886 (1997) (internal punctuation omitted). "'The specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a

decree too vague to be understood.'" *Id.* (quoting *Schmidt v. Lessard* 414 U.S. 473, 476, 94 S. Ct. 713, 715(1974)).

Moreover, even apart from the fact that Plaintiff cannot show any violation of R.C. 125 or 3506.05 that would justify relief of any kind, plaintiff's claims are not ripe to the extent they seek relief related to hypothetical future contracts. A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998); *see also 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.").

Plaintiff's failure to present a justiciable controversy requires dismissal.

B. Plaintiff Lacks Standing

The Amended Complaint also fails because, like the original complaint, it does not establish standing. In the Amended Complaint, Plaintiff posits two theories of standing. First, Plaintiff contends he has standing as a taxpayer and because he "paid statutory fees to the defendant when he filed his declaration of candidacy for election to the United States House of Representatives in the General Election held on November 6, 2012." First Amended Complaint ¶¶ 10-13. Second, Plaintiff argues he has standing to sue under a "public right theory." *Id.* at ¶ 18. As explained in the Secretary's Memorandum and Reply in Support of his Motion to dismiss, Plaintiff's allegations fail to establish standing under either theory. *See* Memorandum in Support of Motion to Dismiss at 3-5; Defendant's Reply in Support of Motion to Dismiss ("Reply") at 4-6;

First, Plaintiff's status as a taxpayer does not suffice to confer standing. *Gildner v. Accenture*, L.L.P., 10th Dist. No. 09AP-167, 2009-Ohio-5335, 2009 Ohio App. LEXIS 4491, ¶

24 ("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). At a minimum, Ohio law requires Plaintiff to demonstrate that he has "a special interest whereby his own property rights are placed in jeopardy," or that he will "sustain damage different in character from that suffered by the general public." *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). Plaintiff tries to demonstrate this special interest by alleging that he paid statutory fees in connection with his declaration of candidacy for U.S. House of Representatives. But the payment of this statutory fee does not help Plaintiff's claim to standing. According to Ohio law, the statutory fees for candidacy for U.S. House of Representatives are submitted to the "board of elections of the most populous county within the congressional district." *See* R.C. 3513.05. $50 of the statutory fee is paid into the "county treasury" and $35 of the fee is paid to "the credit of the Ohio Elections Commission fund." *See* R.C. 3513.10 (A), (B), (D), (E). None of the statutory fee for candidacy for the U.S. House of Representatives goes to the Secretary of State. Accordingly, Plaintiff's payment of this statutory fee could not, as a matter of law, contribute to a "special fund" from which the Secretary purchased ES&S technology at issue.

Nor is this the "rare and extraordinary" case of sufficient magnitude to justify invocation of public right standing. *ProgressOhio.org, Inc. v. JobsOhio*, 10th Dist. No. 11AP-1136, 2012-Ohio-2655, 2012 Ohio App. LEXIS 2333, ¶8 (denying public right standing where the challenged legislation '"makes significant changes to the organizational structure of state government'") (discretionary appeal permitted by 2013-Ohio-158 (Jan. 23, 2013); *Brown v.*

Columbus City Schools Bd. of Edn., 10th Dist. No. 08AP-1067, 2009 Ohio 3230, ¶ 11; *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313, 2007 Ohio 4372.; *see also* Reply at 6.

Because Plaintiff cannot demonstrate standing under either a taxpayer or a public right theory, Plaintiff's case must be dismissed.

CONCLUSION

For the foregoing reasons and those explained in the Secretary's briefing in support of his previous motion to dismiss, Defendant Secretary of State Jon Husted respectfully requests that this Court dismiss this action with prejudice.

Respectfully submitted,

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Secretary of State Jon Husted

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Motion to Dismiss Plaintiff Fitrakis' First Amended Complaint and Memorandum in Support* were filed electronically on February 8, 2013. 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.

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