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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF NEVADA**
10 **UNLIMITED JURISDICTION**
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12 GINA WILL,
13 Contestant
14 vs.
15 ROB TRIBBLE,
16 Defendant.

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21 GREGORY DIAZ, in his official capacity
as Nevada County Registrar of Voters;
22 and DOES 1-25,
23 Real Parties in Interest.

Case No. CU0000159

(Assigned to the Honorable Judge S.
Robert Tice-Raskin - Department 6)

**CONTESTANT GINA WILL'S
SUPPLEMENTAL BRIEF RE:
EXPERT WITNESS TESTIMONY,
PROPER REMEDY AND
STATUTORY CONSTRUCTION**

Closing Argument Date:
Tuesday, November 8, 2022
Time: 9 a.m.
Dept: 6

1 Contestant Gina Will (“Contestant”) hereby responds to the Court’s October 31,
2 2022 request that the parties submit post-trial briefs addressing the following three
3 questions:

4 1. What legal authority supports the Court’s ability to consider the expert
5 testimony proffered at trial with regard to the meaning of subsection (b) of California
6 Government Code section 26945?

7 2. Assuming Contestant has met her burden of proving that Defendant Rob
8 Tribble (“Defendant”) lacks the legal qualifications to serve as Nevada County Auditor-
9 Controller, what is the proper remedy for this Court to apply?

10 3. What does the term “dealing with similar fiscal responsibilities” mean as
11 used in subsection (b)?

12 As discussed in more detail below, Contestant responds as follows:

13 1. Contestant asserts that subsection (b) is not ambiguous and expert testimony
14 therefore is not needed for the purpose of assisting the Court with statutory interpretation.
15 Contestant further asserts, however, that expert testimony is helpful, and appropriate for
16 the Court to consider, with regard to factual issues relative to the office of Auditor-
17 Controller and Defendant’s recent work experience (or lack thereof). In the alternative, if
18 the Court finds subsection (b) to be ambiguous, it may turn to expert testimony to aid it in
19 interpreting the statute.

20 2. The California Elections Code does not expressly answer the question as to
21 the proper remedy in an election contest based on a candidate’s eligibility to run for a
22 particular office, but case law (albeit old and distinguishable) suggests that one remedy is
23 for the Court to annul the election and declare a vacancy (in which case the Nevada
24 County Board of Supervisors would fill the vacancy). There also appears to be legal
25 authority for the Court to declare Contestant to be the winning candidate and to install her
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1 as the County’s new Auditor-Controller.

2 3. The phrase “dealing with similar fiscal responsibilities” necessarily relates
3 to the fiscal responsibilities of the County Auditor.

4 Accordingly, the Court should: (1) consider the opinions of Contestant’s expert
5 witnesses in connection with factual issues pertaining to the office of Auditor-Controller,
6 and only if the Court finds subsection (b) to be ambiguous, consider expert testimony
7 with regard to interpreting the statute; (2) either annul the election and declare a vacancy,
8 or, in the alternative, declare Contestant the winner; and (3) determine whether Defendant
9 meets the statutory qualifications by analyzing whether his recent work experience “dealt
10 with similar fiscal responsibilities” as the County Auditor-Controller.

11 **1. The Court Can and Should Consider Expert Testimony**
12 **Regarding Issues of Fact Relative to the Office of Auditor-Controller**
13 **and Defendant’s Recent Work Experience. If the Court Finds**
14 **Subsection (b) to be Ambiguous, Then it Can and Should Consider**
15 **Expert Testimony Regarding the Statute.**

16 As a general matter, trial courts are given wide latitude to consider expert opinion
17 testimony, so long as certain criteria are met. In this regard, California Evidence Code
18 section 801 provides that expert opinion testimony must be “(a) Related to a subject that
19 is sufficiently beyond common experience that the opinion of an expert would assist the
20 trier of fact; and (b) Based on matter (including his special knowledge, skill, experience,
21 training, and education) perceived by or personally known to the witness or made known
22 to him at or before the hearing . . . whether or not admissible, that is of a type that
23 reasonably may be relied upon by an expert in forming an opinion upon the subject to
24 which his testimony relates. . . .”

25 The expert testimony of Juan Raigoza, the President of the California Association
26 of County Auditors, and Placer County Auditor Andrew Sisk satisfied these Evidence
27 Code requirements, in addition to all other requirements for experts. (See, for example,

1 Evidence Code sections 720, 802 & 805.) Their testimony regarding issues of fact
2 relative to the Auditor-Controller’s office and Defendant’s recent work experience (or
3 lack thereof) can and should be considered by this Court. By way of example, Mr. Sisk
4 stated in his September 26, 2022 Declaration, at page 2, section 6 (see Contestant’s
5 September 30, 2022 Brief in Support of Election Contest) that “In my expert opinion, Mr.
6 Tribble does not have the qualifications to serve as a county auditor, and has not served
7 for at least three of the last five years in a senior fiscal management position at a
8 governmental entity, private firm or nonprofit organization dealing with similar fiscal
9 responsibilities.” His testimony at trial echoed this conclusion.

10 Similarly, Mr. Raigoza stated, in the September 19, 2022 letter submitted by the
11 California State Association of County Auditors, at page 4, that “A senior fiscal manager
12 is a position that has oversight of all county revenues, expenditures, assets, liabilities, and
13 equity. They manage financial operations, like the functions listed above, by leading
14 others effectively. Given the breadth and wide-ranging scope of these responsibilities, we
15 believe it takes an individual who has the right combination of education and experience.”
16 He repeated this conclusion at trial.

17 Accordingly, given that Contestant’s experts testified regarding factual issues
18 pertaining to the office of Auditor-Controller and Defendant’s dearth of recent work
19 experience, their testimony can and should be considered, just as experts’ opinions are
20 considered by courts all the time.

21 In the alternative, if the Court finds subsection (b) to be ambiguous, it can and
22 should consider the opinions of Messrs. Raigoza and Sisk regarding the statutory
23 language. This notion is supported by the recent decision in City of Los Angeles v.
24 PriceWaterhouseCoopers, LLC (2022 Daily Journal D.A.R. 10,983; 2022 WL 12010415,
25 at 19 (10/20/22) (“PWC”).) There, the Court of Appeal confirmed the appropriateness of
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1 a trial court looking to extrinsic sources, such as experts, to assist it in interpreting an
2 ambiguous statute. Specifically, when a court looked at ambiguities regarding the
3 sanctions provisions of the Civil Discovery Act, it cited the expert opinion of Professor
4 James Hogan, who co-authored the leading treatise on California discovery law and was
5 the Reporter for the commission that drafted the Discovery Act.

6 The PWC case confirms the process of legislative interpretation, as similarly
7 described by the Court’s statements on October 31, 2022:

8 [O]ur fundamental task is to ascertain the Legislature's
9 intent so as to effectuate the purpose of the statute. We begin with
10 the language of the statute, giving the words their usual and ordinary
11 meaning. The language must be construed ‘in the context of the
12 statute as a whole and the overall statutory scheme, and we give
13 “significance to every word, phrase, sentence, and part of an act
14 in pursuance of the legislative purpose.

15 In other words, we do not construe statutes in isolation,
16 but rather read every statute with reference to the entire scheme
17 of law of which it is part so that the whole may be harmonized
18 and retain effectiveness. If the statutory terms are ambiguous,
19 we may examine extrinsic sources, including the ostensible objects
20 to be achieved and the legislative history. In such circumstances,
21 we choose the construction that comports most closely with the
22 Legislature's apparent intent, endeavoring to promote rather than
23 defeat the statute's general purpose, and avoiding a construction that
24 would lead to absurd consequences. (PWC at 16.)

25 Among the “extrinsic sources” trial courts are allowed to consider are the opinions
26 of qualified experts. Indeed, in Agnew v. City of Los Angeles (1950) 97 Cal.App.2d 557,
27 566, the Court of Appeal found that the trial court abused its discretion by not allowing an
28 expert witness to testify. And in Jeffer, Mangels & Butler v. Glickman (1991) 234
Cal.App.3d 1432, 1443, a legal malpractice case, the Court of Appeal found that once it
was demonstrated that an expert witness had sufficient knowledge to assist the trier of
fact in determining whether the respondent law firm was negligent, it was an abuse of
discretion for the trial court to refuse to permit the expert to testify.

1 It follows, therefore, that a court is permitted to consider expert testimony
2 regarding ambiguous laws and legal standards, as well how much weight to afford such
3 testimony. (See Cloud v. Market St. Ry. Co. (1946) 74 Cal.App.2d 92, 100.)
4 Accordingly, to the extent this Court finds subsection (b) to be ambiguous (even though
5 Contestant does not view it as such), the Court would be permitted to consider the expert
6 opinions of Messrs. Sisk and Raigoza when construing the statute.

7 **2. The Proper Remedy is Either to Nullify the Election, Thereby Allowing**
8 **the Board of Supervisors to Fill the Vacancy by Appointment, or, in the**
9 **Alternative, to Declare Contestant the Winner.**

10 The Elections Code does not explicitly spell out what remedy should apply when a
11 court concludes that a candidate does not meet the statutory qualifications for the
12 particular office.

13 Because Defendant received a majority of the votes cast in an election in which
14 Contestant was the only other candidate, the June 2022 primary election becomes the
15 general election, and the provisions of the Elections Code regarding contests in general
16 elections apply (sections 16700-16703).¹

17 If the Court determines that Defendant is not qualified to hold the office of
18 Auditor-Controller, one provision in the Elections Code would allow the Court to nullify
19 Defendant's certificate of election and create a vacancy in the office. (Cal. Elec. Code

20 ¹“Any candidate for a nonpartisan office who at a primary election receives votes
21 on a majority of all the ballots cast for candidates for that office shall be elected to that
22 office.” (Cal. Elec. Code section 8140.) Where a candidate wins the majority of votes in
23 a nonpartisan primary election, the election is effectively transmuted into a general
24 election, and the general election statutes are applied. (See Pini v. Fenley (2017) 9
25 Cal.App.5th 67, 72.) In addition, the remedy set forth in the provisions relating to
26 primary elections speaks in terms of “nominating” the contestant to the general election,
which of course does not apply when there are only two candidates running in the primary
election and therefore there is no general election. (Section 16720 [court shall either
confirm “nomination” or set it aside and declare contestant “nominated”].)

1 section 16702 [“Whenever an election is annulled or set aside by the judgment of the
2 superior court . . . , the . . . [certificate], if any has issued, is void and the office vacant.”)
3 Under this option, when the election is declared void, the “person before whom the
4 proceedings are had shall give notice thereof to the officer or body empowered to fill the
5 vacancy.” (Cal. Govt. Code section 1771(a).) Insofar as the Nevada County Board of
6 Supervisors is the body empowered to fill the vacancy pursuant to California Government
7 Code section 25304, this Court, as the “person before whom the proceedings [were] had,”
8 would give notice to the Board, and the Board would appoint Defendant’s replacement.

9 Notwithstanding the foregoing, there is also statutory authority in the Elections
10 Code for the Court to declare Contestant the winner of the election. Specifically, section
11 16700 provides that “[t]he person declared elected by the superior court is entitled to a
12 certificate of election. If a certificate has not already been issued to him or her, the
13 elections official shall immediately make out and deliver to that person a certificate of
14 election” (Emphasis added.) Further, section 16701 states that “[i]f the elections
15 official has issued any certificate for the same office to any other person than the one
16 declared elected by the court . . . , the certificate is annulled by the judgment.”

17 Accordingly, if the Court finds that Defendant was ineligible, it could declare Contestant
18 to be the winner, relying on sections 16700 and 16701, which refers to declaring the
19 Contestant to be the winner, and not to section 16702, which refers to a vacancy.

20 Case law arguably suggests that invalidating the election and declaring the seat
21 vacant is the only remedy when the grounds for the elections contestant is the candidate’s
22 eligibility to run for the particular office. However, these older cases are arguably
23 distinguishable and do not take away the Court’s discretion to choose another appropriate
24 remedy.

1 Doran v. Biscailuz (1954) 128 Cal.App.2d 55 is evidently the most recent reported
 2 election contest case based on the eligibility of a candidate to run for particular office. In
 3 Doran, a candidate for county sheriff who received the most votes was challenged based
 4 on his qualifications for office, though the court ultimately rejected the challenge. (See
 5 also Saunders v. Haynes (1859) 13 Cal. 145 [court invalidated election with multiple
 6 candidates when winner was deemed ineligible to run]; (Campbell v. Board of
 7 Supervisors of Santa Clara County (1907) 7 Cal.App. 155, 156 [same]).) In dicta, the
 8 Doran case cited to an even older case, Crawford v. Dunbar (1877) 52 Cal. 36, for the
 9 proposition that an unsuccessful candidate cannot be held to have been elected when the
 10 successful candidate is found to be ineligible.

11 However, the proper remedy for an election contest involving eligibility for office
 12 was actually not at issue in Doran because the court rejected the challenge to the
 13 candidate’s eligibility. Cases of course are “not authority for propositions not
 14 considered.” (See, e.g., Areso v. CarMax (2011) 195 Cal.App.4th 996, 1006.) Contestant
 15 therefore does not view Doran as limiting this Court’s remedial options.

16 In addition, these older cases are arguably distinguishable. Unlike the recent
 17 Nevada County Auditor-Controller’s race, in which Contestant and Defendant were the
 18 only two candidates, the elections at issue in Crawford, Saunders and Campbell had more
 19 than two candidates.² As such, in those cases, even if the winning candidate were to be
 20 disqualified after the election, there would be no way of knowing who that candidate’s
 21 votes would have gone to if the winning candidate had been disqualified before the
 22 election. Here, in contrast, with Contestant being the only other candidate on the ballot,

23 _____
 24 ²It is not clear from the facts as described in Doran whether more than two
 25 candidates were running in the election at issue in that case, but the court’s reliance on
 26 prior cases in which there were more than two candidates suggests that at least three
 candidates were involved in the election at issue in the Doran case as well.

1 had Defendant been disqualified before the election, Contestant would have received one
2 hundred percent of the votes. In other words, unlike the older cases which discuss
3 creating a vacancy in the office as the only remedy, there is no ambiguity in the present
4 election contest about who voters would have selected had Defendant been removed from
5 the ballot. Accordingly, the older cases are distinguishable, leaving the Court with the
6 discretion to order Contestant to be installed as Auditor-Controller, as opposed to merely
7 declaring the office vacant.

8 **3. The Phrase “Dealing with Similar Fiscal Responsibilities” Must Relate**
9 **to the Duties and Functions of the County Auditor’s Office Because the**
10 **Code Section is Under Article 4 (Qualifications for Office) of Chapter 4**
11 **(Auditor) of Title 3 (Government of Counties) of the Government**
12 **Code.**

13 Section 26945(b) requires that a candidate for County Auditor have held jobs
14 within the last five years “dealing with similar fiscal responsibilities” – but it does not
15 explain explicitly to what those responsibilities are supposed to be “similar.”
16 Nevertheless, this phrase can only be referring to the fiscal responsibilities of the County
17 Auditor. First and most notably, section 26945 is under Article 4 (“Qualifications for
18 Office”) of Chapter 4 (“Auditor”) of Title 3 (“Government of Counties”). The only
19 logical explanation is that this phrase refers to County Auditors, after whom Chapter 4 is
20 named.

21 Second, looking solely at the language in subsection (b), another interpretation
22 would be that the phrase “dealing with similar fiscal responsibilities” relates to the phrase
23 “senior fiscal management position.” However, “dealing with similar fiscal
24 responsibilities” of a “senior fiscal management position” would facilitate the logical
25 fallacy of *petitio principii* (i.e., begging the question). Being in a senior fiscal
26 management position necessarily requires dealing with similar fiscal responsibilities of a
27 person in a senior fiscal management position. The premise of someone having to deal
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1 with similar fiscal responsibilities of someone in a senior fiscal management position
2 would be circular and nonsensical. This, of course, cannot be the case and would not
3 answer either what a senior fiscal management position is or what the duties of someone
4 in a senior fiscal management position are.

5 As such, the only reasonable and logical way of interpreting this language is to
6 conclude that it refers to the position of County Auditor. In short, a candidate for County
7 Auditor must prove that the senior fiscal management position which he or she has held
8 for three of the last five years at a government agency, private firm or nonprofit deals
9 with similar fiscal responsibilities of a County Auditor. This is the only logical reading of
10 this phrase. Of course, as demonstrated in Contestant's briefs and at the evidentiary
11 hearing, helping a company sell a business and helping a patent holder find a licensee are
12 not what County Auditors do – so the Court must conclude that Defendant does not meet
13 the statutory requirements.

14 **CONCLUSION**

15 Based on the foregoing, Contestant asserts that the law requires this Court to: (1)
16 consider the opinions of Contestant's expert witnesses to support the conclusion that
17 Defendant has not served in a position with duties similar to a County Auditor during the
18 last five years; (2) choose whether to declare Contestant the winner of the election or
19 annul the election and declare a vacancy; and (3) conclude that candidates for County
20 Auditor must have held a position at an organization performing duties which are similar
21 to the fiscal responsibilities of the County Auditor.

22 Respectfully submitted,

23 THE SUTTON LAW FIRM

24 Dated: November 4, 2022

By: /s/ James R. Sutton

James R. Sutton

Attorneys for Contestant GINA WILL

1 **PROOF OF SERVICE**

2 I am employed in the City and County of San Francisco, State of California. I am over
3 the age of eighteen years and not a party to the within action. My business address is 150 Post
4 Street, Suite 405, San Francisco, CA 94108.

5 On November 4, 2022, I served true and correct copies of the following documents:

6 **CONTESTANT GINA WILL'S SUPPLEMENTAL
7 BRIEF RE: EXPERT WITNESS TESTIMONY,
8 PROPER REMEDY AND STATUTORY CONSTRUCTION**

9 on the following parties and/or their counsel in this action:

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29 X (VIA E-MAIL) I emailed the documents to the parties and/or their counsel as listed
30 above.

31 I declare under penalty of perjury under the laws of the State of California that the above
32 is true and correct.

33 Executed on November 4, 2022 at Los Angeles, California.

34 /s/ Bradley W. Hertz
35 Bradley W. Hertz

36 SUPPLEMENTAL BRIEF RE: EXPERT WITNESS TESTIMONY,
37 PROPER REMEDY AND STATUTORY CONSTRUCTION