

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

STATE OF OHIO ex rel.
ROBERT J. FITRAKIS
1021 East Broad Street
Columbus, OH 43205,

and

ROBERT J. FITRAKIS
1021 East Broad Street
Columbus, OH 43205,

Case No. 12CV11-13888

Plaintiffs,

Judge Mark A. Serrott

v.

JON HUSTED
In his official capacity as
Ohio Secretary of State
30 East Broad Street
Columbus, OH 43215,

Defendant.

FIRST AMENDED COMPLAINT FOR MANDATORY OR INJUNCTIVE RELIEF

Jurisdiction and Venue

1. This Court has jurisdiction over the subject matter of this action under Article IV, Section 4 of the Ohio Constitution.
2. This Court has personal jurisdiction over defendant Jon Husted (“hereinafter “Husted”) in his official capacity as Ohio Secretary of State because his principal office is located in Franklin County, Ohio.

3. Venue in this Court is proper under Civil Rule 3(B) because the defendant conducted activity that gave rise to the claims for relief in Franklin County, Ohio, and defendant Husted is a public officer who maintains his principal office in Franklin County, Ohio.

Parties

4. Plaintiff Robert J. Fitrakis (hereinafter "Fitrakis") was a candidate for election to the United States House of Representatives in the General Election held on November 6, 2012; is citizen of the State of Ohio; pays income taxes to the State of Ohio; and is registered to vote in the State of Ohio.

5. Defendant Husted is the duly elected and presently serving Ohio Secretary of State. Pursuant to R.C. 3501.04, the defendant is the chief election official of the State of Ohio, and is responsible for the administration of state laws affecting voting and for assuring that elections in the state are conducted in accordance with the law.

Facts

6. Election Systems & Software, Inc. (hereinafter "ES&S") designs and provides state and local governments with technology designed to tabulate, record and report votes cast in general and primary elections.

7. In violation of R.C. 125.05, defendant Husted purchased technology from ES&S to tabulate, record, and report votes cast by Ohio voters in general and primary elections without competitive selection or bidding. A true copy of the contract under which the defendant purchased said technology is appended hereto under Civil Rule 10(D).

8. In violation of R.C. 125.18, defendant Husted failed to afford the Office of Information Technology an opportunity to evaluate the technology he purchased from ES&S in order to determine the technology's compliance with information integrity and security standards, plans, policies, standards, and criteria.

9. Defendant Husted attempted to evade the requirements of R.C. 125.18 by misrepresenting the features of the aforesaid technology to the United States Election Assistance Commission ("USEAC"), by fraudulently obtaining certification from the USEAC that the technology did not need to be evaluated for compliance with information integrity and security standards, plans, policies, standards, and criteria, and by bifurcating the payment terms of the contract between his office and the county boards of elections to conceal the fact the contract was for an amount subject to the requirements of R.C. 125.18 .

10. Plaintiff Fittrakis 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 and, upon information and belief, the plaintiff avers that defendant Husted deposited some of those fees into a special fund and deposited some of those fees into the general fund.

11. Plaintiff Fittrakis is a citizen of the State of Ohio, pays income taxes to the State of Ohio, is registered to vote in the State of Ohio, and has an interest in the proper implementation of the laws of the State of Ohio.

12. Defendant Husted paid for the technology he purchased from ES&S with statutory fees and income taxes collected from the plaintiff, thereby exposing the plaintiff to the cost and expense of a purchase that defendant Husted made unlawfully.

13. Defendant Husted damaged the plaintiff in a character different from that sustained by the general public because the plaintiff has a special interest in the statutory fees he paid to the defendant and because the general public includes persons who do not pay income taxes or are registered to vote.

14. The right to vote possessed by the plaintiff and other Ohio citizens is directly affected by vote tabulation, recording, and reporting technology used by the Ohio Secretary of State; and such citizens consequently possess a special interest in having such technology comply with information integrity and security standards, plans, policies, standards, and criteria.

15. In violation of R.C. 3506.05, defendant Husted failed to afford the Board of Voting Machine examiners the opportunity to evaluate the technology he purchased from ES&S before putting such technology in use, and failed to afford boards of elections in each county where the technology was to be used an opportunity to demonstrate such technology to all interested electors.

16. Defendant Husted attempted to evade the requirements of R.C. 3506.05 by misrepresenting that the aforesaid technology was experimental.

Claim for Relief

17. The plaintiff has standing to sue as a payer of statutory fees into a special fund, as a payer of statutory fees into the general fund, and as a taxpaying voter, in order to vindicate his rights against performance of a public contract or the expenditure of public funds where he has a special interest therein and his own rights are jeopardized and damaged differently from that sustained by the public generally, and further has a clear legal right to procure the enforcement of public duties applicable to defendant Husted as described above.

18. The plaintiff also has standing to sue to enforce a public right without showing any special individual interest in the result because it is sufficient that he is a citizen of the State of Ohio, is interested in the execution of laws of the State of Ohio, and is willing to enforce the public's special interest in having purchases of vote tabulation, recording, and reporting technology by the Ohio Secretary of State comply with information integrity and security standards, plans, policies, standards, and criteria.

19. As described above, defendant Husted has clear legal duties as Ohio Secretary of State to comply with Ohio law; to expend statutory fees collected from Ohio citizens and expend taxes collected from Ohio voters only as authorized by Ohio law; and to afford the Office of Information Technology an opportunity to evaluate the technology he purchased from ES&S to determine the technology's compliance with information integrity and security standards, plans, policies, standards, and criteria.

20. As described above, defendant Husted violated his clear legal duties as Ohio Secretary of State to comply with Ohio law; to expend statutory fees collected from Ohio citizens and expend taxes collected from Ohio voters only as authorized by Ohio law; and to afford the Office of Information Technology an opportunity to evaluate the technology he purchased from ES&S to determine the technology's compliance with information integrity and security standards, plans, policies, standards, and criteria.

21. The plaintiff has a clear legal right to enforce the defendant Husted's duties as Ohio Secretary of State to comply with Ohio law; to expend statutory fees collected from Ohio citizens and expend taxes collected from Ohio voters only as authorized by Ohio law; and to afford the Office of Information Technology an opportunity to evaluate the technology he

purchased from ES&S to determine the technology's compliance with information integrity and security standards, plans, policies, standards, and criteria.

22. The plaintiff has no plain and adequate remedy at law.

WHEREFORE, plaintiff Robert J. Fitrakis demands judgment against defendant Jon Husted, in his official capacity as Ohio Secretary of State, as follows:

a. That this Court issue a writ of mandamus against defendant Husted ordering him to cancel the contract he entered into with ES&S in September 2012 to provide the defendant with technology designed to tabulate, record, and report the votes cast by Ohio voters in primary and general elections;

b. Alternatively, that this Court issue a mandatory injunction ordering defendant Husted, his agents, servants, employees, attorneys, successors, and all persons acting in concert with him to cancel the contract he entered into with ES&S in September 2012 to provide the defendant with technology designed to tabulate, record, and report the votes cast by Ohio voters in primary and general elections;

c. Additionally, that this Court issue a permanent injunction prohibiting defendant Husted, his agents, servants, employees, attorneys, successors, and all persons acting in concert with him from entering 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 R.C. 125.18.

d. That this Court award the plaintiff his attorney fees and costs incurred in this action; and

e. Such other relief as this Court deems necessary or proper.

Respectfully submitted,

/s/ Clifford O. Arnebeck Jr.
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent to all counsel of record through the Franklin County Common Pleas Court's electronic filing system this 25th day of January, 2013.

/s/ Clifford O. Arnebeck Jr.
Clifford O. Arnebeck, Jr.